International Issues in Estate Planning: Part 1 -- Estate Planning for Nonresident Aliens

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INTRODUCTION

The world that we live in, as well as the world economy, is becoming increasingly global. To illustrate, an estimated four to 10 million U.S. nationals live abroad.[2] In this increasingly global environment, there are an increasing number of migratory families and other nonresident aliens who have substantial contacts with the United States.

These individuals include foreign executives moving to the United States to run U.S. companies or U.S. subsidiaries of foreign companies, wealthy aliens who acquire homes in the United States for retirement or vacation purposes, and young aliens with substantial wealth. They also include migratory families or family members, what the media once called "jet setters," who have homes and substantial assets in various parts of the world, including the United States, and who constantly move from one locale to another. Many of these individuals come from countries with very different tax systems than ours. They typically would be shocked to learn that their contacts with the United States may cause them to be treated as U.S. resident aliens for tax purposes, thereby subjecting them to U.S. income taxation on their worldwide income, and U.S. estate and gift taxation on their worldwide assets.

The United States also continues to be one of the most desirable destination countries for immigrating families and individuals. Despite the September 11 terrorist attacks, the United States continues to have the most stable political system in the world, and it remains one of the safest countries to live in. It also has one of the highest standards of living in the world, and it remains the sole "superpower" today.

In addition, the character of individuals immigrating into the United States today differs from the historical character of immigrants into the United States. Today, many immigrants come to the United States with substantial assets and either a high level of income, or a high probability of receiving a high level of future income. This is in stark contrast to the huddled masses that once immigrated to the United States.

Based on the foregoing, we believe that international issues in estate and tax planning, which have always been important, will become even more important as time goes by. This is also the clear historical trend. In this regard, estate and tax planners can provide substantial tax and estate planning benefits to such individuals, frequently, by using very simple techniques.

FEDERAL ESTATE AND GIFT TAXATION OF NONRESIDENT ALIENS ("NRAs")

Generally

NRAs are subject to federal estate taxes at the same rates applicable to U.S.citizens and residents -- but only on assets situated in the United States at the time of their deaths.[3] They are subject to federal gift taxes only with respect to transfers (by trust or otherwise) of real or tangible property (but generally not intangible property) situated in the United States, after taking into consideration the annual gift tax exclusion, which is currently $11,000 per year, per donee.[4]

Who Is an NRA?

Generally / Significance of Issue

If an individual is a U.S. citizen or resident alien, the United States subjects that individual to U.S. estate and gift taxation on his/her worldwide assets. In contrast, if an individual is an NRA, then: (a) the United States subjects him/her to U.S. estate and gift taxation only on assets situated in the United States; and (b) with proper planning, that person may avoid virtually all U.S. estate and gift tax.

To be an NRA, an individual must be *neither* a U.S. citizen, nor a U.S. resident.

Citizenship

Citizenship is generally an objective factual issue. Most individuals know, with a high level of confidence, whether they are U.S. citizens. In cases of doubt, it is prudent for tax practitioners to consult with immigration lawyers.

Occasionally, individuals may mistakenly believe that they have lost their U.S. citizenship for U.S. tax purposes by the commission of certain acts. However, not only must a person commit one of the several acts set out by statute, but he/she must do so voluntarily and with the intent to surrender his/her U.S. nationality.[5] Therefore, when presented with a client who was once a citizen, the practitioner must carefully review that client's citizenship status.

If client is in fact a U.S. citizen, then he/she is subject to estate and gift taxation on his/her worldwide assets, just as any other citizen would be, regardless of the location of his/her residence or domicile. Example 1 illustrates where an estate planner is most likely to encounter this type of situation.

> *Example 1:* Carl, a U.S. citizen and resident, retains Edith Estate-Planner to prepare his estate plan. In the course of the initial client interview, Edith asks Carl if he expects to inherit any substantial wealth. Edith learns that Carl expects to inherit several million dollars from his father, Frank, who has lived in Switzerland for the past 50 years. Upon further inquiry, Edith learns that Frank was born in the United States and holds a U.S. passport, even though he has not stepped foot in the United States for more than 40 years. Edith also learns that Frank has just assumed that he is not a U.S. citizen for U.S. tax purposes, since he does not live in the United States. More precisely, because Frank has intended to remain outside the United States for his remaining life, he has not even thought about whether he

is a U.S. citizen for tax purposes, and has just assumed that he is not treated as a U.S. citizen for U.S. tax purposes. Therefore, Frank has not filed any U.S. income or other tax returns for the past 50 years.

Caution: The facts illustrated by Example 1, which are more common than one would expect, raise significant and serious tax issues. Estate planners must tread very carefully in such situations because, in certain circumstances, they may inadvertently both (1) expose themselves to civil and criminal tax liability, and (2) expose their clients to additional civil and criminal tax liability. A full discussion of the issues raised by such situations exceeds the scope of this article. However, in such cases estate planners, unless they are familiar with these issues, should immediately contact tax counsel who has previously dealt with these issues.

Special Treatment for Citizens/Residents of U.S. Possessions

The Code treats U.S. citizens and residents of U.S. possessions differently in certain respects than other U.S. citizens and residents for estate and gift tax purposes. Specifically, the Code treats U.S. citizens as NRAs for estate and gift tax purposes if both:

• they acquire U.S. citizenship *solely* by reason of their (a) being a citizen of such U.S. possession, or (b) birth or residence within such possession, and

• they are both a citizen and resident of such possession at their death or at the time of the gift in question.[6]

In this context, if a U.S. citizen acquires citizenship by birth in one possession and dies in a different possession, he/she is also treated as NRA.[7] In addition, where a U.S. citizen acquires citizenship by virtue of his/her parent's residence in one possession and then dies in a different possession, he/she is also treated as NRA.[8]

Example 2: Paul is born in Texas. When Paul is two years old, his parents move to Puerto Rico, where Paul lives until his death, at the age of 43. Here, this special rule does not apply, and Paul is treated as any other citizen for estate tax purposes.

Example 3: Same facts as Example 2, except that Paul is born in Puerto Rico, and his parents move to Texas when Paul is two years old. When Paul is 40 years old, he moves to Puerto Rico, where he dies three years later. Here, Paul is treated as an NRA for estate tax purposes.

Residence

Domicile Is Test

For estate tax purposes, a nonresident decedent is a decedent who, at the time of his/her death, had his/her domicile outside the United States.[9] Consistent with the above discussion, the term "United States" means only the 50 states and the District of Columbia. It does not include U.S. possessions.

Caution: Many accountants and attorneys mistakenly confuse the estate and gift tax residence test with the U.S. income tax residence test. The estate and gift tax residence test differs from the income tax residence test. Consequently, an individual can be a resident for income tax purposes but not for transfer tax purposes, and vice versa.

Domicile Defined

Treasury regulations provide that a person acquires a domicile in a place by living there, even for a brief period of time, with no definite intention of later removing therefrom. Residence without the requisite intention to remain indefinitely will not suffice to constitute domicile, nor will intention to change domicile effect such a change unless accompanied by actual removal.[10]

Whether a person is domiciled in the United States is a fact issue. Proof of the required intent to remain depends on all of the relevant facts and circumstances. Relevant factors include the following:[11]

• Immigration status of the individual.

Note: The United States issues two types of visas, immigrant and nonimmigrant visas. Most non-immigrant visas limit visa-holders to a specified time period during which they may remain in the United States. All other things being equal, holding a non-immigrant visa would seem to indicate nonresident status, since such a visa does not allow the holder to legally remain in the United States. However, this is not always the case.[12] Conversely, all other things being equal, if a person holds an immigrant visa, this would seem to indicate intent to remain in the United States indefinitely. Having said this, a green card holder is not necessarily an ipso facto resident. Again however, a green card would appear to be strong evidence of residence.[13]

• Presence within the United States, including duration of stay in the United States and elsewhere, the frequency and nature of travel, etc.

• Nature, extent, and reasons for temporary absence from the foreign home.

• Individual's own statements, including statements made to immigration authorities, and contained within legal documents (e.g., wills, deeds, divorce petitions, etc.).[14]

• The size, cost, location, and nature of the individual's home or other dwelling places, and whether such home is owned or rented.[15]

• Marital status and residence of individual's family. To illustrate, if a person moves his/her family to the United States and places his/her children in U.S. schools, this would indicate an intent to remain in the United States.[16]

• Situs of clothing and personal belongings.

• Participation in community activities.[17] To illustrate, if an individual becomes active within the community within which he/she lives in the United States by joining a Rotary or Lions club, this would seem to indicate an intent to remain in the United States indefinitely. On the other hand, if a foreign business executive joins a private social club for business entertainment purposes, this would appear to be irrelevant with respect to the executive's intent concerning establishing a new domicile in the United States.

• Phone listing, U.S. driver's license, and auto registration.

• U.S. bank accounts and investments.

• Participation in U.S. business ventures.[18]

• Payment of taxes.

• Voting.

• Return ticket.

• Registration.

• Stationary.

• Mail.

Example 4:[19] **Facts.** D was an illegal alien who entered the United States in 1959. Two years later, D's wife illegally immigrated into the United States. D remained in the United States until his death, in 1978. Between 1959 and 1978, D purchased a home in the United States, and remained there until his death. He was a member of several local clubs and an active participant in the community. In 1964 and in 1972, D purchased rental real property in his native country, which he rented out. At his death, D's estate took the position that D was an NRA and, therefore, that the real property located in D's native country was not includible in his federal gross estate. **Ruling.** The IRS ruled that an illegal alien who lived in the United States for 19 years with his family, purchased a residence, and established strong community ties was domiciled in the United States at his death. Therefore, his taxable estate is subject to the estate tax imposed by §2001, including estate tax on the real property located in D's native country.

Example 5:[20] **Facts.** D, a citizen of a foreign country, was an employee of an international organization at his death. In 1965, D entered and remained in the United States with a "G-4" visa. A "G-4" visa is a non-immigrant visa granted to employees of international organizations. After arrival, D formed the intent to remain in the United States indefinitely, and the intent persisted until D's death in 1978. **Ruling.** At date of death, D was a U.S. resident. Therefore, the transfer of D's taxable estate, both situated inside and outside the United States, is subject to federal estate tax under §2001.

Gross Estate and Situs Rules

Generally

The issue of situs is extremely important because only an NRA's U.S. situs property is subject to estate, gift, and generation-skipping transfer ("GST") tax.[21] The appropriate analysis is as follows:

- Determine the gross estate of the NRA.

- Determine if any treaties apply. This is because treaties may modify the situs rules applicable to an NRA's property. As of the date of this article, countries with which the United States has estate tax treaties include the following:

- **Australia**

- **Austria**

- **Denmark**

- **Finland**

- **France**

- **Germany**

- **Greece**

- **Ireland**

- **Italy**

- **Japan**

- **Netherlands**

- **Norway**

- **South Africa**

- **Sweden**

- **Switzerland**

- **United Kingdom**

- Determine the situs of the NRA's property, under an applicable treaty, if one applies, or under the situs rules, discussed below.

Real Property

Real property is deemed to have its situs in the place where it is located.[22]

The issue occasionally arises as to what constitutes real property. Because neither the Code nor treasury regulations define "real property," either an applicable treaty or the law of the jurisdiction governs the issue of what property constitutes real or personal property.[23] To illustrate, generally, real property includes land, buildings, improvement and fixtures, growing crops,[24] timber cutting rights,[25] and mineral rights.[26] Conversely, real property generally does not include leasehold interests, unless the lease term is sufficiently long,[27] and security interests such as mortgages.[28]

Planning Pointer. NRAs acquiring real property may do so through a non-U.S. company. This will effectively convert U.S. real property into non-U.S. intangible personal property for federal estate tax purposes.[29] This analysis assumes, of course, that the non-U.S. company is a valid and bona fide corporation, with all proper corporate formalities maintained.[30] In this regard, NRAs who already own U.S. real property can also effectively convert U.S. real property into non-U.S. intangible personal property for federal estate tax purposes. However, there may be FIRPTA [31] issues in doing this. A common structure for this purpose is to have U.S. real property owned by a U.S. company, which in turn is owned by a foreign holding company.

Caution Regarding Earnings Stripping Rule: When using a foreign holding company that owns a U.S. subsidiary to hold U.S. real property, practitioners should examine carefully any debt that the U.S. company uses to finance the acquisition of the real estate. Specifically, there is an issue of whether such debt triggers the §163(j) earnings-stripping rule.

As a general matter, the earnings stripping rule applies to a corporation for tax years where (a) its ratio of debt to equity at the close of the tax year exceeds 1.5 to 1, and (b) it has excess interest expense for the year.[32] Generally, "excess interest expense" would be the amount by which the U.S. subsidiary's "net interest expense" exceeds 50% of its adjusted taxable income.[33]

To the extent the earnings stripping rule applies to a U.S. subsidiary for a taxable year, "disqualified interest" paid or accrued during such tax year would be nondeductible, except to the extent that such interest exceeds the U.S. subsidiary's excess interest expense. For this purpose, disqualified interest includes (1) interest payable to a related person not subject to U.S. tax on such interest; (2) interest payable to an unrelated person under an obligation guaranteed by a related person that is either tax-exempt or a foreign person; or (3) interest paid or accrued by a taxable real estate investment trust ("REIT") subsidiary to the REIT.[34]

It should be noted that this issue, earnings stripping, is a favorite one for IRS international examiners. The issue is usually "picked up" as a result of the U.S. company, filing its Form 5472, Information Return of 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade of Business, disclosing the fact that it is more than 25% owned by a foreign person and that there is a related-party transaction.

Finally, advisors should note that the earnings stripping issue is not limited to U.S. real estate holding companies. It can crop up for many types of U.S. subsidiaries of foreign parents.

Caution Regarding Use of Debt to Reduce Value of Real Property: Sometimes NRAs get creative and try to reduce the value of U.S. real property, particularly U.S. homes, by encumbering such property with a mortgage. This strategy is problematic in that, for it to succeed, the mortgage must be non-recourse debt, secured solely by the real property. Unless this is the case, the mortgage will not reduce the value of the real property for purposes of inclusion in the NRA's gross estate. Instead, such mortgage would constitute a deduction for U.S. estate tax purposes. More important, as discussed below, it would be only partially deductible. Specifically, the mortgage would be allocated to the U.S. gross estate, for deduction purposes, in proportion to the U.S. gross estate over the worldwide gross estate. In other words, the mortgage would be multiplied by a fraction, the numerator of which would be assets includible in the NRA's U.S. estate, and the denominator would be the NRA's worldwide assets, even though the entire mortgage relates to U.S. assets.[35]

Tangible Personal Property

The situs of tangible personal property is determined by its physical location at the time of death or gift.[36] However, items of personal property accompanying an NRA who dies while temporarily visiting the United States are not includible in his/her gross estate.[37]

One type of tangible personal property that is particularly problematic is art. This is because art is portable and highly valuable. It is not unusual for an NRA to loan art to a U.S. museum or to send art to the United States to be cleaned or sold. Under the general situs rule for tangible personal property, if an NRA who has loaned property to a U.S. museum dies during the period of such loan, that NRA would be subject to estate tax on such art. Because this is obviously unfair, the Code provides an exception for this type of situation. Specifically, works of art owned by an NRA decedent are not included in the NRA's estate if such art was:

• imported in the United States solely for exhibition purposes;

• loaned for exhibition purposes to a public gallery or museum, no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

• at the time of the NRA decedent's death, on exhibition, or en route to or from exhibition, in such a public gallery or museum.[38]

Caution: If an NRA sends artwork to the United States to be cleaned or sold, and dies in the interim, such artwork will be subject to U.S. estate taxation.

Planning Pointer. In the facts of PLR 199922038, an NRA loaned 31 works of art to a U.S. museum, which rotated its art so that all 31 works of art were generally not on display continuously. The museum stored those pieces not on current display. The IRS ruled that none of the 31 works of art, including any in storage, would be subject to U.S. estate tax if the NRA died during the loan period. It reasoned that the entire collection was "on exhibition for purposes of section 2105(c) even though only part of the collection will actually be on display to the public at any given time on a rotating basis." Based on this rationale, an NRA could enter into a similar arrangement with a museum, loaning several pieces to such museum, and requiring the museum to clean or restore such art as a condition of the loan. Such arrangements with museums are common.

Currency or Cash

Currency or cash that an NRA owns is not considered to constitute a debt obligation or intangible property. Currency or cash owned by an NRA, which is located in the United States (e.g., in a safe deposit box) constitutes tangible personal property subject to U.S. estate tax.[39]

Personal Property of Diplomatic Personnel

Personal property of diplomatic personnel in the United States is not includible in the NRA's gross estate if such property is used in the conduct of such NRA's official mission and is reasonably required for such purpose.[40]

Shares of Stock of a Corporation

U.S. tax law deems shares of stock issued by a U.S. corporation that are beneficially owned (or deemed beneficially owned) by an NRA at his/her death to be situated in the United States.[41] In contrast, U.S. tax law deems shares of stock issued by a foreign corporation that are beneficially owned (or deemed beneficially owned) by an NRA to be situated outside the United States.[42]

The location of the stock certificates, evidencing ownership of stock, is completely irrelevant for federal estate tax purposes.[43] As a result, an NRA cannot avoid federal estate taxation by using nominees or other agency arrangements to hold U.S. corporate stock. Alternatively, an NRA can avoid federal estate taxation by using a valid and bona fide foreign corporation to hold such U.S. corporate stock.

Planning Pointer. The rules regarding the situs of corporate stock provide significant tax planning opportunities. Specifically, an NRA may avoid federal estate tax on property situated in the United States by establishing a foreign corporation with a bona fide business existence and having that foreign corporation acquire and hold such property.

Caution: To ensure that an NRA's ownership of U.S. situs property through a foreign entity will eliminate his/her federal estate tax exposure, the foreign entity must be a corporation for U.S. tax purposes. To ensure that an entity organized under the laws of a foreign jurisdiction is a corporation for U.S. tax purposes advisors must ensure that:

- The corporation has a business activity [44] (e.g., management of property, purchase of property, payment of debts, etc.) and is a bona fide corporation, which does the following:

- observes all corporate formalities;

- maintains a corporate bank account;

- is the legal and beneficial owner of its property; and

- performs functions, such as securing loans, so as to avoid characterization as a passive, sham corporation, set up merely as a blind to deter creditors.

- The corporation is classified as a corporation under §7701.[45]

Debt Obligations

Generally, debt obligations of U.S. persons or of the United States, any state, any state political subdivision or the District of Columbia, or any agency or instrumentality of any such governmental unit constitutes property within the United States for federal estate and gift tax purposes.[46] Conversely, any debt obligation, including a bank deposit, the primary obligor of which is not a U.S. person, the United States, any state, any state political subdivision or the District of Columbia, or any agency or instrumentality of any such governmental unit constitutes property outside the United States for federal estate and gift tax purposes.[47]

For purposes of the foregoing rules, it is irrelevant whether any written evidence of the debt obligation is treated as being the property itself. It is also irrelevant whether the NRA was engaged in a trade or business in the United States at the time of his/her death.

Exception for Bank Deposits

U.S. bank deposits are deemed to be situated outside the United States for federal estate tax purposes if the income from such deposits would be exempt from federal income tax (under §871(i)(1)[48]) were such income received by the decedent at his/her death. This generally includes all bank deposits except where the interest thereon is effectively connected with a U.S. trade or business.[49]

U.S. bank deposits for this purpose generally includes deposits with persons carrying on the banking business, deposits or withdrawable accounts with a federal or state chartered savings institution if interest credited thereon is a deductible expense to the savings institution under §591, and amounts held by an insurance company under an agreement to pay interest thereon.

Caution: U.S. bank deposits do not include the following types of assets:

- Cash held by a brokerage firm, because brokerage firms are not in the business of banking.[50]

- Cash in a bank's safe deposit box.[51]

- Funds held by an institution in a fiduciary capacity are not treated as bank deposits and are treated as property situated within the United States for federal estate tax purposes.[52]

Note. This exception is designed to encourage wealthy NRAs to use U.S. banks and insurance companies.

Exception for Foreign Branch Deposits

Deposits with a foreign branch of a domestic corporation or partnership engaged in the commercial banking business are not deemed situated in the United States.[53]

Exception for Portfolio Debt Obligations

Debt obligations are not located in the United States if, without regard to the general requirement that the obligor not be a U.S. person, the interest thereon would have been treated as portfolio interest exempt from U.S. income tax if the decedent had received that interest before he/she died.[54]

Portfolio obligations are bonds, debentures, notes or other forms of debt that:

- are not issued by a corporation or partnership in which the decedent (and parties related to the decedent) own in the aggregate 10% or more of the voting stock, for a corporation, or 10% or more of the capital or profits interest, for a partnership, and that

- is either in (a) registered form; or (b) bearer form, but with arrangements in place to prevent a U.S. citizen or resident from acquiring the obligation, and interest is payable outside the United States.[55]

Caution: If an individual is an NRA for estate tax purposes, but not for income tax purposes, then this exception will *not* apply to that individual. This results because portfolio interest is only exempt from income tax if the owner of the debt obligation is an NRA for income tax purposes.[56]

Failure to Provide Written Statement, Which Is Required Under §871(h)(2). For interest that an NRA receives on registered debt obligations to be exempt from income tax, the NRA must make a statement in writing, which satisfies the requirements of §871(h)(5), to the persons otherwise required to withhold income taxes to the effect that he/she is the beneficial owner of the obligation and is not a U.S. person. Failure to provide such a statement subjects the interest thereon to income taxation, but such failure does not subject the obligation itself to estate tax.

Caution: If the interest is taxed to the NRA for any other reason, then it generally will be situated in the United States for federal estate tax purposes.[57]

Contingent Interest. If any part of a portfolio interest obligation would be treated as contingent interest under §871(h)(4) if received by a NRA at the time of his/her death, a part of such obligation would be deemed to be property situated in the United States.[58] For this purpose, interest is contingent if the amount of such interest is determined by reference to any of the following:

- receipts, sales or other cash flow of the debtor or a related person;
- any income or profits of the debtor or a related person;
- any change in the value of any property of the debtor or a related person; or
- Any dividends, partnership distributions, or similar payments made by the debtor or a related person.[59]

Exception for Debt of Corporations with Predominately Foreign Source Income

Debt issued by certain U.S. corporations will not be deemed situated in the United States if at least 80% of their gross income derived from all sources was active foreign business income, as defined by §861(c), for a three-year period prior to the NRA's death.[60]

Multiple Obligors. If there are multiple obligors, one or more of whom is a U.S. citizen or resident alien and the other of whom is not, the debt is apportioned among them based on all of the facts and circumstances.[61]

Life Insurance

Life insurance proceeds on the life of an NRA are deemed to be property situated outside the United States. For this purpose, it is irrelevant whether the insurer is domestic or foreign.[62] On the other hand, however, the cash value of a policy underwritten by a U.S. insurer on the life of another person, which is owned by an NRA, is situated in the United States for estate tax purposes.[63]

Partnership

There are no clear-cut rules for determining the situs of a partnership interest, as there are for many other types of assets.[64] Neither the Code nor treasury regulations expressly address partnership interests in the context of the situs rules for NRAs. Moreover, there are no cases that address the application of either §2104 or §2105 (which deal with the situs rules) to partnership interests, and there are no administrative rulings on point. As a result, there is little authoritative guidance, other than commentary, on the issue of determining the situs of partnership interests for application of the federal estate tax to NRAs.

The proper analysis that planners should follow appears to be as follows:

• The nature of an NRA's property interest in a partnership varies depending upon whether, under the local law of its creation, the partnership qualifies as a legal entity (separate and distinct from its partners) and whether, under the same law, the partnership survives the death of one of its partners.[65]

• If the partnership does not qualify as a legal entity under local law or is dissolved upon the death of one of its partners, the property interest of a deceased partner for federal estate tax purposes is his/her share of the assets of the partnership.[66]

• Conversely, if the partnership in which the NRA is a partner both (1) is recognized as a legal entity under local law, and (2) survives the death of a partner, his/her partnership interest appears to be where the business of the partnership is conducted.[67]

Planning Pointer. Generally, it makes much more sense to place U.S. operations within a foreign holding company. Where there is a compelling reason to use a U.S. partnership or LLC, such as where there is U.S. real estate with U.S. investors, if possible, planners should place the NRA's U.S. partnership or LLC interest into a valid and bona fide foreign holding corporation, in which all proper corporate formalities are maintained. By doing this, the planner will convert a partnership or LLC interest, whose situs for federal estate tax purposes is uncertain, into a corporate interest that is situated outside the United States for federal transfer tax purposes.

Trust Interests

An NRA's interest in a trust is subject to the federal transfer tax if either (a) it is an indefeasibly vested interest that would be includible in the gross estate of a U.S. citizen or resident; or (b) the NRA has an interest or power that would cause the trust to be includible in the gross estate of a U.S. citizen or resident under §§2033-2044.[68]

If the trust interest is includible in the NRA decedent's estate, what is the situs of the trust interest? The general rule is that the situs of a beneficial interest in a trust is generally determined by the situs of the trust's underlying assets.[69] Therefore, if an NRA has a beneficial interest in a trust, which has assets deemed to be situated in the United States, the NRA's interest is includible in the NRA's gross estate for federal estate tax purposes. This holds true even if the trust itself is a foreign trust.[70]

Common Trust Fund Units. If a U.S. trust holds investments in a common trust fund, U.S. tax law deems the shares/units owned by the trust to be situated in the United States regardless of where the assets owned by the common trust fund are located.[71]

Counter Argument. Virtually all commentators agree about the foregoing rule. However, at least one commentator has argued (without citing any authority) that a valid argument may be made that a beneficial interest in a nongrantor trust constitutes intangible personal property for federal estate tax purposes, the situs of which, under the traditional rules would be the NRA/beneficiary's domicile, or alternatively, the location of the trust, (i.e., where the trust is administered and where the rights of the parties are enforceable).[72]

Patents, Trademarks, Copyrights, and Contractual Rights

There appears to be no direct authority regarding the situs of intellectual property, and in the absence of such authority, commentators take the view that intellectual property rights obtained from a jurisdiction's governmental agencies are situated in that jurisdiction.[73] Under this view, if an NRA were granted a patent or copyright in the United States, then such patent or copyright would be situated in the United States. Conversely, if such patent or copyright were issued elsewhere, then it would be situated outside the United States.

Transfers Includible Under §§2035 Through 2038

If an NRA makes a gratuitous transfer of property which comes within the provisions of §§2035-2038, such property is "deemed to be situated" in the United States if it was situated in the United States *either* (a) at the time of the gift, or (b) at the time of the donor/decedent's death. For this purpose, the estate tax situs rules apply in determining situs at the time of the gift.[74]

> *Example 6:*[75] **Facts.** Decedent ("D") created an inter vivos trust in 1923, at which time she was a U.S. citizen. Under the terms of the trust, D received the trust income for life, and she retained a general testamentary power of appointment over the remainder interest. The trust was funded with stock in U.S. corporations, debt issued by U.S. corporations, and U.S. real estate, all of which would have been situated in the United States under the NRA situs rules. In 1974, D renounced her citizenship and became a citizen of Spain. In 1984, D executed her last will, in which she exercised her general testamentary power of appointment over the remainder interest in the trust. When D died in 1991, the trust corpus consisted solely of U.S. debt that would be treated as situated outside of the United States under the exception for portfolio debt obligations, discussed above. **Ruling.** The IRS ruled that the entire corpus of D's trust was situated in the United States under §2104(b) because the trust property consisted of property with respect to which D made an §2038 transfer that was situated in the United States at the time of the transfer.

Note: If D had created the trust after she was an NRA, and assuming no tax-motivated expatriation rules applied, there would have been no estate tax inclusion. In other words, even though the property in the trust at D's death has a situs outside the United States, because the property that was originally transferred, which was subject to §§2035-2038, had a U.S. situs, there was estate tax inclusion here.

Deductions

Generally

NRAs are generally entitled to the same types of deductions as estates of citizens and resident aliens. However, there are significant differences in the amounts deductible. Generally, only a portion of the expenses, debts, taxes and losses allocated to a U.S. gross estate are deductible by an NRA decedent. Special rules apply for the marital and charitable contribution deductions.

Deduction for Expenses, Debts, Taxes, and Losses

Section 2106 allows estates of NRA decedents to deduct a portion of the expenses specified in §§2053 and 2054. Specifically, §2053 generally allows an estate to deduct funeral and administration expenses, claims against the estate, and mortgages on, and indebtedness with respect to, property included in the gross estate. In addition, §2054 generally allows an estate to claim a deduction for uninsured casualty losses that the estate suffers. The proportion of §§2053 and 2054 expenses that an NRA estate may deduct is determined by a fraction, the numerator of which is the value of the gross estate situated in the United States, and the denominator of which is the value of all property, wherever situated, that is included in the NRA's gross estate.[76] It is irrelevant whether the amounts to be deducted were incurred or expended inside or outside the United States.

Special Treatment for Nonrecourse Mortgages

If mortgage debt is nonrecourse, such that the creditor must look solely to the security for payment, and the NRA decedent's estate has no personal liability, then the mortgage debt is treated as a reduction in the value of the mortgaged property rather than as a deduction. By reducing the value of the mortgaged property by the nonrecourse mortgage debt and reporting only the equity of redemption, the taxable estate is reduced by the entire mortgage debt, rather than by only the pro rate share allocated to the U.S. estate, as with other deductions.[77] In addition, it is not necessary to disclose the worldwide estate on the estate tax return to obtain the benefit of nonrecourse mortgage debt.

Caution: If an NRA is personally liable for a mortgage, the entire value of the mortgaged property is includible in his/her estate and the mortgage, as a general obligation of the NRA, is allocated to all of the NRA's property with the result that only a proportionate part of the mortgage is deductible.

Planning Pointer. If an NRA owns mortgaged real property outside the United States, personal liability is preferable (assuming disclosure of worldwide assets is acceptable), whereas if the NRA owns mortgaged real property in the United States, a nonrecourse mortgage is preferable.

Disclosure Required to Claim Deduction

In order to claim the deduction for §§2053 and 2054 expenses, the worldwide gross estate must be disclosed on the NRA decedent's estate tax return, and the executor must submit evidence of the liabilities, claims and administrative expenses claimed.[78]

Advisors should note that NRA clients will frequently desire to avoid such disclosure because of a desire for confidentiality. Often, this is a direct result of cultural differences regarding such confidentiality, which it is difficult to overstate.

Charitable Contribution Deduction

NRA decedents may claim a charitable contribution deduction, which is identical to the deduction for resident aliens or citizens, except for the following differences, which are explicitly imposed on NRAs. The charitable contribution deduction for NRAs is allowed only if either: (a) the charitable bequest, legacy, devise or transfer is to a corporation or association created or organized in the United States;[79] or (b) the charitable bequest, legacy, devise or transfer is to a charitable trust, fraternal order, or association, and is for use within the United States.[80]

With respect to transfers to corporations or associations created or organized in the United States, there is no requirement that the domestic corporation spend the bequest within the United States. In other words, the funds could be donated to a "friends of" organization, which benefits a foreign charity.

With respect to transfers for use within the United States, the bequest may be to a foreign trust for expenditure in the United States.[81]

If charitable transfers qualify, the NRA's estate may deduct the entire charitable contribution, and no apportionment is required.[82] However, the amount of the deduction for any transfer to charity may not exceed the value of the transferred property required to be included in the NRA decedent's gross estate.[83]

Caution -- Disclosure Required to Claim Deduction

In order to claim the deduction for charitable contributions, the worldwide gross estate must be disclosed on the NRA decedent's estate tax return.[84]

Marital Deduction

Surviving Spouse Is U.S. Citizen

An NRA's estate is entitled to a marital deduction for U.S. property that passes to a U.S. citizen spouse.[85]

Caution: Although the marital deduction is very beneficial, because it allows the planner to defer the estate tax until the death of the surviving spouse, planners must use care when planning to use the marital deduction. Specifically, it is important to ensure that only property situated in the United States passes to the surviving U.S. citizen spouse. If property situated outside the United States is left to the surviving U.S. citizen spouse, it unnecessarily subjects such property to the U.S. estate tax at the surviving spouse's death. Therefore, unless there are personal reasons to provide otherwise, planners should consider leaving all property in the NRA decedent's estate that is situated outside the United States to the surviving U.S. citizen spouse in a manner that it will not make such property includible in the surviving U.S. citizen spouse's estate.

Surviving Spouse Is Not United States Citizen

If the surviving spouse is not a U.S. citizen, a marital deduction is available only if: (a) the surviving spouse becomes a U.S. citizen before the filing of the U.S. estate tax return and has been resident in the United States at all times between the deceased spouse's death and the date of naturalization; or (b) the property is transferred to a qualified domestic trust ("QDOT"), either pursuant to the deceased spouse's will or by an irrevocable assignment of the surviving spouse.[86]

QDOT

If a QDOT has the characteristics set forth in §2056A(a), income may be distributed to the surviving spouse from a QDOT without estate tax.[87]

Caution: Principal distributed to the surviving spouse during lifetime (other than hardship distributions) and the remaining trust principal at the surviving spouse's death are subject to the estate tax imposed at the rate imposed on the estate of the previously deceased spouse.[88] Therefore, any assets of the NRA decedent that would not be subject to estate tax because they do not have a U.S. situs should not be bequeathed to a QDOT because that will cause such property to be subject to estate tax at the death of the surviving spouse or upon earlier principal distributions.

Gift Tax Marital Deduction

There is no gift tax marital deduction for gifts to a spouse who is not a U.S. citizen.[89] Instead, there is a $100,000 annual exclusion for gifts to a non-U.S. citizen spouse, which is increased to reflect cost of living adjustments.[90] For 2003, this amount is $112,000.[91]

Credits

NRA estates are generally entitled to a unified credit of only $13,000, rather than the $345,800 allowed to estates of U.S. citizens or residents for 2003. This credit represents the estate tax due on an estate valued at $60,000, rather than $1 million.[92]

If a decedent is treated as an NRA for estate tax purposes solely because he/she acquired U.S. citizenship by reason of citizenship, birth, or residence in a U.S. possession, and was domiciled in a U.S. possession at his/her death, then that individual's estate is allowed a unified credit equal to the greater of: (a) $13,000, or (b) the proportion of $46,800 (which offsets the tax on the first $175,000 of the decedent's estate), which the value of the decedent's U.S. situs assets bears to the value of his/her gross estate.[93] If a treaty requires that an NRA decedent be treated as a U.S. citizen or resident for unified credit purposes, then the NRA decedent's estate is allowed to claim the full unified credit, but only the proportion of the amount applicable under §2010(c) as the U.S. gross estate bears to the worldwide gross estate.[94]

If the NRA decedent had previously been allowed a unified credit for gift tax purposes (i.e., because he/she was a U.S. citizen or resident at the time of the gift), then the unified credit for estate tax purposes must be reduced by the amount of such gift tax unified credit.[95]

Estates of NRA decedents are allowed a credit for estate and inheritance taxes paid to the 50 states and the District of Columbia. This credit is limited to the proportion of the maximum credit computed under §2011(b) (i.e., credit for state death taxes) that the value of the includible property on which such states' taxes were paid bears to the value of all property includible in the NRA decedent's federal gross estate.[96] Of course, beginning in 2005, the state death tax credit is replaced by a deduction for state death taxes paid.[97] Estates of NRA decedents may also claim the following types of credits:

• credit for federal gift taxes paid on property included in the NRA's gross estate; and

• credit for federal estate tax paid on prior transfers of property included in the NRA's gross estate.[98]

Note -- No Foreign Tax Credit: Estates of NRA decedents are not entitled to a foreign tax credit.

Rates of Tax

The rate of estate, gift, and GST tax is generally the same for NRAs as for resident aliens and citizens.[99]

Basis of Property Transferred by Gift or Death

Gift Tax Basis

Under current law, for property received by gift, the basis of the transferred property in the donee's hands is generally the donor's basis, increased by the gift tax paid with respect to the net appreciation in the value of the gifted property.[100] However, if the donor's basis exceeds the fair market value of the gifted property on the date of the gift, then for purposes of determining a loss, the basis is such fair market value.[101]

The net appreciation in value is the difference between the donor's basis and the fair market value on the date of the gift.[102]

Estate Tax Basis

The basis of property transferred at death is generally the property's fair market value at the date of death or the alternate valuation date (i.e., six months after the date of death), whichever is elected for federal estate tax purposes.[103] If the decedent acquires appreciated property by gift within one year of his death, and at his/her death such property passes to the original donor (or such original donor's spouse), the decedent's basis immediately before death is the property's basis in original donor's hands, rather than the fair market value at date of death or the alternate valuation date.[104]

The basis of foreign-situs property inherited by a U.S. citizen or resident alien from an NRA is such property's fair market value on the date of the decedent NRA's death, if such property passed as part of such decedent NRA's estate.[105] However, the alternate valuation date is not available because the election cannot be made for property that is not included in a decedent's U.S. gross estate.

Property that passes to a U.S. citizen or resident alien from an NRA by reason of death, form of ownership or other conditions, including property acquired through the exercise or non-exercise of a power of appointment, but which does not pass as part of the decedent NRA's estate is not entitled to a fair market value basis.[106] Instead, the property takes a carryover basis from the transferee.

Planning Pointer -- Foreign Situs Property. The date of death value of foreign-situs property is frequently denominated in the currency of the situs of such property. Therefore, such value must be converted into U.S. currency. Note that the conversion rate used may significantly impact the value and, thus, the basis of such property. Also, records of such conversion rate should be preserved, along with all other basis information.

EGTRRA 2001

Generally

Under the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), the current rules that provide for a stepped-up basis for property received from a decedent will be replaced with a carryover basis regime for 2010. In other words, recipients of property from a decedent, under this regime, will take a basis equal to the lesser of the decedent's adjusted basis in the property or the fair market value of such property on the date of the decedent's death.[107]

Application to NRAs

EGTRRA allows an NRA decedent's spouse to allocate a basis increase to eligible assets owned by an NRA decedent at death by $60,000 in the aggregate for assets passing to all beneficiaries and by an additional $3 million in the aggregate for assets passing to a surviving spouse, or to a QTIP trust for the benefit of a surviving spouse.[108] The $60,000 increase is in lieu of the $1.3 million step up in basis that applies to decedents who were U.S. citizens or resident aliens.

After the estate tax repeal in 2010, an NRA decedent's executor must file an information return reporting:

- the decedent's tangible property situated in the United States;
- other non cash-assets acquired by U.S. persons from the decedent with a value in excess of $60,000; and
- appreciated property acquired by a U.S. person from the decedent if that property was acquired by the decedent by gift within three years of the date of gift and a gift tax return for such property was required to be filed by the donor.[109]

Gift Tax

The United States imposes a gift tax on donors, not the donee.[110] In addition, a donee's citizenship or residence is irrelevant for federal gift tax purposes. Therefore, NRAs can make unlimited gifts to U.S. persons without any liability for U.S. gift tax if the property gifted has a situs located outside of the United States.[111]

As an incidental note, the Code's estate tax provisions for NRAs are contained within a separate subchapter (i.e., Subchapter B, Estates of Nonresidents Not Citizens, of Chapter 11, Estate Tax). In contrast, the Code's gift tax provisions for NRAs are not contained in a separate subchapter. Instead, they consist of specific provisions within Chapter 12, Gift Tax.

Situs Rules

The gift tax situs rules are generally the same as for the federal estate tax, which are discussed above.[112]

Intangible Property

The federal gift tax does not apply to any gifts by NRAs of intangible property (e.g., shares of stock in U.S. corporations, debts of a U.S. person, etc.), unless the donor is an NRA who expatriated from the United States and meets certain statutory requirements.[113]

Planning Pointer. Since no gift tax applies to gifts made by NRAs of intangible property, such as debt obligations of U.S. persons or stock of U.S. corporations, NRAs should consider making gifts of this type of property, which otherwise would be subject to the federal estate tax if held by them at death. If an NRA wishes to make a gift of tangible personal property situated in the United States, it is advisable to remove such property before completing the gift to avoid the federal gift tax. By doing so, the NRA would avoid the federal gift tax. It should be noted, however, that even where the donor removes such property from the United States, he/she should not retain rights or powers that under §§2036 through 2038 would cause the property to be includible in his/her gross estate if situated in the United States at the time of his/her death.[114]

Gift Splitting by Spouses for Gifts to Third Parties

Gift splitting is not available if either spouse is an NRA.[115]

Annual Exclusion

The annual gift tax exclusion is available to all donors, including NRAs.[116]

Gift Tax Rate

The gift tax rate for NRA donors is the same as for citizens and residents.

Unified Credit Against Gift Tax

The gift tax unified credit does not apply to NRA donors.[117] Therefore, an NRA donor must begin paying gift tax as soon as his/her gifts exceed the annual gift tax exclusion amount.

Charitable Gifts

The gift tax charitable deduction is generally allowable for NRAs only if the charity is a U.S. governmental entity, a U.S. domestic charitable corporation, or charitable trust (either U.S. or foreign) if the gift is used for charitable purposes in the United States.[118]

Spousal Gifts

Generally

There is no gift tax marital deduction for gifts to a NRA spouse.[119] However, there is a $100,000 annual exclusion for gifts to a non-U.S. citizen spouse, which is increased through annual cost-of-living adjustments.[120] For 2003, this amount is $112,000.[121]

Joint Property

For U.S. citizens, the unlimited marital deduction will shelter any gift upon the creation (or termination) of a joint tenancy from gift tax. However, because there is no marital deduction for an NRA spouse and the annual exclusion is limited to $112,000 (for 2003), the creation or termination of a joint tenancy with such an NRA spouse may have gift tax consequences.

The creation of a joint interest in real property is not considered a taxable gift.[122] The termination of such a joint tenancy in real property will not be a gift so long as each spouse receives proceeds proportionate to the funds that spouse contributed to the real property.[123]

With the creation of a joint interest in personal property, each spouse is treated as having retained one-half of the jointly owned property, and therefore if an NRA creates a joint tenancy in his/her own U.S. tangible personal property with his/her NRA spouse, one-half will be treated as a gift to the spouse.[124] On the other hand, if each spouse contributes half of the funds, no gift will occur.

If a joint tenancy is created in a bank account, a gift occurs only when one joint owner withdraws an amount for his/her own benefit in excess of his/her contribution to the account without any obligation to account for a part of the proceeds to the other joint owner.[125]

GST Tax

Statutory Basis

Section 2663(2) provides that the Secretary shall prescribe "regulations (consistent with the principles of chapters 11 and 12) providing for the application of this chapter in the case of transferors who are nonresidents not citizens of the United States."

Final Regulations -- GST Tax Applied Based on Situs of Property Transferred

The final GST tax regulations issued by the Service impose GST tax upon transfers by NRAs based solely upon the situs of the property transferred under the applicable estate and gift tax rules.[126]

> *Example 4:* Winston, an NRA grandfather gives his U.S. citizen grandson, Tony, stock in a U.S. corporation at his death. Such stock is subject to GST tax.
>
> *Example 5:* Assume the same facts as in Example 4, except Tony is a British citizen. Here, the result is the same, because the situs of the U.S. stock is the determining factor.
>
> *Example 6:* Assume the same facts as in Example 4, except that Winston gives the U.S. stock to Tony during Winston's life. Here, there is not gift or GST taxation.

Planning Pointer. NRAs should not make gifts of U.S. situs property to skip persons, as this will cause both federal gift and GST taxation. Generally, it is advisable for owners of U.S. situs property, such as U.S. situs real property or tangible personal property, to hold such property through a foreign corporation.

Footnotes

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2 McKinnon, "Proposed Repeal of Break for United States Citizens Overseas Could Hurt Small Firms," *Wall St. J.* A2 (May 9, 2003).

3 §§2103-2105.

4 §§2511, 2503(b); Rev. Proc. 2002-70, 2002-46 I.R.B. 845, §3.24(1).

5 8 USC §1481(a).

6 §§2208, 2209, 2501(b)-(c).

7 Rev. Rul. 74-25, 1974-1 C.B. 284.

8 PLR 9403009.

9 Regs. §20.0-1(b)(2).

10 Regs. §20.0-1(b)(1).

[11]Lawrence, *International Tax & Estate Planning* §§2:3.3, 2:3.2 (PLI 2001); 837 T.M., *Aliens -- Estate, Gift and Generation-Skipping Taxation,*.

[12]*See, e.g.,* Rev. Rul. 80-363, 1980-2 C.B. 249 (IRS ruled that holder of a G-4 non-immigrant visa, was domiciled in the United States where he possessed the intent to remain in the United States indefinitely).

[13]*Lyons Est. v. Comr.,* 4 T.C. 1202 (1945).

[14]*See, e.g., Bloch-Sulzberger Est. v. Comr.,* 6 T.C.M. 1201 (1947).

[15]*See, e.g., Fokker Est. v. Comr.,* 10 T.C. 1225 1948), *acq.* 1948-2 C.B. 2.

[16]*See, e.g., Farmers' Loan & Trust Co. v. U.S.,* 60 F.2d 618 (S.D.N.Y. 1932).

[17]*See, e.g.,* Rev. Rul. 80-209, 1980-2 C.B. 248.

[18]*See, e.g., Kahn Est. v. Comr.,* T.C. Memo 1998-22.

[19]Rev. Rul. 80-209, 1980-2 C.B. 248.

[20]Rev. Rul. 80-363, 1980-2 C.B. 249.

[21]§§2103, 2511, 2663(2).

[22]Regs. §§20.2104-1(a)(1), 20.2105-1(a)(1).

[23]*de Perigny Est. v. Comr.,* 9 T.C. 782 (1947), *nonacq.,* 1948-2 C.B. 2.

[24]*Peebles v. Comr.,* 5 B.T.A. 386 (1926), *acq.,* VI-2 C.B. 2.

[25]*Laird v. U.S.,* 115 F. Supp. 931 (W.D. Wis. 1953); *contra* Rev. Rul. 53-65, 1953-1 C.B. 391.

[26]*Umsted v. U.S.,* 35-1 USTC ¶9130 (W.D. Ark. 1935).

[27]*See, e.g., de Perigny Est. v. Comr.,* 9 T.C. 782 (1947), *nonacq.,* 1948-2 C.B. 2 (involving 99 year leases).

[28]*Tarafa y Armas Est. v. Comr.,* 37 B.T.A. 19 (1938), *acq.,* 1938-1 C.B. 30. Note, however, that certain types of mortgages, such as *hipotecas*, do constitute real property for U.S. transfer tax purposes.

[29]Regs. §20.2105-1(f).

[30]*See Jackson v. Comr.,* 233 F.2d 289 (2d Cir. 1956) (for a corporation to be deemed a juridical entity separate from its shareholders, it must be organized to or engage in some "business" activity other than the avoidance of tax).

[31]Foreign Investment in Real Property Tax Act of 1980, P.L. 96-499.

[32]§163(j)(2)(A); Prop. Regs. §1.163(j)-1(a)(1).

[33]§163(j)(2)(B)(i); Prop. Regs. §1.163(j)-2(b).

[34]§163(j)(3).

[35]§2106(a); *Johnstone Est. v. Comr.,* 19 T.C. 44 (1952); *Fung Est. v. Comr.,* 117 T.C. 247 (2001), *aff'd,* 2003-1 USTC ¶60,460 (9th Cir. 2003).

[36]Regs. §§20.2104-1(a)(2), 20.2105-1(a)(2).

[37]*Delaney v. Murchie,* 177 F.2d 444 (1st Cir. 1949).

[38]§2105(c); Regs. §20.2105-1(b).

[39]Regs. §§20.2104-1(a)(7), 25.2511-3(b)(4)(iv); Rev. Rul. 55-143, 1955-1 C.B. 465. *See also* PLR 7737063.

[40]Rev. Rul. 53-187, 1953-2 C.B. 291.

[41]§2104(a); Regs. §20.2104-1(a)(5).

[42]Regs. §20.2105-1(f).

[43]Regs. §§20.2104-1(a)(5), 20.2105-1(f).

[44]*See Jackson v. Comr.,* 233 F.2d 289 (2d Cir. 1956) (for a corporation to be deemed a juridical entity separate from its shareholders, it must be organized to or engage in some "business" activity other than the avoidance of tax).

[45]*See, e.g., Swan Est. v. Comr.*, 24 T.C. 829 (1955), *acq.,* 1956-2 C.B. 8, *aff'd in part, rev'd in part,* 247 F.2d 144 (2d Cir. 1957) (*Stiftung* held to be a revocable trust for U.S. tax purposes).

[46]§2104(c); Regs. §20.2104-1(a)(7).

[47]§2105(b); Regs. §20.2105-1(k).

[48]Section 871(i)(1) exempts from the 30% tax under §871 interest earned on deposits, if such income is not effectively connected with the conduct of a trade or business within the United States.

[49]§2105(b)(1).

[50]*Ogarrio Est. v. Comr.,* 337 F.2d 108 (D.C. Cir. 1964); Rev. Rul. 65-245, 1965-2 C.B. 379; *Rosenblum v. Anglim* , 135 F.2d 512 (9th Cir. 1943); Rev. Rul. 56-421, 1956-2 C.B. 602.

[51]Rev. Rul. 55-143, 1955-1 C.B. 465.

[52]Rev. Rul. 69-596, 1969-2 C.B. 179; GCM 22419 (11/7/40).

[53]§2105(b)(2).

[54]§§2105(b)(3), 871(h).

[55]§871(h)(2), (3).

[56]§871(h).

[57]§2105(b)(3).

[58]§2105(b)(3).

[59]§871(h)(4).

[60]§§2104, 861(a)(1)(A).

[61]Regs. §20.2104-1(a)(7).

[62]§2105(a); Regs. §20.2105-1(g).

[63]*Guaranty Trust Co. of New York v. Comr.,* 16 B.T.A. 314 (1929).

[64]*See generally* Martin, "Why Section 2104 Must Address When Partnership Interests Owned by Foreign Investors Are (and Are Not) Subject to United States Estate Tax," 2003 *Tax Notes Today* 94-127 (May 15, 2003).

[65]*Sanchez v. Bowers,* 70 F.2d 715 (2d Cir. 1934).

[66]*Id.*

[67]Rev. Rul. 55-701, 1955-2 C.B. 836.

[68]§2103; Regs. §20.2031-1.

[69]*Comr. v. Nevius,* 76 F.2d 109 (2d Cir.), *cert. denied,* 296 U.S. 591 (1935); Rev. Rul. 55-163, 1955-1 C.B. 674; Rev. Rul. 82-193, 1982-2 C.B. 219.

[70]*Equitable Trust Co. of New York v. Comr.,* 31 B.T.A. 329 (1934), *rev'd on other grounds*, 82 F.2d 157 (2d Cir. 1936); *Comr. v. Nevius,* 76 F.2d 109 (2d Cir.), *cert. denied,* 296 U.S. 591 (1935).

[71]Rev. Rul. 55-163, 1955-1 C.B. 674.

[72]Lawrence, *International Tax & Estate Planning* §§3:2.7 (PLI 2001).

[73]*See* Lawrence, *International Tax & Estate Planning* §3:2.8 (PLI 2001); 837 T.M., *Aliens - Estate, Gift and Generation-Skipping Taxation. Cf.* Christensen, *International Estate Planning* §1.04[7] (2002); *Wodehouse v. Comr.,* 19 T.C. 487 (1952), *acq.*, 1953-1 C.B. 6 (Tax Court held that manuscript, given by P.G. Wodehouse to his wife before registering it in the United States was deemed situated outside the United States at the time of gift where both donor and donee were NRAs and the manuscript was physically located outside the US).

[74]§2104(b); Regs. §20.2104-1(b).

[75]TAM 9507044.

[76]Regs. §20.2106-2(a)(2).

[77]*Johnstone Est. v. Comr.,* 19 T.C. 44 (1952), *acq.,* 1953-1 C.B. 5.

[78]Regs. §20.2106-2(a)(2), (b).

[79]§2106(a)(2)(ii); Regs. §20.2106-1(a)(2).

[80]§2106(a)(2)(iii); Regs. §20.2106-1(a)(2).

[81] *McAllister Est. v. Comr.*, 54 T.C. 1407 (1970).

[82] §2106(a)(2).

[83] §2106(a)(2)(D).

[84] §2106(b).

[85] §§2106(a)(3), 2056.

[86] §2056(d)(4) and (2)(A).

[87] §2056A(b)(3)(A).

[88] §2056A(b)(1) and (2).

[89] §2523(i).

[90] §§2523(i), 2503(b).

[91] Rev. Proc. 2002-70, 2002-46 I.R.B. 845, §3.24(2).

[92] §2102(c)(1).

[93] §2102(c)(2).

[94] §2102(c)(3)(A).

[95] §2102(c)(3)(B).

[96] §2102(b).

[97] §§2011, 2058.

[98] §2102(a).

[99] §§2101(b), 2001(c).

[100] §1015(a), (d).

[101] §1015(a).

[102] §1015(d)(6)(B).

[103] §1014(a).

[104] §1014(e).

[105] Rev. Rul. 84-139, 1984-2 C.B. 168. *See also Ujvari v. U.S.,* 212 F. Supp. 223 (S.D.N.Y. 1963); *Cinelli v. Comr.*, T.C. Memo 1973-140, *aff'd,* 502 F.2d 695 (6th Cir. 1974).

[106] §1014(b)(9); Regs. §1.1014-2(b)(2).

[107] §1022, effective Jan. 1, 2010.

[108]§1022(b)(3) and (c), effective Jan.1, 2010.

[109]§6018, as amended by EGTRRA.

[110]§2502(c).

[111]§2501; Regs. §25.0-1(b).

[112]Regs. §25.2511-3(b).

[113]§2501(a)(2)-(3).

[114]§2104(b).

[115]§2513.

[116]§2503(b).

[117]§2505(a).

[118]§2522(b).

[119]§2523(i).

[120]§2523(i).

[121]Rev. Proc. 2002-70, 2002-46 I.R.B. 845, §3.24(2).

[122]§2523(i), incorporating the provisions of §2515, before its repeal by P.L. 97-34, §403(c)(3)(B); Regs. §25.2523(i)-2(b).

[123]*Id.*

[124]§2523(i), incorporating the provisions of §2515A, before its repeal by P.L. 97-34, §403(c)(3)(B); Regs. §25.2523(i)-2(c).

[125]Regs. §25.2511-1(h)(4).

[126]Regs. §26.2663-2.