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2023 Estate and Gift Tax Conference

Estate Planning for Multi-National Families with Global Assets

Thursday, March 9, 2023
9:45 am - 11:15 am

Speakers:

Patrick Martin

Anuar Estefan

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Thomas Giordano-Lascari

Conference Reference Materials

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ESTATE PLANNING FOR MULTINATIONAL FAMILIES WITH GLOBAL ASSETS

2023 Estate and Gift Tax Conference
California Lawyers Association
March 2023

Patrick W. Martin - Chamberlain
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Case Study

1. Mr. Jose Lopez is a Mexican national and is a tax resident of Mexico.

2. Mr. Lopez is married to Mrs. Maria Buenaventura, a Spanish citizen. They got married in Mexico under the separate property regime, and got a confirmation of their marriage under Spanish law.

3. Mr. and Mrs. Lopez own real property in Mexico, La Jolla, Spain and the U.K.

4. Mr. Lopez has three children, Miguel age 20, Maria age 23, and Jorge age 24. Miguel and Maria were born in the U.S. and Jorge was born in Spain. Miguel and Maria attend college in the U.S. Jorge finished his studies and is working in the United States for a software company who sponsored his H1B visa.

5. Mr. Lopez owns a successful business in Mexico, inherited from his father more than 40 years ago, that produces a variety of Mexican food products for export to the U.S. and Europe under the famous trademark "Productos Mi Tierra".

6. The business is conducted through a group of four entities, incorporated under the laws of Mexico, a Spanish distribution and sales corporation, and a U.S. distribution and sales corporation; the Spanish and U.S. entities are subsidiaries of a Mexican holding company. Mrs. Lopez also established a Singapore company that receives 2% of all global sales of the corporate group.

7. A large multinational group has informally expressed its interest in buying Mr. Lopez's business within the next five years, as part of the multinational's expansion plan to Mexico, although some of Mi Tierra's competitors are also possible targets.

Case Study

8. Mr. Lopez also has a foreign account in Switzerland, through a Canadian limited partnership, whose sole limited partner is a New Zealand trust, beneficially owned by Mr. Lopez. This structure was implemented by a Swiss financial advisor. The Singapore company also has Swiss and Singapore accounts.

9. Per Mr. Lopez own statements, he has not paid any tax in Mexico arising from his Swiss and Singapore accounts nor filed any information returns in Mexico, his country of residence.

10. Mr. Lopez has not disclosed the accounts to his Mexican or U.S. accountants.

11. Mr. Lopez wishes to transfer the Swiss accounts to a U.S. financial institution to avoid being reporting to the Mexican government under OECD common reporting standard, and asks you to create a "U.S. based trust."

12. The individual Swiss account was funded 15 years ago with $20 million dollars and has increased in value more than 150% by way of appreciation of equities, capital gains, interests and dividends. The company Singapore accounts are worth approximately $60 million dollars.

13. Mr. Lopez's counsel in Mexico informs you that if the "U.S. based trust" includes certain provisions reflecting a lack of "control" over the trust's principal and income, Mr. Lopez "… *would not have a tax and reporting requirement in Mexico*" allowing Mr. Lopez to "… *continue deferring his Mexican income tax liability*."

14. Mr. Lopez's counsel has read Lee Sheppard's article and asks that you create a "U.S. trust" "… like the one described in Lee Shepard's article…" which he read on Tax Notes (Lee A. Seppard; *Snow Washing*; Tax Notes Federal; October 28, 2019).

The Structure

Our trust settlor is a Mexican national who does not have a U.S. passport. He has legal-source funds but is not anxious to level with his home government. He forms a U.S. trust (a directed trust under Delaware or South Dakota law) with a U.S. trustee and a U.S. bank custodian for assets that include U.S.-issued securities, treasuries, and foreign assets. The trust is a grantor trust because it is revocable (section 676). U.S. law does not see a completed gift. A trust need not be revocable to be a grantor trust (section 672(f)(2)(A)).

The trust has a foreign trust protector that has the power to remove the trustee or terminate the trust. U.S. law would consider the trust foreign because it has a foreign trust protector. Under some circumstances, a trust can be a foreign person for U.S. tax purposes even if it has a U.S. trustee, such as by giving a foreign person the right to terminate the trust or replace the trustee (section 7701(a)(31)(B) and (30)(E), reg. section 301.7701-7). Only U.S. tax resident trusts are required to file Form 8938, the tax analogue of a foreign bank account report.

PLR-101747-15

Under the terms of Trust, during the joint lifetimes of Settlors, each Settlor retains the absolute power to revest title in him or herself to any community property and any separate property that he or she contributed to Trust. Accordingly, based solely upon the information submitted and the representations made, we conclude that under § 676(a), during their joint lifetimes, each Settlor will be treated as the owner of that portion of Trust constituted of his or her interest in community property, if any, and the separate property that he or she contributed. Furthermore, we conclude that § 672(f)(1) will not prevent each Settlor from being treated under § 676(a) as the owner of that portion of Trust.

Case Study

15. Mr. Lopez is concerned about the Mexican political environment and has expressed his intention of moving permanently to live at his home in Southern California, but at this time is unsure of how many days per year he will actually spend in Southern California in the near future as his work requires frequent travel.

16. Mr. Lopez hires a law firm to advise him with respect to planning alternatives related to his worldwide assets in light of his plan of moving permanently to live in Southern California. You are part of Mr. Lopez's legal team.

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Potential Tax Issues?

Foreign Tax and Criminal Issues

1. Foreign tax fraud?
2. Would Mr. Lopez's assets be subject to estate tax in Mexico or Spain?
3. Would Mr. Lopez's children be liable for tax in Mexico or Spain by reason of acquiring the Mexican and Spanish assets by inheritance from their father?
4. What is the most efficient way to transfer Mexican/Spanish assets to Mr. Lopez's children considering they are not Mexican or Spanish tax resident taxpayers?

U.S. Tax and Criminal Issues

1. Wire Fraud (*Pasquantino v. United States*).
2. Money laundering.
3. Civil asset forfeiture.
4. Bank secrecy act violations.
5. If Mr. Lopez becomes domiciled in the U.S. would his worldwide assets (including Mexican and Spanish assets) be computed in his gross estate?
6. Would Mr. Lopez or his children receive a foreign tax credit to account for income taxes paid in Mexico and Spain?
7. Pre-immigration planning options?

Pasquantino v. United States

In a Nutshell

- U.S. Supreme Court case from 2005. *Pasquantio v. United States* (544 U.S. 349 (2005))
- Issue: Is a conspiracy to defraud the Canadian government of tax revenue a crime in the U.S.?
- Answer: Yes, if an over act of the conspiracy takes places in the U.S.—even if the victim is based abroad.
- Reason: The U.S. intended to punish domestic criminal conduct, not recover tax proceeds for a foreign government.

Civil asset forfeiture

- Title 18, United States Code, Section 981(a)(1)—Civil Litigation.

- Burden on the United States, by a preponderance of the evidence, to establish that the subject property "constitutes or is derived from proceeds traceable to" various crimes.

- Defenses available to owners and interest-holders in subject property.

Back to the facts

8. Mr. Lopez and the Singapore company also have foreign accounts in Switzerland, through a Canadian limited partnership, whose sole limited partner is a New Zealand trust, beneficially owned by Mr. Lopez. This structure was implemented by a Swiss financial advisor.
9. Per Mr. Lopez own statements, he has not paid any tax in Mexico arising from his Swiss account nor filed any information returns in Mexico, his country of residence.
10. Mr. Lopez has not disclosed this account to his Mexican or U.S. accountants.
11. Mr. Lopez wishes to transfer the Swiss account to a U.S. financial institution to avoid reporting to the Mexican government under the OECD common reporting standard, and asks you to create a "U.S. based trust."
12. The Swiss accounts were funded 15 years ago with $20 million dollars and has increased in value more than 150% by way of appreciation of equities, capital gains, interests and dividends.
13. Mr. Lopez's counsel in Mexico informs you that if the "U.S. based trust" includes certain provisions reflecting a lack of "control" over the trust's principal and income, Mr. Lopez "… would not have a tax and reporting requirement in Mexico" allowing Mr. Lopez to "… continue deferring his Mexican income tax liability."
14. Mr. Lopez's counsel has read Lee Sheppard's article and asks that you create a "U.S. trust" "… like the one described in Lee Shepard's article…" which he read on Tax Notes (Lee A. Seppard; *Snow Washing*; Tax Notes Federal; October 28, 2019).

Wire fraud

- Could Mr. Lopez be deemed as engaged in wire fraud by creating a scheme in the U.S. to defraud Mexico of tax revenues?

Civil asset forfeiture

- Could the property in the scheme be subject to civil asset forfeiture?

Attorney's degree of involvement

- What is your own exposure as an attorney advising on the viability of this type of scheme?

Affirmative defense

- Would an opinion by a Mexican tax attorney suffice?

Example of Potential Issues in Foreign Jurisdictions

- Mexico has a tax fraud statute, which classifies as a criminal offense the omission of any tax arising from willful conduct through deceit or error.
- Mexico does not have estate or gift taxes.
- Spain and the U.K. have an inheritance tax.
- Worldwide income taxation of residents in Mexico, Spain and the U.K.
- Mexico, Spain and the U.K. tax nonresidents with respect to income sourced in each country.
- Spain, the U.K. and Mexico have tax treaties with the U.S., both with residency tie-breaker rules.

U.S. Estate Tax – Gross Estate

Estates of Citizens or Residents (U.S. domiciled)

26 U.S. Code § 2031

(a)General
The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

Estates of Non-Citizens, Not Domiciled

26 U.S. Code § 2031

For the purpose of the tax imposed by section 2101, the value of the gross estate of every decedent nonresident not a citizen of the United States shall be that part of his gross estate (determined as provided in section 2031) which at the time of his death is situated in the United States.

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The Worst Outcome

1. Mr. Lopez's children are liable for Mexican income tax and/or Spanish or U.K. inheritance tax upon acquiring foreign assets from their father's estate.

2. Mr. Lopez's children do not have other items of passive source income and, therefore, do not have the ability to immediately credit foreign income taxes paid in Mexico, Spain and/or the U.K. Excess FTC carry-forward?

3. Mr. Lopez's gross assets in the U.S. include Mexican, Spanish and U.K. based assets.

An Example - Planning for Mexican Real Estate

- It can be challenging to title Mexican real property under a common law trust, or to a foreign entity, plus the transfer can have adverse income tax consequences by triggering gain recognition.

- A Mexican *fideicomiso* is perhaps a better option:
  - Mr. Lopez transfers real property to the *fideicomiso* in a transaction that does not give rise to Mexican income tax.

  - Prior to becoming domiciled in the U.S., Mr. Lopez gifts his beneficiary rights in the *fideicomiso* to his children outright or trough a common-law trust (*i.e.*, a U.S. trust) for the benefit of the children (*i.e.*, perghaps a complex trust) - in a transaction that is exempt from Mexican income taxation -.

  - The Mexican real property in the *fideicomiso* could potentially be exclude from the estate of Mr. Lopez and Mr. Lopez's children provided that Mr. Lopez does not have a retained interest (IRC Section 2036) and that the children do not have a general power of appointment (IRC Section 2041).

  - These Mexican fideicomisos are not commonly used in pre-immigration planning.

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U.S. Income & Transfer Tax Considerations

1. The settlor will most likely be treated as the grantor for income tax purposes, of a foreign trust (i.e., the *fideicomiso*) if the transfer occurred within the five-year period following the residency starting date (IRC Section 679(a)(4)).

2. The gift, however, should be respected for transfer tax purposes and, therefore, assets in the *fideicomiso* should be excluded from the Settlor's gross estate, provided that the gift of the beneficiary rights is a completed gift and Settlor does not have a retained interest.

3. Reporting requirements: Settlor 3520; *fideicomiso* 3520-A; explore filing a substitute Form 3520-A on behalf of the *fideicomiso* (IRS Section 6038).
    1. Who has to file?
    2. When is it due?

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U.S. Income & Transfer Tax Considerations

4. Challenges: Foreign Tax Credit.

- Assume the *fideicomiso* earns Mexican source rental income.
- Under Mexican law the beneficiaries of the *fideicomiso* will be liable for payment of income tax, and the trustee will be required to withhold.
- For US. Income tax purposes, the settlor is the "deemed owner" (grantor) of the *fideicomiso* and is required to report the Mexican source rental income.
- Is Settlor entitled to credit the Mexican income tax paid in Mexico? Who bears the legal liability for payment under Mexican law? The children?

26 CFR § 1.901-2 - Income, war profits, or excess profits tax paid or accrued.

(f) Taxpayer -(1) In general. <u>The person by whom tax is considered paid for purposes of sections 901 and 903 is the person on whom foreign law imposes legal liability for such tax, even if another person (e.g., a withholding agent) remits such tax</u>. For purposes of this section, § 1.901-2A and § 1.903-1, the person on whom foreign law imposes such liability is referred to as the "taxpayer." A foreign tax of a type described in paragraph (a)(2)(ii)(C) of this section is considered to be imposed on the recipients of wages if such tax is deducted from such wages under provisions that are comparable to section 3102 (a) and (b) of the Internal Revenue Code.

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Foreign trusts – “Traps for the unwary”

- U.S. Estate tax considerations
- Transfer as part of pre-immigration planning.
- Information reporting requirements.
- California Income Tax Issues.
  - “Foreign Trust” status is not relevant.
- Tax returns & international information return.
  - Forms 3520 and 3520-A
  - IRS Form 1040NR for Foreign Trusts
  - IRS Form 1040NR for Grantor Trusts with NRA Settlor/Trustor

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Tax Considerations: Maze
Federal income taxes, subchapter J. Subtitle A&B (Income & Transfer Taxes?)
Federal gift taxes IRC §2501 et seq. (subtitle B)
Federal estate taxes IRC §2101 et seq. (subtitle B)
Federal generation skipping §2601 et seq. (subtitle B)
California income taxes – CA Rev. & Taxation code §17731 et seq.

Relevant questions
Who is the Taxpayer?
Who is the Settlor/Grantor? Where is their residency?
Who is the Trustee? Where is their residency?
Who are the beneficiaries? Where is their residency?

WHY EVEN HAVE A "FOREIGN TRUST"?

- Global world with global assets
  - Global family members (Residency in different countries)
- Global estate planning needs
  - Necessities of planning with foreign assets
- Avoiding conflicts of law questions
  - Which law prevails (when assets and/or people are located in multiple jurisdictions?
  - Choosing the best forum; avoiding or minimizing disputes among beneficiaries residing in different countries.
  - Minimizing the cost of administration.

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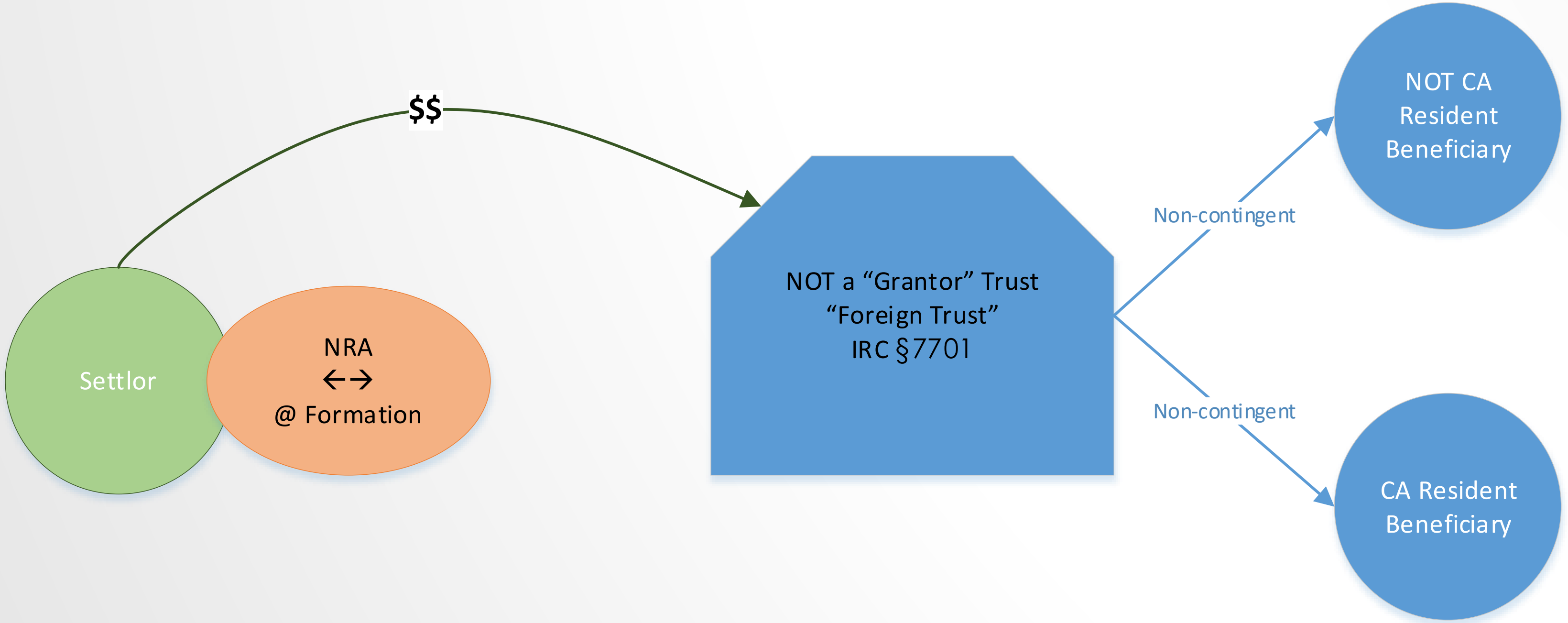
Now that you have a "foreign trust" . . .

- What are the U.S. federal (and estate – e.g. California, if applicable) tax consequences?
  - Information reporting requirements under U.S. law
  - Maybe the biggest "economic exposure item" for a foreign trustee and/or U.S. beneficiaries – e.g. of the trust assets.
- Necessity of foreign advice – foreign advisors
  - Foreign assets, non-U.S. resident beneficiaries, necessity for competent foreign legal advice.

Basic example of foreign trust



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Foreign trust – grantor trust

- A foreign trust (there is a presumption of U.S. Beneficiaries §679(c)(1)) can only be treated as a grantor trust in two scenarios:
  - The trust is completely revocable by the grantor; or
  - The grantor or the grantor's spouse is the sole trust beneficiary during the grantor's life. §672(f)(2)(A).

Thus, any trust that is not completely revocable or for the benefit of grantor (or their spouse) during grantor's life, will be treated as a non-grantor trust for U.S. income tax purposes.

Foreign trust that is not a grantor trust. Who is the taxpayer?

- A foreign trust that is not a grantor trust may be subject to U.S. income taxation.
- Similar regime to the foreign trust as is the case to a "Non resident alien"
- A foreign trust that is not engaged in a U.S. "trade or business," generally is not subject to U.S. income taxes from the following:
  - Gains from income sourced without the U.S. §8620(a)
  - Gains from investing and trading in U.S. securities or commodities for the foreign trust's own account. §864(b)(2).
  - Interest income from certain deposits with U.S. banks. §871(h)(1).
  - Interest earnings from U.S. "portfolio interest" debut instruments. §871(h)(1).

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U.S. Income taxation to U.S. Beneficiaries

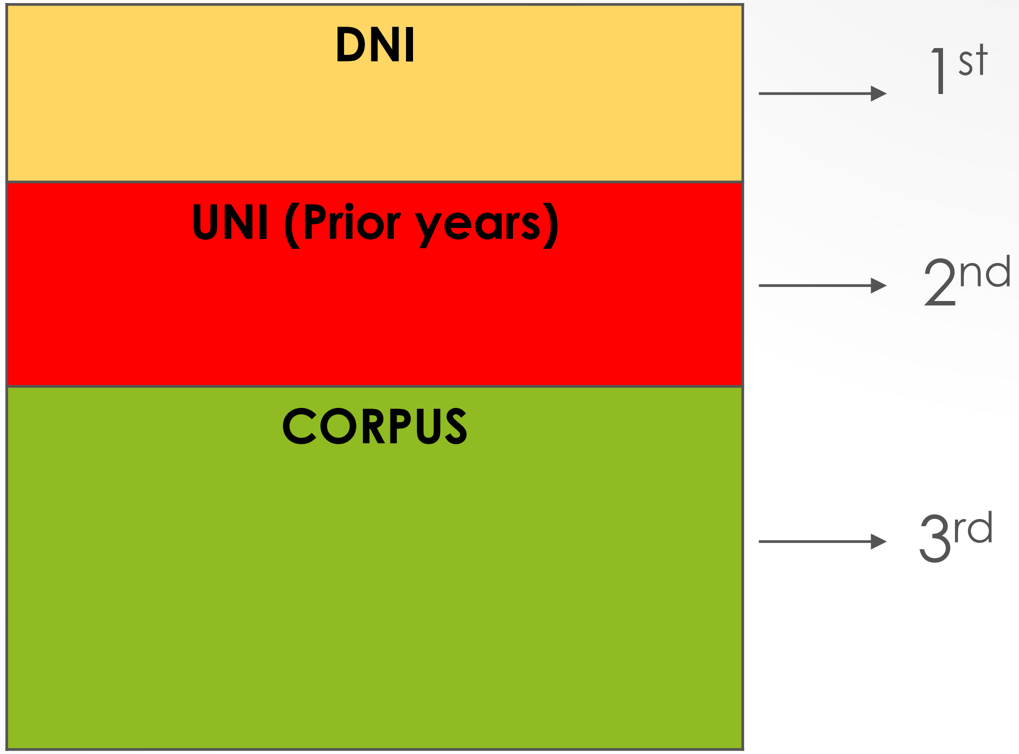
- U.S. income taxation focus on distributions to U.S. beneficiaries. Distributions of trust income depends on whether:

  - Distribution represents current income, which is also known as "distributable net income" ("**DNI**");
  - Distribution represents accumulated trust income, which is also knowns as "undistributed net income" ("**UNI**") §665(a); or
  - Distribution of principal, that is not treated as DNI or UNI.

DNI of a trust for any particular year equals the trust's worldwide taxable income, including foreign-source income net of related deductions, income that is exempt under treaties, and capital gains reduced (but not below zero) by capital losses. §643(a) and 643(a)(6).

U.S. Income taxation on accumulation distributions – UNI & the throwback tax

- This special tax, creates a disincentive for accumulations of income and is colloquially referred to as the "throwback" rule with an accompanying interest charge thereon. §§666 and 668.
- Any DNI that is not actually distributed, will become UNI. §§665 and 666.
- Subsequent year distributions are first treated as coming from DNI, and once exhausted then from UNI. §668.



U.S. Income taxation on accumulation distributions – UNI & the throwback tax

- The amount of the tax under the throwback rule is taxed at the U.S. beneficiary's highest marginal U.S. income tax rate, and then the interest charged is calculated on such amount.
- Importantly, UNI that was from a capital gain (e.g. a long term capital gain that would be normally taxed at the highest rate of 20%) loses its character and is taxed at ordinary income tax rates to the U.S. beneficiary when distributed.

Planning for Foreign Corporations and Entities

<u>Objectives</u>

1. Exclude value of the companies from Mr. Lopez's gross estate, should he become domiciled in the U.S.

2. Basis step-up in the U.S. with respect to the foreign companies' stock and equity interests; if possible.

CTBE pre immigration planning – California's perspective

- The California Office of Tax Appeals ("OTA"), in the Matter of the Appeal of B. Housman and B. Pena issued an opinion on August 31, 2022, where a marriage of California residents, are entitled to a step up in basis per a valid "check the box election."

> *"Pursuant to AM 2021-002, "[a]ny eligible entity, including a foreign eligible entity whose classification is not relevant for federal tax purposes, may elect to change its classification." Thus, [the company] was permitted to elect to change its default classification from an association to a partnership, even if its classification was not relevant prior the effective date of this election.*
>
> *Pursuant to AM 2021-002, the liquidation and stepped-up basis resulting from the change in classification is deemed to occur when [the company] was not relevant, which is the day before the effective date of April 1, 2008. (See also Treas. Reg. § 301.7701-3(g)(1)(ii).)"*

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Planning for Foreign Corporations and Entities

- Completed gift transfers of stock and equity interest in foreign companies could potentially achieve the desired result.

- Mr. Lopez could transfer the foreign companies’ stock to a common law trust (i.e., a U.S. trust) for the benefit of his children, excluding the companies’ stock from Mr. Lopez estate and from his children’s estate, provided that no retained interest exists and that the children do not have a general power of appointment.

- Challenges from a foreign law perspective:
  - Whether or not the transfer to the trust would be taxable in the foreign jurisdiction.

Planning for Foreign Corporations and Entities

- Can a foreign non-grantor trust be used as a pre-immigration planning strategy to defer the U.S. income taxation of foreign source income?

If the completed gift transfer to the trust occurred within the past 5 years of becoming a U.S. resident

a) The trust is treated as grantor trust, irrespective of the actual provisions of the trust document, if it has a U.S. beneficiary (IRC Section 679(a)(4)).

b) The trust's worldwide income is taxable to the U.S. grantor on a current basis under general grantor trust rules (IRC Section 671).

c) Grantor will likely have to recognize, on a yearly basis, certain items of income subject to a U.S. anti-deferral regime (Subpart F, Gilti, PFIC) (IRC Section 958(b) in connection with Section 318(2)(B)(ii)).

If the transfer to the trust occurred more than past 5 after becoming a U.S. resident

a) The trust is respected as a foreign non-grantor trust (IRC Section 679(a)(4)).

b) Distributions are taxable to the U.S. beneficiaries of the trust as either DNI or UNI:

- DNI: Taxed to the beneficiaries with the character income it had at the trust level (IRC Section 662).
- UNI: Subject to throw-back treatement, to recapture the tax that would have been paid if the income had been distributed to the beneficiary in the year it was earned rather than accumulated in the trust (IRC Section 667 and 667).

c) Attribution rules (IRC Section 958(a)(2)) likely will cause the U.S beneficiaries to recognize on yearly basis certain items if income subject to a U.S. anti-deferral regime (Subpart F, GILTI, PFIC) (See Treas. Reg. Section 1.958-2(c)(1)(ii)).

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Planning for Foreign Corporations and Entities

- Basis step-up with respect to foreign corporation's stock?
  - A foreign corporation's stock may be subject to a basis step-up through a relevant check-the-box election.
  - In general, a CTBE is considered relevant whent its classffication affects the liability of any person for federal tax or information purposes (See Treas. Reg. Section 301.7701-3(d)(1)(i)).
  - A CTBE should be considered a deemed liquidation of the foreign corporation immediately followed by a contribution of the distributed assets to a newly formed partnership (See Treas. Reg. Section 301.7701-3(g)(1)(ii)).

Planning for Foreign Corporations and Entities

- CTBE tax consequences – Corporation (deemed liquidation) to partnership (newly formed):

A. The tax effects of the foreign corporation's liquidation should be as follows:

1. At the shareholder level:

a) Each shareholder recognizes capital gain or loss on the difference between the amount realized on the surrender of his stock and the adjusted basis in the stock (IRC Section 331 and 1001).

b) Each shareholder to whom property is distributed in a complete liquidation takes the property with basis equal to its FMV (IRC Section 334(a)).

2. At the corporate level:

a) A corporation is generally taxed on a liquidating distribution of property as if the property had been sold to the shareholders at FMV (IRC Section 336(a)).

B. The tax effects of the foreign corporation's liquidations should be as follows:

1. At the partner level:

a) The partners do not recognize any gain or loss on the transfer of property to a partnership in exchange of a partnership interest (IRC Section 721).

b) Each partner's outside basis is equal to the sum of the FMV of property contributed, plus cash (IRC Section 722).

2. At the partnership level:

a) No gain or loss at the partnership level (IRC Section 721).

b) The partnership takes a transferred basis in contributed property equal to that of the c

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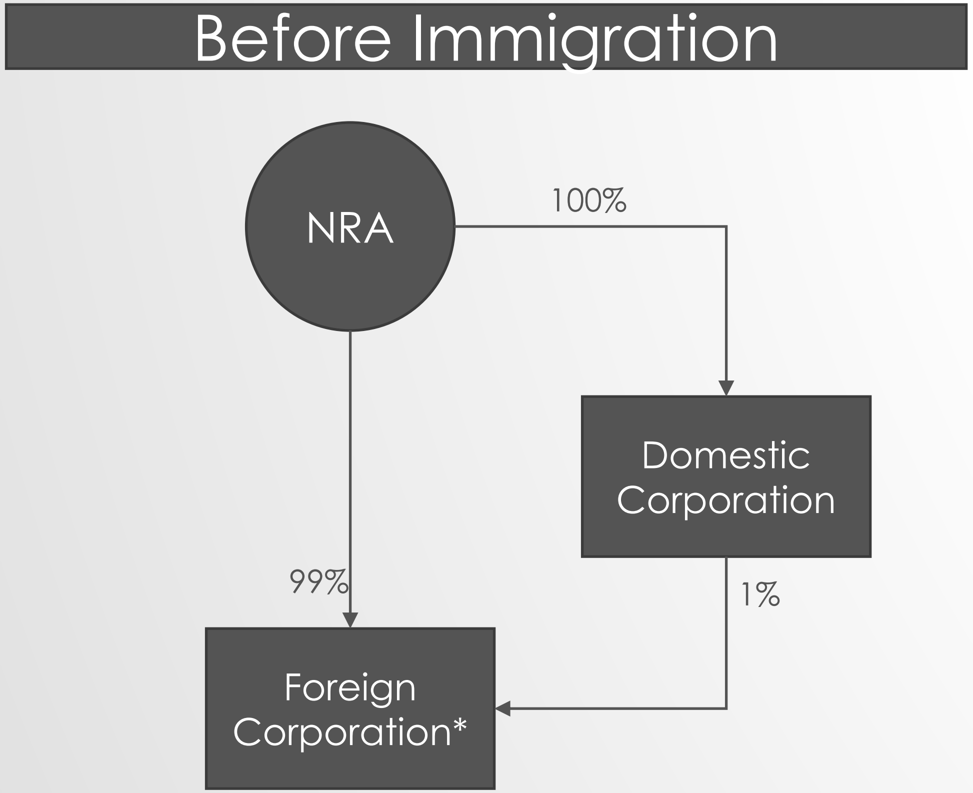
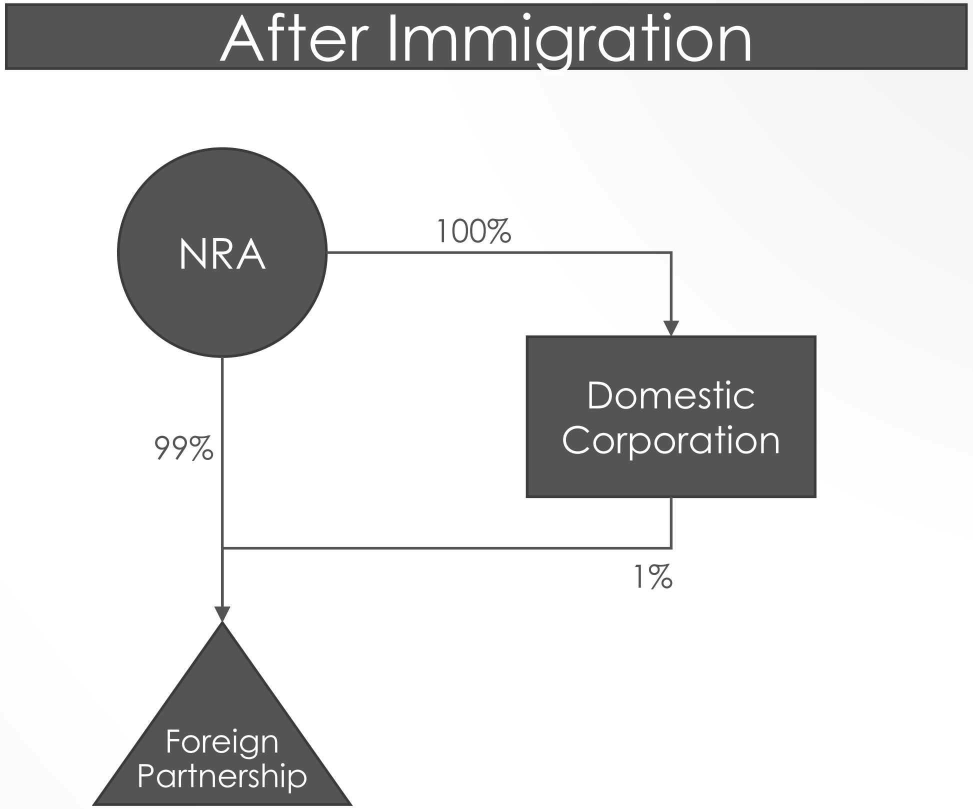
Planning for Foreign Corporations and Entities





*Pre-immigration check the box election.

Planning for Income Tax Residency

1. Treaty tie-breaker rules.
2. Domicile for transfer tax purposes.

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U.S. Resident Taxpayers (Income Tax)

The following individuals are considered U.S. persons for federal income tax purposes (IRC Section 7701(a)(30)):

1. U.S. citizens, irrespective of their place of residence;

2. U.S. resident aliens:

   a) Lawful permanent residents of the U.S. (i.e., green card holders);
   b) An individual who meets the substantial presence test.
   c) An individual who makes a first year election for status as a U.S. resident alien, provided that he meets certain additional requirements.

U.S. Resident Taxpayers (Income Tax)

1. Worldwide taxation.

2. Strict and complex anti-deferral regimes:
   a) Subpart F (Section 951).
   b) PFIC (Section 1297)
   c) GILTI (Section 951A).

3. Information return requirements:
   - FBAR.
   - CFC – 5471.
   - PFIC – 8621.
   - Foreign partnerships – 8865.
   - Foreign trusts – 3520/3520A.
   - Specified foreign financial assets – 8938.
   - Several reporting requirements!

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Tax Treaties – Residency Tie-Breaker Rules

- Who is a dual-resident taxpayer?

- Treas. Reg. Section 301.7701(b)-7(a)(1), Coordination with income tax treaties:

  "… an individual who is considered a resident of the United States pursuant to the internal laws of the United States and also a resident of a treaty country pursuant to the treaty partner's internal laws…"

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Tax Treaties – Residency Tie-Breaker Rules

- Virtually all tax treaties include rules for resolving the residence for income tax purposes of dual resident taxpayers; we refer to these rules as "residency tie-breaker rules".

- Under the residency tie-breaker rule, the country of residency of a dual-resident taxpayer is determined by reference to the following facts in order of priority:

  a) Permanent home.
  b) Center of vital interest.
  c) Habitual abode.
  d) Nationality.

Alberto Aroeste et al. v. United States, U.S. Southern District (2023).

"The upshot of this statutory and regulatory framework applicable to this action, in which tax treaties provide a potential escape hatch that excuses certain "United States persons" from filing FBARs, can be expressed as a 5-step process:

> (1) Under 26 U.S.C. § 7701(b)(6), anyone allowed to permanently reside within the United States by virtue of US immigration laws is a "lawful permanent resident" for tax purposes ***unless*** an applicable tax treaty allows that person to be treated as a resident of a foreign country for tax purposes only;
>
> (2) Under 26 U.S.C. § 7701(b)(1)(A)(i), any "lawful permanent resident" is a "resident alien";
>
> (3) Under 31 C.F.R. § 1010.350(b)(2), any "resident alien" is a "resident of the United States";
>
> (4) Under 31 C.F.R. § 1010.350(b), Any "resident of the United States" is a "United States person" required to file an FBAR;
>
> (5) Therefore, any person allowed to permanently reside in the United States by virtue of US immigration laws must file an FBAR unless that person is entitled to be treated as a resident of a foreign country under a tax treaty."

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Tax Treaties – Residency Tie-Breaker Rules

- 26 CFR § 301.7701(b)-7(b). An alien individual described in paragraph (a) of this section who determines his or her U.S. tax liability as if he or she were a nonresident alien shall make a return on Form 1040NR on or before the date prescribed by law (including extensions) for making an income tax return as a nonresident.

- The same regulation goes on to describe the exact procedural steps that must be taken and how Form 8833 must be attached to the return, Form 1040NR.

Form **8833**
(Rev. December 2021)
Department of the Treasury
Internal Revenue Service

Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)
▶ **Attach to your tax return.**
▶ **Go to *www.irs.gov/Form8833* for the latest information.**

OMB No. 1545-1354

Attach a separate Form 8833 for each treaty-based return position taken. Failure to disclose a treaty-based return position may result in a penalty of $1,000 ($10,000 in the case of a C corporation) (see section 6712).

Name	**U.S. taxpayer identifying number**	**Reference ID number, if any (see instructions)**

Address in country of residence	Address in the United States

Check one or both of the following boxes as applicable.
- The taxpayer is disclosing a treaty-based return position as required by section 6114 . . . . ▶ ☐
- The taxpayer is a dual-resident taxpayer and is disclosing a treaty-based return position as required by Regulations section 301.7701(b)-7 . . . . ▶ ☐

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Tax Treaties – Residency Tie-Breaker Rules

- A residency treaty position is only relevant for purposes of determining an individual's income tax liabilities.

- An individual who determines based on a Treaty that he or she is not a resident for income tax purposes has other information reporting requirements per the regulations.

26 CFR § 301.7701(b)-7 - Coordination with income tax treaties.

(a)Consistency requirement –

(2) Computation of tax liability. If an alien individual is a "dual resident taxpayer," then the rules on residency provided in the convention shall apply for purposes of determining the individual's residence for all purposes of that treaty.

(3) Other Code purposes. Generally, for purposes of the Internal Revenue Code other than the computation of the individual's United States income tax liability, the individual shall be treated as a United States resident. Therefore, for example, the individual shall be treated as a United States resident for purposes of determining whether a foreign corporation is a controlled foreign corporation under section 957 or whether a foreign corporation is a foreign personal holding company under section 552. In addition, the application of paragraph (a)(2) of this section does not affect the determination of the individual's residency time periods under § 301.7701(b)-4.

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Gift & Estate Tax – Domicile

- U.S. transfer taxes are imposed on the FMV of the worldwide assets of U.S. citizens or residents (See IRC Section 2031, defines the decedent's gross estate to include the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated).

- Treasury Regulations provide that a residence decedent "… is a decedent who, at the time of his death, had his domicile in the United States."

- A person acquires a domicile in a place by living there, for even a brief period of time, with no definite present 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. (Treas. Reg. § 20.0-1(a)(1)).

- Separate analysis independent of an individual's stratus for income tax purposes.

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Gift & Estate Tax – Domicile

- Revenue Ruling 80-209
  1. Person will be presumed domiciled in the U.S. if he/she:
     a) has the legal capacity to form intent necessary to establish domicile;
     b) must have expressed and displayed intent to make the U.S. his home without the intent to leave; and
     c) Person must be physically present in the United States.

  2. Presumption of domicile can be rebutted in the U.S.
  3. Rev. Rul. 80-209 applied to a decedent who entered the U.S. without a visa.

- Revenue Ruling 85-70. Deals with persons who are temporary visitors present in the U.S. at the time of death (found not domiciled).

Questions?

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