RESOURCES

Estate Planning for Noncitizens

magine arriving in the United States as a noncitizen for an extended or indefinite time period. Whatever the reason for coming to the U.S. – whether for a job, an education, family reasons or a fresh start – such a move has overwhelming implications. In addition to the challenges of navigating cultural differences and getting settled in a new country, the noncitizen faces a new tax and legal system.

With all of the adjustments to living in the U.S., it can be easy for noncitizens to overlook how their wealth will be taxed and distributed at death under U.S. law. As a result, the details of the U.S. estate system often come as a surprise to noncitizens (or worse, the family members of a *deceased* noncitizen). Accordingly, it is important to understand how living in the U.S. impacts a noncitizen's estate and that being a noncitizen can present some unique planning opportunities.

Residency

The critical estate planning question for noncitizens living in the U.S. is whether they are considered U.S. *residents* or *nonresidents* under the transfer tax law. Just living in the U.S. does not make a person a resident for transfer tax purposes. Instead, transfer tax residency is a subjective test, which essentially asks whether there is a *present intention to leave the U.S*. The Internal Revenue Service looks at several factors to determine whether a noncitizen-decedent intended to leave the U.S., including why and how long he or she was in the U.S., and the location of his or her family, business interests, social memberships and assets.

The residency distinction is crucial in determining if and how much estate tax will be owed. Generally, only the nonresident alien's real estate and tangible personal property *located in the U.S.* is subject to U.S. gift or estate tax, whereas resident aliens (i.e., those that are here in the U.S. and *do not* intend to leave) are subject to U.S. gift and estate tax on their *worldwide* assets.

Transfer Taxation Exemption Amounts

While the scope of the gift and estate tax is much more limited with respect to nonresident aliens, they are only entitled to a $60,000 gift and estate tax exemption. Meaning any of the nonresident alien's real or tangible personal property located in the U.S. valued in excess of $60,000 will be subject to U.S. transfer tax. On the other hand, resident aliens are generally afforded the same gift and estate tax exemptions as U.S. citizens (currently, $5.25 million). As a result, there is a dramatic difference in estate tax liability based purely off of the noncitizen's intent to remain in the U.S. or leave the U.S. A treaty between the U.S. and a noncitizen's country of citizenship, however, may supersede these rules.

Marital Transfers

Despite the general similarity between the transfer taxation of resident aliens and U.S. citizens, one big difference is the absence of the unlimited tax-free transfer of assets to a noncitizen spouse. While gifts to a noncitizen spouse are permitted up to $143,000 a year without gift tax liability, additional gifts and transfers at death to a noncitizen spouse are subject to transfer taxation.

To avoid the imposition of the estate tax on a wealth transfer to a noncitizen spouse at death, the noncitizen spouse must either become a U.S. citizen in a compressed time frame or the decedent must bequeath the assets to a trust for the benefit of the noncitizen spouse meeting the requirements of a qualified domestic trust – commonly referred to as a "QDOT." Fortunately, if the decedent failed to establish a QDOT at his or her death, all

is not lost and the problem can be fixed in estate administration with the timely action of the noncitizen spouse, who can establish a QDOT him or herself and fund it with the inherited assets before the filing deadline of the decedent’s estate tax return.

Non-Tax Estate Planning Considerations

In addition to the transfer tax implications discussed above, another key consideration in international estate planning is the effectiveness of their U.S. estate planning documents on property located in a foreign jurisdiction. In addition, although trusts are common in the American legal system, many foreign legal systems do not recognize trusts or impose confiscatory taxes on trusts. Accordingly, if U.S. based estate planning documents or trusts are used as part of an estate plan, consideration needs to be given to the legal effectiveness of such plan in the foreign country and how such country will treat (and perhaps tax) the arrangement.

The prevalence of these international estate planning issues is only going to increase with the compression of travel and communications between countries. Estate planning involving noncitizens who reside in the U.S. is fraught with rules and exceptions, which makes proper advanced planning crucial to passing wealth to heirs in a tax efficient manner.

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