Boca Raton Estate Planning Council
Dinner Meeting

TAX PLANNING FOR FOREIGN NATIONALS WITH ASSETS IN THE U.S.

October 18, 2016
5:15 pm – 7:30 pm
Boca Country Club

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I. INTRODUCTION

Estate planning in the United States is relatively commonplace. Even those individuals with smaller estates will have an "estate plan", often consisting of a will, health care directive, power of attorney, and possibly a revocable trust depending on the individual's size of estate and jurisdiction in the United States in which he or she lives. For example, revocable trusts are commonly used in states, such as California, in which it is desirable to avoid probate due to the time and expense incurred in a probate.[1]

In common law countries, like the United States, Canada and the United Kingdom, there is considerable control over how one disposes of his or her estate, with few restrictions. Particularly for the high net worth client, it is not uncommon for bequests to a surviving spouse and children to have "strings" attached to the bequests. For example, a trust agreement may grant the trustee discretion to withhold distributions to a particular beneficiary, such as a child, if the child has drug or alcohol problems or perhaps because the child is not a productive member of society. Distributions from a trust can often get quite complicated, often tailored to a client's objectives and desires, requiring distributions at various intervals or when the beneficiary has met certain age or other thresholds, such as graduating from college or university.

In civil law countries, there are often laws that set forth who are entitled to benefit from a decedent's estate. The proportion of inheritance depends on who the other heirs are. For example, if a spouse and children of the decedent are living, often the spouse and children will share in the inheritance. It is perhaps for this reason that estate planning is not as commonplace as it is in common law countries like the United States. Estate planning may not be as commonplace in countries like Australia because there is no death, estate or inheritance tax. Compare that to the United States estate tax, discussed further below in Section III, with tax rates as high as 40%. For countries with an inheritance tax, like Japan, it is important to always check if there is an applicable tax treaty they may help to minimize or avoid double taxation. For a further discussion of tax treaties, see Section VI below.

Estate planning is essential for high networth clients with U.S. ties. As discussed further below, a non-U.S. citizen, not residing in the U.S. must understand when he or she may be subject to U.S. transfer tax (defined herein to include gift, estate and generation-skipping transfer taxes—all of which are discussed below in Section III). Many non-U.S. citizens are surprised to find out that even though they have never stepped foot in the United States, the mere fact he or she owned stock in a U.S. corporation at death will trigger U.S. estate taxes if such ownership exceeds the exemption amount, currently U.S. $60,000. A discussion of whether an asset is an asset that will be subject to the U.S. transfer tax system is discussed below in Section III.E. With proper tax and estate planning, the U.S. estate tax for a non-U.S. citizen person who is not residing in the U.S. may be minimized, deferred or completely eliminated.

For the U.S. person of high net worth, estate planning is equally important. In addition to directing who inherits what and when, there are a number of sophisticated estate planning

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[1] Probate is the legal process of proving the validity of the will and the competence of the testator to make that will. It is also the procedure by which a personal representative is appointed to handle the decedent's affairs. Each state in the United States has its own probate rules and procedures that must be followed, so it will be important to find an attorney licensed to practice in the state in which a probate is required.

techniques that may reduce significantly the estate taxes that will be due. A discussion of these techniques is geared more towards U.S. domestic planning and is beyond the scope of this outline.

The majority of this outline will focus on U.S. tax concepts, but there are a number of non-tax factors to take into consideration when advising an international client. Some of the factors include:

A. Understanding the facts.

1. Who are your clients? What is their nationality? Residency?

2. What assets do the clients own? How is title held to such assets? Are there issues concerning actual ownership versus how title is held? What are the values of these assets?

3. If clients are married, where did they marry? Did they make any representations, written or otherwise, concerning the characterization of their property (i.e., separate or community property)? Did the laws of the jurisdiction in which they married or in which they resided at the time of their marriage have any presumptions concerning marital assets? Will the assets be considered "community" assets, owned equally by husband and wife or will the assets be considered owned by only party spouse?

4. Is asset protection an objective?

5. Where are the beneficiaries located? What is the nationality of each beneficiary? Are there any tax or reporting issues concerning the receipt of a bequest or inheritance? If so, are there any planning opportunities or exemptions/exceptions that could be applied?

6. Are there any restrictions regarding transferring any of the assets, such as forced heirship or the individual's religion? If so, to whom do the rules apply and can or should they be avoided?

7. For the U.S. citizen residing abroad, will the laws of the country in which the person resides apply to such person? For example, will the laws of the U.S. or Japan govern the inheritance of the U.S. citizen who has been residing in Japan for many years, is married to a Japanese national and has children who are Japanese? Can or should the U.S. person make a will in Japan? If so, how does one go about doing this? Should it apply to all the person's assets or just those in Japan?

8. What are the family dynamics?

9. Are there any cultural matters to consider? In the United States, while most people do not like to think about their own death, it is fairly common for estate planning attorneys to discuss death and incapacity issues openly with their clients. These discussions often include discussions about what should happen if the client becomes incapacitated, the client's desires concerning life support, organ donation and disposition of remains, and of course,

what should happen with the client's assets after the client has passed away. In some cultures, these issues are rarely discussed or such discussions may be seen as taboo. It is very important for the advisor who works with clients from different cultures to know when it is appropriate to have these discussions.

10. When working with foreign counsel, will the attorney-client privilege be respected? In the United States, confidentiality of attorney-client communications is protected. This is not always the case in other countries. In fact, some countries place a requirement on the attorney to notify authorities of certain suspicious activities, such as money laundering.

B. Conflicts of law. It is important to determine which country's laws apply as it will effect judicial jurisdiction, characterization of property, choice of law and the recognition and enforcement of foreign judgments.

1. In general terms, common law provides that law of jurisdiction of domicile governs disposition of tangible personal property and situs governs real property. Civil law often refers to nationality.

2. Many civil law jurisdictions do not recognize the concept of a trust. The Hague Conference on Private International Law adopted a Convention on the Law Applicable to Trusts and Their Recognition ("Convention"). While the Convention provides that a trust should be governed by the law chosen by the settlor as evidenced in the trust instrument, the Convention provides that its provisions will not prevent the application of some mandatory laws, such as marital rights, succession rights, and creditors' rights.

3. Understanding the potential conflicts of law will help in understanding what issues may arise and then develop a plan to minimize or eliminate those issues. A properly drafted plan will consider the tax consequences in the other jurisdictions involved. For example, having a U.S. revocable trust with foreign beneficiaries may incur high rates of tax if proper planning is not done. Oftentimes, U.S. practitioners plan under U.S. law without considering the consequences of the foreign beneficiaries overseas or the tax consequences in other jurisdictions. For instance, a revocable trust established by a U.S. person with German resident beneficiaries (even if those German resident beneficiaries are U.S. citizen children living in Germany) under German inheritance tax laws, inheritances coming to residents of Germany and distributions passing from a trust of any sort are treated as deriving from a non-related party, and thereby subject to the highest rate of tax, being 50%. Had the gift or bequest come directly from the parent, the tax rate would have been much lower. In the U.S., the donor is responsible for the gift tax. However, in some countries it is the recipient who must pay tax on the gift. With proper planning, this double taxation can be minimized or completely eliminated in some cases.

C. Choice of law. Where trusts are involved, most courts respect the law designated by the settlor to govern questions of contribution, administration, and validity. If there is no choice of law clause, courts make their determinations based on the law of the place most significantly related to the trust or specific issue. Some of the factors taken into consideration include: location of assets, place of administration, trustee's place of business, place of execution of trust agreement and settlor's domicile. Where the trust asset is real property, however, less weight is given to the settlor's intent and more to the law of the situs.

D. Forced heirship. In many civil law countries, like France, South Korea and Japan, there are laws that govern who must receive assets when a person dies. These laws are commonly referred to as "forced heirship" as the systems force or require that certain beneficiaries, often spouses and children, have certain rights in a decedent's assets. In addition, some religions set forth who will receive one's assets on death.

1. Common law jurisdictions, in contrast, have greater freedom of disposition of property so a testator may disinherit offspring. Spouses are generally given some statutory protection, however.

2. In the United States, the laws of each state govern inheritances. In California, a person may dispose of his or her assets to whomever he or she wants. There are no requirements that a percentage or amount must pass to a spouse or descendants.

3. If your client is faced with forced heirship laws that do not fit with the client's estate planning objectives, consider the following options:

a) Remove assets (legally, of course) from a country with forced heirship laws.

b) Centralize assets in jurisdictions in accordance with individual's objectives.

c) If appropriate, manifest a lifestyle that evidences residency in a non-forced heirship jurisdiction.

E. Recent Legislation Affecting Choice of Law and Forced Heirship.

1. EU Succession Regulation

a) On July 4, 2012, the European Union adopted EU Succession Regulation 650/2012 ("Brussels IV"), applicable to estates of persons dying after August 17, 2015. Brussels IV will apply to all EU member states except the United Kingdom, Denmark, and Ireland. Brussels IV attempts to harmonize the succession regime for a decedent's property located throughout the Brussels IV zone such that the decedent's entire estate is treated under a single law and by a single authority.

b) Under Brussels IV, the law that governs the succession of the estate of a decedent "as a whole" shall be the law of the state of the decedent's habitual residence at the time of death, unless the decedent chose the law of the state of his nationality (at the time of the choice or the time of death) to govern his succession. It is important to note that the law chosen does not need to be the law of a Brussels IV member state, nor does the state of habitual residence need to be a Brussels IV member state. The governing law shall apply to the succession of the decedent's estate as a whole. Brussels IV also allows one state's court to have jurisdiction of the entire estate succession, and to issue a European Certificate of Succession that will be recognized in all Brussels IV member states.

c) As a result of Brussels IV, it may now be possible to avoid the forced heirship laws of EU countries in which a testator resides or has property, if the testator is a national or habitual resident of a country without forced heirship laws. Practitioners must still consider conflicts of law principles, as renvoi applies if no election is made and the decedent is habitually resident outside a Member State. For example, if U.S. law is applied as the governing law under the default rule of the testator's habitual residence, renvoi would result in the application of the law of the situs to real property. By contrast, if an election is made by the testator, the election applies the substantive law of the governing nation, and renvoi is not applied. As an additional caveat, a Brussels IV state may refuse to apply the law of another state if it would be "manifestly incompatible with the public policy" of the Brussels IV state.

d) Note that Brussels IV only applies to the law of succession. The regulations do not apply to other laws such as matrimonial property law, trust law, and tax law.

F. Foreign Counsel. It is extremely important when working with a client with tax and estate planning issues involving more than one country to seek the advice of local counsel. Failure to obtain competent local counsel in a multi-jurisdictional estate plan could prove to have significant tax and legal consequences. It cannot be reiterated enough how important it is to obtain competent local counsel.

G. Taxation. U.S. tax laws affecting the foreign client, defined to include non-U.S. citizens, who are either resident aliens or non-resident aliens, can provide a quagmire for the unwary, ill advised, and unknowing. Tax traps abound, but in knowing what to avoid or plan for, there is great opportunity for tax savings, instead of tax hits, provided one knows the rules. Set forth below are some general U.S. tax principles to provide guidance to those practitioners who encounter U.S. tax planning for the non-U.S. person.

II. INCOME TAXES

A. U.S. Citizens. U.S. citizens are subject to U.S. income tax on their worldwide income. For most individuals, they are aware that they are U.S. citizens. However, there are circumstances when a person may not be aware that he or she is a U.S. citizen, often referred to as the "accidental American". For example, if a child is born in the United States, that child is a citizen of the United States. Even if the child's parents do not have legal status in the United States, the child is a U.S. citizen. The only exception is for children born of foreign diplomats, who are not considered citizens of the United States even if born in the country. Further, if a child is born outside of the United States to one or more U.S. citizen parents, that child may be a U.S. citizen at birth. Whether the child is a U.S. citizen will depend on the following: birth date of the child; whether the U.S. citizen parent resided in the United States; and whether the child resided in the United States.

B. Resident Aliens.

1. Like U.S. citizens, resident aliens are subject to U.S. income tax on their worldwide income.

2. Who is a Resident Alien? An individual will be considered a resident alien for income tax purposes if (a) he has a green card, (b) he meets the

substantial presence test, or (c) he makes an election to be treated as a U.S. resident. A discussion of each residency status is discussed further below.

3. Green Card. A person is a lawful permanent resident of the United States at any time if he or she has been given the privilege, according to the immigration laws, of residing permanently in the United States as an immigrant. An individual generally has this status if the U.S. Citizenship and Immigration Services (USCIS) (or its predecessor organization) has issued an Alien Registration Receipt Card, also known as a "green card." The person continues to have resident status under this test unless the status is taken away from him or her or is administratively or judicially determined to have been abandoned.

   a) Resident status taken away. Resident status is considered to have been taken away from a person if the U.S. government issues the person a final administrative or judicial order of exclusion or deportation. A final judicial order is an order that the person may no longer appeal to a higher court of competent jurisdiction.

   b) Resident status abandoned. An administrative or judicial determination of abandonment of resident status may be initiated by the person, the USCIS, or a U.S. consular officer.

   c) If the person initiates the determination, resident status is considered to be abandoned when he or she files either of the following with the USCIS or U.S. consular officer:

      (1) An application for abandonment on Form I-407, Abandonment of Lawful Permanent Resident Status.

      (2) His or her green card attached to a letter stating his or her intent to abandon his or her resident status.

   d) The person may submit these documents in person at a local USCIS office or local embassy or consulate, or can send the documents by mail. If the documents are mailed, they must be sent by certified mail, return receipt requested. It is highly recommended that the person keep a copy of the letter and proof that it was mailed and received. Until there is proof that the letter was received, the person remains a resident alien for tax purposes even if the USCIS would not recognize the validity of the green card because it is more than ten years old or because the person has been absent from the United States for a period of time.

   e) If the USCIS or U.S. consular officer initiates this determination, the person's resident status will be considered to be abandoned when the final administrative order of abandonment is issued. If the person is granted an appeal to a federal court of competent jurisdiction, a final judicial order is required.

f) Under U.S. immigration law, a lawful permanent resident who is required to file a tax return as a resident and fails to do so may be regarded as having abandoned status and may lose permanent resident status.

g) For a long-term resident, Form 8854 (Initial and Annual Expatriation Statement) must be filed with the U.S. Department of Treasury to establish that the person has expatriated for tax purposes. A person is considered a long-term resident if he or she was a lawful permanent resident of the United States in at least 8 of the last 15 tax years ending with the year his or her status as a long term resident ends. Until Form 8854 is filed and the Department of State or the Department of Homeland Security is notified of the person's expatriating act, the person's expatriation for immigration purposes does not relieve the person from his or her obligations to file U.S. tax returns and report worldwide income as a resident of the United States.

4. Substantial Presence Test

a) A person meets the substantial presence test for the calendar year if he or she is physically present in the United States for one hundred eighty-three (183) days or more during such year. Internal Revenue Code of 1986, as amended ("IRC") §7701(b)(3)(a)(ii).

b) An alien individual also qualifies as a resident alien of the United States for the calendar year under the substantial presence test if he is physically present in the United States for at least thirty-one (31) days during the calendar year and satisfies a physical presence test under the 3-year look back rule. IRC §7701(b)(3)(a).

c) An alien individual satisfies the physical presence test under the 3-year look back rule if the sum of the number of days of his physical presence in the United States in the current calendar year, one-third (1/3) the number of days of his physical presence in the first preceding calendar year, and one-sixth (1/6) the number of days of his physical presence in the second preceding calendar year equals one hundred eighty-three (183) days or more. Because the substantial presence test turns upon the number of days an alien individual is physically present in the United States, the rules governing the numerical day count are extremely important.

d) As a general rule, an individual is treated as present in the United States on any day that he is physically present in the United States at any time during the day. Thus, the day of arrival as well as the day of departure from the United States counts. However, the following days are <u>not</u> included when counting days of presence in the United States for the substantial presence test:

(1) Days where an alien individual regularly commutes to work in the United States from a residence in Canada or Mexico. An alien individual is generally considered to commute regularly if he or she commutes to and from the United States within a 24-hour period for work, for more than 75% of the total workdays.

(2) Days when an alien individual is in the United States for less than 24 hours while in transit between two places outside the United States.

(3) Days when an alien individual is in the United States as a crewmember of a foreign vessel.

(4) Days when an alien individual intended to leave the United States but was unable to because of a medical condition that arose while in the United States. The alien individual must show based on the facts and circumstances that he or she intended to leave the United States on a particular day, and must file a fully completed Form 8843 with the IRS to qualify to exclude these days.

5. Election. Certain individuals may make an election to be treated as a U.S. resident for income tax purposes.

a) An individual must be physically present in the United States for at least 31 consecutive days during the year. The individual must also be continuously present in the United States, meaning that he or she is present for 75 percent of the days in the current year beginning with and including the first day of the individual's 31-day presence.

b) If a nonresident is married to a U.S. citizen, the nonresident may elect to be treated as a U.S. resident. This includes situations in which one spouse is a nonresident alien at the beginning of the tax year, but a resident alien at the end of the year, and the other spouse is a nonresident alien at the end of the year. With this election, both spouses are treated for income tax purposes as residents for the entire tax year. A joint income tax return must be filed for the year the election is made, but in subsequent years the spouses may file joint or separate returns.

6. Exception – Closer Connection. An individual who is present in the United States for less than one hundred eighty-three (183) days in the current calendar year but who meets the one hundred eighty-three (183) equivalent-date test (i.e., three-year look-back rule) under the substantial presence test is treated as a non-resident alien for the current calendar year if the following current conditions are satisfied:

   a) The individual establishes that, for the current calendar year, his "tax home" is in a foreign country and the individual has a closer connection with that foreign country than with the U.S., and

   b) The individual does not have an application pending for adjustment of immigration status and has not taken other steps to apply for status as a lawful permanent resident of the United States at any time during the year.

   c) The Internal Revenue Service, with the concurrence of the Tax Court, has historically taken the position that a taxpayer's "tax home" is the individual's principal place of business. The regulations make it clear that:

      (1) An alien's tax home is located in the country in which his regular or principal (if more than one) place of business is located; and

      (2) If the alien has no regular or principal place of business, his tax home is located at his regular place of abode in the real and substantial sense.

   d) Proving that the alien individual has a tax home in a foreign country is only one-half of the story. In order to come within the exception, the individual must also establish that, during the current year, he has "closer connections" to the country of his tax home than to the United States. Several factors will be considered in this regard including, inter alia, the location of the individual's permanent home; the location of the individual's family; the location of the individual's personal belongings; the location of the banks with which the individual conducts his banking activities; the jurisdiction that issued the individual's driver's license; and the jurisdiction where the individual votes. In order to take advantage of this exception, the individual must file Form 8840, The Closer Connection Exception Statement with the IRS stating that he or she is claiming to be protected by this exception.

7. Exception - Tax Treaties. There are certain instances where a person may be considered a dual resident taxpayer because the individual is considered a U.S. resident under the U.S. residency rules described above, and is also

considered a resident of another country under that country's internal laws. If the two countries have an income tax treaty, the treaty will contain a provision that provides for resolution of conflicting claims of residence (tiebreaker rule). If the alien individual determines that he or she is a resident of the other country, then he or she will be treated as a nonresident alien for U.S. income tax purposes only. For all other purposes (e.g., the filing of informational returns, which are discussed further below), the individual will be treated as a U.S. resident. Anytime a treaty benefit is claimed, the nonresident must file a U.S. income tax return with Form 8833, Treaty-Based Return Position Disclosure under Section 6114 or 7701(b).

C. First and Last Year of Residency

1. Where an individual qualifies as a resident alien under the substantial presence test, the residency starting date is generally the first day in the calendar year in which that person is present in the United States during the calendar year. Note, however, there is also a de minimus rule in which the person may be physically present up to ten days in the U.S. without having to use those dates as the residency start date if, on those days, the person can show that he or she had a closer connection to a foreign country and had a tax home in that foreign country. For example, if a nonresident was planning on moving to the United States on September 1 and came to the United States in March of that same year for less than ten days to look for a home, those days in March would not be counted toward the residency start date, and the nonresident's residency start date would be on September 1.

2. Where an individual qualifies as a resident alien under the green card test, his or her residency starting date is the first day in the calendar year on which that person is present in the United States as a lawful permanent resident.

3. Where an individual meets <u>both</u> the green card test and the substantial presence test, the residency starting date is the earlier of the first day in the calendar year in which that person is present in the United States under the substantial presence test or as a lawful permanent resident.

4. Where a resident alien ceases to be a resident of the United States under either test, the residency termination is generally December 31, unless he or she qualifies for an earlier residency date as described below, and for the remainder of the year that person has a closer connection to a foreign country and has a tax home in that foreign country.

    a) If the individual qualified for residency under the substantial presence test, his or her residency termination date would be the last day of the calendar year that the nonresident alien was physically present in the United States. As with the first day of residency, the de minimus rule applies to allow the alien individual to be physically present in the U.S. for up to ten days without being counted in determining the residency termination date, as long as he or she has a closer connection to a foreign country and had a tax home in that foreign country.

b) If the individual qualified for residency under the green card test, his or her residency termination date would be the first day of the calendar year that he or she was no longer a lawful permanent resident.

c) If the individual had qualified under both tests, his or her residency termination date would be the later of the dates listed above.

D. Exempt Individuals. In General. Certain individuals, even though they meet the substantial presence test, are still considered non-resident aliens for income tax purposes. They include:

1. A foreign government related individual or other Visa holders (e.g., G4 Visa holders). One will qualify as a foreign government related individual if he is temporarily present in the United States as a full-time employee of an international organization. See International Organizations Act, 22 U.S.C. 288. A foreign government related individual enjoys a tax-free status superior to citizens as well as all aliens (whether resident or non-resident) because, not only is his U.S. source personal services income exempt from U.S. income tax, but also, all of his foreign source income (whether active or passive) is exempt from U.S. tax. However, when such an employee retires and is no longer a full-time employee of the international organization, he will be subject to United States taxes in the same manner as a non-resident alien provided he does not satisfy the substantial presence test and convert his status into that of a resident alien.

2. A teacher or trainee temporarily present in the United States under a "J" or "Q" visa, who substantially complies with the requirements of the visa and files a fully completed Form 8843 with the IRS.

3. A student temporarily present in the United States under an "F," "J," "M," or "Q" visa, who substantially complies with the requirements of the visa and files a fully completed Form 8843 with the IRS.

4. A Professional athlete temporarily present to compete in a charitable sports event ("O" Visa holder) and files a fully completed Form 8843 with the IRS.

E. Nonresident Aliens

1. Effectively connected income. Nonresident aliens are generally taxed in the same manner as a U.S. citizen or resident on all income that is "effectively connected" with the conduct of a trade or business in the United States.

2. Other U.S. source income. For any U.S. source income that is not effectively connected to a U.S. trade or business, the nonresident alien will be subject to a flat 30% tax. This 30% flat tax generally applies to U.S. fixed and determinable periodic income and includes the following: dividends, interest, rents, royalties, wages, salaries, annuities, compensation and any other item of annual or periodical gain, profit or income. See below for a discussion of the source rules.

3. Capital gain. The net capital gains of nonresident aliens that are effectively connected with the conduct of a U.S. trade or business are taxed in the same manner as a U.S. citizen or resident. Net capital gains that are not effectively connected to a U.S. trade or business and are not fixed or determinable periodic income are exempt from U.S. income taxation. As discussed further below, the sale of real property will be treated as effectively connected with a U.S. trade or business. It is important to note that if a person was in the United States for 183 days or more during the tax year, the person's net gain from sales or exchanges of capital assets is taxed at a 30% (or lower treaty) rate. For purposes of the 30% (or lower treaty) rate, net gain is the excess of capital gains from U.S. sources over capital losses from U.S. sources. This rule applies even if any of the transactions occurred while the person was not in the United States.

4. Community income. If a nonresident alien is married to a U.S. citizen or resident and does not elect to be treated as a resident, than any community income is to be treated as follows:

    a) Earned income (other than from a trade or business, or partnership income) is treated as income of the spouse who rendered the personal services;

    b) Trade or business income (other than from a partnership) is treated as the separate income of the spouse carrying on the trade or business (unless carried on jointly);

    c) Partnership income is treated as the income of the spouse who is the partner with no portion attributed to the other spouse; and

    d) All community income that is derived from the separate property of one spouse is treated as the income of that spouse.

e) All other community income shall be treated as provided in the applicable property law. IRC § 879.

F. Source Rules

1. Personal service income is sourced to the country where the services are performed;

2. Interest income is sourced to the residence or country of incorporation of the obligor;

3. Dividend income is sourced to the residence of the payor;

4. Rents and royalties are sourced to the location of the property;

5. Income from trade and business in the U.S. will in general be taxed in the same manner as a U.S. citizen or domestic corporation.

6. Gain on the sale of real property is sourced to the location of the real property. The rules regarding the sale of U.S. real property merit further discussion. See below.

   a) Tax on net gain. Both nonresident aliens and foreign corporations must treat a disposition of U.S. real property as though the gain or loss was effectively connected with a U.S. trade or business. This puts a nonresident alien or foreign corporation on the same footing as a U.S. citizen or a domestic corporation.

   b) Withholding rules. In order to ensure that foreign investors in U.S. real property interests will pay taxes on gain realized upon dispositions, a withholding tax is imposed. Unless one (1) of five (5) exemptions applies to the transaction, a transferee of any U.S. real property interest disposed of by foreign investors (i.e., non-resident alien or foreign corporations) is required to deduct and withhold a tax equal to 10% of the amount realized (generally the sales price). The transferee must report and pay to the IRS the amount within twenty (20) days after the transfer. Effective for closings after February 16, 2016, the withholding rate increased to 15% for sales of residences intended for personal use by the buyer if the purchase price exceeds $1 million.

   c) No withholding is required if one (1) of the following five (5) exceptions applies. IRC § 1445 (b)(2)-(6):

      (1) The transferor furnishes an affidavit stating, under penalties of perjury, the transferor's U.S. taxpayer identification number and that the transferor is not a foreign person.

(2) Where the transferor is a domestic corporation, it furnishes to the transferee an affidavit stating, under penalties of perjury, that the domestic corporation is not and never has been a U.S. real property holding corporation.

(3) The transferee receives a withholding certificate from the Internal Revenue Service that excuses withholding or the transferor gives the transferee a written notice that no recognition of any gain or loss on the transfer is required because a non- recognition provision of the Internal Revenue Code or a provision in a U.S. tax treaty.

(4) The property acquired by the transferee will be used as a residence, the amount realized on the disposition does not exceed $300,000, and the transferee expects to reside at the property at least 50% of the days it is used during the first two (2) years following the transfer.

(5) The disposition is of a share of a class of stock that is regularly traded on an established securities market (e.g., a REIT).

G. Rates

1. Ordinary income tax rates range from 10% to 39.6% (2016).

2. The federal income tax rates for trusts and estates is as follows:

2015 Federal Estate and Trust Income Tax Rates

If taxable income is:	**Then the tax is:**
Not over $2,500	15% of the taxable income
Over $2,500 but not over $5,900	$375 plus 25% of the excess over $2,500
Over $5,900 but not over $9,050	$1,225 plus 28% of the excess over $5,900
Over $9,050 but not over $12,300	$2,107 plus 33% of the excess over $9,050
Over $12,300	$3,179.50 plus 39.6% of the excess over $12,300

3. Many states have an additional income tax. California's highest marginal income tax rate is 13.3%. Some states, such as Nevada, Florida, and Texas do not have an income tax.

4. The general capital gain rate for assets held more than twelve months is either 15% or 20% depending on the taxpayer's taxable income. Certain

capital gains are also subject to an additional Net Investment Income Tax ("NIIT") of 3.8%. NIIT does not apply to nonresident aliens but may apply to certain trusts with undistributed net income and adjusted gross income over the dollar amount at which the highest tax bracket for an estate or trust begins for such taxable year.

III. U.S. TRANSFER TAXES

A. In General. For purposes of this section, "U.S. transfer taxes" is defined to apply to gift, estate and generation skipping transfer taxes. It is very important to understand whether a person will be considered a "resident" of the U.S. for transfer tax purposes as the taxation of residents and nonresidents are quite different under the U.S. tax system.

B. U.S. Residents and Citizens. U.S. citizens and residents (defined below) are subject to U.S. estate, gift and generation-skipping transfer tax on their worldwide assets.

C. Nonresident Aliens

1. Nonresident aliens are subject to federal estate taxes only on assets situated in the U.S. at the time of death.

2. Nonresident aliens are subject to federal gift taxes only with respect to transfers by them of real or tangible property situated in U.S.

D. Definition of Residents. The term "resident" as used with reference to any person for federal estate tax purposes, relates to the person's domicile, regardless of citizenship. Under the general rules of domicile, length of residency and amount of assets held in the location of domicile are not determinative. Rather, a person can acquire a domicile in a place by living there, even for a brief period of time, if he or she had no definite present intention of moving from that location. Below is the test for U.S. domicile.

1. The test for U.S. domicile is

    a) physical presence in the U.S., even for a brief period of time, and

    b) an intent to remain indefinitely. If there is no intent to remain indefinitely, there can be no domicile and the alien will be treated as a non-resident alien rather than as a resident alien.

2. Factors to Consider. Below is a list of the major factors that should be considered in determining domicile in estate or gift tax cases:

    a) The duration of stay in the United States and in other countries, and the frequency of travel both between the U.S. and other countries and between places abroad.

    b) The size, cost and nature of the decedent's houses or other dwelling places, and whether those places were owned or rented.

c) The area in which the houses and other dwelling places are located.

d) The location of expensive and cherished personal possessions.

e) The location of the decedent's family and close friends.

f) The place where he/she maintained church and club memberships.

g) The location of his/her business interests.

h) Declarations of residency or intent made in visa applications for re-entry permits, wills, deeds of gift, trust instruments, letters and oral statements.

i) Motivation, especially health, pleasure, business and avoidance of the miseries of war or political repression.

E. U.S. Situs Assets. A nonresident's gross taxable estate is limited to "U.S. situs" assets.

1. U.S. situs assets:

a) U.S. real property (includes land, buildings, improvements and fixtures, growing crops, timber cutting rights and mineral rights)

(1) If the property is subject to a recourse mortgage, the value of the real property is its fair market value at the time of the decedent's death. The decedent can claim a deduction for the mortgage, but the deduction will be subject to the limitations as set forth in Paragraph F.4 below. See Estate of Fung v. Commissioner, 117 T.C. 247 (2001), which found that both the subject promissory note decedent and his wife, as borrowers, had signed with World Savings & Loan Association as lender and State law (California) afforded the lender a choice of remedies, one of which included the imposition of personal liability. The court held that the full value of decedent's interest in the California property must be included as part of his gross estate, with a corresponding deduction allowed to the extent permitted by the Internal Revenue Code.

(2) If the property is subject to a nonrecourse mortgage, the value of the real property is its fair market value at the time of the decedent's death <u>less</u> the outstanding mortgage as of the decedent's death, i.e., only equity interest will be subject to U.S. estate tax.

(3) Note – If a non-U.S. corporation acquires U.S. real property, the shares in the corporation should not be subject to U.S. estate or gift tax. There will be U.S. income taxes and withholding as discussed above.

b) Tangible assets located in the U.S.

(1) Currency & cash are considered tangible personal property

(2) Exceptions:

(i) Art loaned to a museum by a nonresident alien

(ii) Tangible personal property accompanying a nonresident alien who dies while temporarily visiting the U.S.

c) Stock in a U.S corporation (location of shares has no relevance)

d) All intangible personal property the written evidence of which is not treated as the property itself, is property located within the United States if it is issued by or enforceable against a resident of the U.S. or a domestic corporation or government unit.

e) Although the situs of an interest in a partnership is unclear, there is authority that if the partnership carries on its business in the United States, the interest will be a U.S. situs asset. See Rev. Rul. 55-701, 1955-2 C.B. 836. There is some authority supporting the proposition that a partnership interest, as an intangible property interest, should be treated as non U.S. situs property where either: (i) the partnership is formed in a jurisdiction outside of the United States; or (ii) the partnership interest is held by a non-U.S. domiciliary. Further, there are additional authorities that support a look-through to the partnership assets in order to determine whether they have a U.S. situs and therefore need to be included in the non-U.S. person's estate.

f) Interest in trust with U.S. situs assets if the beneficiary has either an indefeasibly vested interest that would be includable in the gross estate of a U.S. citizen or resident or if the beneficiary has an interest or power that would cause the trust to be includible in the gross of a U.S. citizen or resident under Internal Revenue Code sections 2033-2044, i.e., a power to appoint the trust assets in favor of the decedent, his estate, his creditors or the creditors of his estate (although some exceptions apply).

g) Bank Deposits. However, there is an exception for bank deposits if the income from such deposits would be exempt from federal income tax (under §871(i)(1)). This generally includes all bank deposits except where the interest is effectively connected with a U.S. trade or business. The bank deposit exception does not include either cash held by a brokerage firm because brokerage firms are not in the business of banking or cash in a bank's safe deposit box.

h) The cash surrender value of a policy issued by a U.S. insurer on the life of another person that is owned by a nonresident alien.

2. Non-U.S. situs assets

a) Real property located outside of the U.S.

b) Tangible assets located outside the U.S.

c) Stock in a foreign (non-U.S.) corporation

d) Debt obligations in which the primary obligor 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 such governmental unit.

e) Portfolio Debt Obligations. If the interest from the portfolio debt obligation is treated as portfolio interest exempt for U.S. income tax, then the debt obligation is deemed not located in the U.S.

(1) Portfolio debt obligations are bonds, debentures, notes or other forms of debt that are not issued by a corporation or partnership in which the decedent owned in the aggregate 10% or more of the voting stock of the corporation, or 10% or more of the capital or profits interest for a partnership and that is either in registered form or 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.

(2) It is important to note that if a person is a nonresident for estate tax purposes, but a resident for income tax purposes, then this exception will not apply because the portfolio interest will not be tax exempt (tax exemption only applies if the owner of the debt obligations is a nonresident alien for income tax purposes).

f) Deposits with a foreign bank or foreign branch of a U.S. corporation or partnership engaged in the commercial banking business.

g) Life insurance proceeds on the life of a nonresident alien. It is irrelevant whether the insurer is domestic or foreign.

F. Tax Rates, Credits, Deductions

1. Rates. For decedents dying after November 10, 1988, the tax is computed at the same rates as the rates for U.S. persons.

2. The tentative tax is based on the tentative tax base, which is the sum of the taxable estate and the "adjusted taxable gifts" (i.e., taxable gifts made after 1976). The American Taxpayer Relief Act made permanent an exemption of $5 million adjusted for inflation. This is "unified" with the gift tax and may be used at death or during lifetime, with lifetime use subtracted from the amount remaining for use at death. The tax rate is capped at 40%.

3. Credits.

    a) The unified credit for a nonresident alien is $13,000. This is equivalent to an exclusion of $60,000. This is significantly lower than the equivalent exclusion of a U.S. person of $5 million (adjusted for inflation).

    b) Credit for state death taxes paid. Note, this credit is limited to an amount that bears the same ratio to the credit as to the value of the property subject to the state bears to the total value of the property subject to the federal tax.

    c) Gift taxes paid

    d) Estate taxes paid on prior transfers

    e) Estate tax treaty rules may vary under some treaties. If there is double taxation, the domiciliary jurisdiction provides a credit for any death tax paid to the jurisdiction where the property is situated if the primary taxing authority is based on the situs of the property.

4. Deductions – unless a treaty provides otherwise, deductions must be prorated and worldwide assets of decedent must be disclosed in order to take advantage of any available deductions. Below is a partial list of available deductions to consider:

    a) Funeral and administrative expenses

    b) Claims against estate

    c) Debts

    d) Taxes

e) Charitable deduction, provided the bequest is to a U.S. charity. Note that for U.S. persons, IRC §2055(a)(2) provides that for purposes of the federal estate tax, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises or transfers to a person or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, no part of the net earnings of which inures to the benefit of any private stockholder or individual. Unlike the rules for a charitable deduction for income tax purposes, there is no requirement that the charitable be a U.S. charity if the bequest is made by a U.S. person.

f) Marital deduction, provided the surviving spouse is a U.S. citizen or the bequest passes to a qualified domestic trust (discussed further below).

5. Tax Treaties. Where permitted by treaty, the estate of a nonresident alien is allowed a portion of the unified credit allowed to a U.S. person. Some marital deduction provisions in the treaties may override the provisions of the federal marital deduction. See brief summary of tax treaties below.

G. Qualified Domestic Trusts. In computing the taxable estate of a married person, a marital deduction is allowed for property that passes to a U.S. citizen spouse. The marital deduction is unlimited. Thus, a person could leave his or her estate to the surviving spouse who is a U.S. citizen and no U.S. estate tax will be due on the first spouse's death. However, if the spouse is not a U.S. citizen, the marital deduction is limited. If the decedent's surviving spouse is not a U.S. citizen, the marital deduction otherwise allowed for property passing to or for the benefit of the decedent's U.S. citizen surviving spouse, is generally disallowed unless:

1. The transfer would have qualified for the marital deduction if the surviving spouse had been a U.S. citizen, and

2. One of the following conditions is met:

a) the surviving spouse becomes a citizen before the date on which the federal estate tax return is made;

b) an appropriate election is made with respect to property that passes to (or pursuant to) a trust which meets the requirements of a Qualified Domestic Trust ("QDOT");

c) an appropriate election is made with respect to property that passes to (or pursuant to) a trust which does not meet the requirements of a QDOT but is reformed after the decedent's date of death to meet those requirements;

d) an appropriate election is made with respect to property that passes to the decedent's surviving spouse by outright bequest or devise, by operation of law or pursuant to the terms of an annuity or other similar plan or arrangement, and which the surviving spouse then transfers or irrevocably assigns to a QDOT before the decedent's federal estate tax return is filed and during the time the QDOT election may be made; or

e) certain requirements are satisfied with respect to a plan, annuity or other arrangement (whether qualified or not) the payments of which are not assignable or transferable to a QDOT under federal, state or foreign law or the terms of the plan or arrangement itself.

3. In general, a trust must satisfy the following requirements to qualify as a QDOT:

a) The trust must be an ordinary trust, as defined in Reg §301.77014(a);

b) The trust must be maintained under the laws of a state of the United States or the District of Columbia, and the administration of the trust must be governed by the laws of a particular state of the United States or the District of Columbia;

c) The trust instrument must require that at least one trustee (United States trustee) be an individual United States citizen or a domestic corporation, subject to regulatory exceptions when foreign countries prohibit trusts or prohibit trusts from having United States trustees;

d) The trust instrument must provide that no distribution, other than a distribution of income, may be made from the trust unless the United States trustee has the right to withhold the QDOT tax imposed on that distribution; and

e) Detailed additional requirements to ensure collection of the deferred estate tax must be satisfied. These requirements include governing instrument requirements for using a United States bank trustee, bond, or letter of credit if the QDOT has assets in excess of $2 million (excluding $600,000 for a personal residence and related furnishings) and reporting requirements for QDOTs owning foreign real property if these security requirements do not apply.

H. Joint Tenancy Assets

1. General rule. The general rule is that only one-half (1/2) of property held between two (2) U.S. citizen spouses jointly with rights of survivorship or tenancy by the entirety is included in the decedent's estate. However,

when one spouse is not a U.S. citizen, then the value of property titled jointly with rights of survivorship or tenants by the entirety is included 100% in the gross estate of the estate of the first joint tenant to die, except to the extent that the executor for the decedent's estate can prove that the surviving joint tenant supplied the consideration for the property.

2. Depending on the type of property acquired, the time of acquisition, and a grandfathering election, different rules may apply.

3. Types of property.

   a) Joint tenancy in real property – when the joint tenancy terminates, there is a gift of the tenancy (other than by reason of the death of a spouse) to the extent that a spouse receives proceeds on termination greater than the proportion of the total consideration furnished by that souse multiplied by the total proceeds on termination. IRC Section 2523(i)(3).

   b) Joint tenancy in personal property – each spouse is deemed to have made a gift upon creation of the joint tenancy of ½ of the consideration furnished by each spouse. IRC Section 2523(i)(3).

   c) Joint tenancy in a bank account – The creation of a joint bank and/or brokerage account where each spouse can withdraw funds without an obligation to repay does not result in a taxable gift upon the creation of the joint tenancy. Reg. §25.2511-1(h)(4). Although there is no gift tax on creation, there will be a gift tax on termination of the account or at the time of a withdrawal from the account to the extent that either spouse receives more than the portion of the account balance that he/she contributed and there is no legal obligation to make a payment to the contributing spouse.

4. Time of Acquisition.

   a) For years after 1988: IRC §2515(a) provides that a creation of a tenancy by the entirety in real property by a citizen with a non-U.S. citizen spouse will not constitute a gift to a non-U.S. citizen spouse unless an election is made to treat the transfer as a gift. Likewise, a creation of a joint interest in a bank account is not a gift to the non-U.S. citizen spouse at the time the interest is created.

   b) For years 1982-1988: creation of tenants by the entirety and joint property was deemed a gift of one-half (1/2) of the property by the donor spouse.

5. Practice tip: In making gifts of jointly owned properties, one should consider the following:

a) what types of property are available to be divided,

b) when was the property purchased,

c) was there an election to treat the creation of the joint tenancy as a gift,

d) who provided the origination for the original purchase,

e) what evidence of consideration is there, and

f) who paid for improvements and the reduction of any indebtedness secured by the property?

IV. GIFTS

A. By U.S. Citizens and Residents

The gift tax is imposed on gratuitous transfers of property by any individual who is a U.S. citizen or resident of the U.S. to the extent that the value of the property transferred exceeds the amount of the exclusions and deductions allowable. IRC §2501(a)(1). The gift tax applies regardless of the situs of the property transferred.

B. By Nonresident, Non-U.S. Citizens

1. Applies to gifts of real and tangible personal property located in the U.S.

2. No gift tax on transfer by nonresident alien of intangible property, including shares of a domestic or foreign corporation, or ownership interests in a partnership or LLC.

3. Annual exclusions

   a) As with U.S. persons, nonresident aliens are entitled to an annual gift tax exclusion of $14,000 (for the year 2016) per donee;

   b) Annual $100,000 (indexed for inflation and in the year 2016 is $148,000) exclusion for gifts to a nonresident alien spouse;

   c) There is no unified credit available;

   d) There is no gift-splitting;

   e) The marital deduction is available for gift tax purposes if spouse is a U.S. citizen;

   f) The donor is entitled to a charitable income tax deduction for gifts made to U.S. qualified charities.

4. Practice tip: A nonresident alien for gift tax purposes is not allowed an exemption amount for gifts of U.S. situs assets made during his life. To the extent the nonresident alien gifts in excess of the annual exclusion amount, every dollar over the annual exclusion amount will be subject to U.S. gift tax. One way around the U.S. gift tax is to convert U.S. situs assets into non-U.S. situs assets, or make the transfer/gift outside the U.S. Oftentimes, it is the inadvertent gift that traps the unwitting nonresident alien, e.g., a co-owner is added to an account or property and when it is then sold, the proceeds are split and a gift triggered.

5. Practice tip: In order to limit the amount of property and assets that would need to be contributed to a QDOT, it may be beneficial to equalize the estates of both spouses. This can be done through the use of the annual exclusion. Although a gift tax return is not required if a gift between spouses is less than the $100,000 annual exclusion (indexed for inflation) it may be worthwhile filing one to have the three (3) year statute of limitations running particularly when a jointly held asset such as a marital home is being severed and a gift is being inferred.

V. GENERATION-SKIPPING TRANSFER TAX

A. In General. In order to prevent individuals from passing wealth from generation to generation without subjecting the assets to U.S. estate taxes, the U.S. has what is commonly referred to as a "generation skipping transfer tax".

B. Tax Rate. The generation-skipping transfer ("GST") tax is a flat tax and the rate is the highest estate and gift tax rate. In the year 2016, the rate is 40%. The tax is computed by multiplying the taxable amount of the transfer by the applicable rate.

C. What is a GST Transfer? A GST transfer takes two forms.

1. A transfer from one generation to a generation that is two or more generations younger than the transferor, e.g., a gift from a grandparent to a grandchild. This type of transfer is often referred to as a "direct skip" and the transferee is often referred to as a "skip person"; or

2. When a trust which skips a generation below the grantor either makes a distribution to a skip person or undergoes a taxable termination to a skip person.

D. Exceptions and Exclusions. In general, transfers by a nonresident alien that are not subject to U.S. transfer tax (i.e., either gift tax or estate tax) will not be subject to GST tax. A good example where no GST tax will apply is a gift of stock (U.S. or foreign) by an nonresident alien to a U.S. grandchild.

E. When the GST tax applies to transfers by Nonresident Aliens

1. At death to the extent that the transferred property is U.S. situs and is subject to U.S. estate tax.

2. During life to the extent that the transferred property is U.S. real or tangible personal property and is subject to U.S. gift tax.

3. Whether the skip person is a U.S. citizen or resident is irrelevant.

4. If the nonresident alien, during life, transfers U.S. corporate stock to a GST trust that provides for income to child and remainder to grandchild and both are citizens of the U.S., there will be no taxable event for GST tax purposes because the initial transfer of the stock was not subject to gift tax.

VI. U.S. GIFT/ESTATE TAX TREATIES

A. In General. If a decedent dies with multiple citizenships and/or property located in multiple jurisdictions or if the beneficiaries reside in a different jurisdiction than that of the decedent, it will be important to consider whether or not the other country (or countries) impose a transfer tax, such as a gift tax, inheritance tax or estate tax. If there is more than one country imposing a tax on the transfer, it will be very important to determine whether there is a tax treaty in place that will minimize and/or eliminate any double taxation.

B. Countries in which U.S. has gift and/or estate tax treaty. With respect to estate and gift tax treaties in force, as of January 1, 2016, the U.S. had estate and/or gift tax treaties in force with the following countries:

Estate & Gift Tax Treaties (International)

Country	Separate Estate	Separate Gift	Combined E & G	Other	Signed	Transfers made on or after:	Comments	
Australia	No	Yes	No	No	5305	12/14/53		PR-UC
Australia	Yes	No	No	No	5305	01/07/54	old *	PR-UC
Austria	No	No	Yes	No	8206	07/01/83	new *	
Belgium	Yes	No	No	No	5405	not yet	old	no effect
Canada	No	No	No	1995 Protocol	9503	11/09/95 **	estate tax only	PR-UC
Denmark	No	No	Yes	No	8304	11/07/84	new	
Finland	Yes	No	No	No	5203	12/18/52	old	PR-UC
France	No	No	Yes	No	7811	10/01/80	new	PR-UC (Protocol)

Estate & Gift Tax Treaties (International)

Country	Separate Estate	Separate Gift	Combined E & G	Other	Signed	Transfers made on or after:	Comments	
Germany	No	No	Yes	No	8012	01/01/79	new	PR-UC (Protocol)
Greece	Yes	No	No	No	5002	12/30/53	old	PR-UC
Ireland	Yes	No	No	No	4909	12/20/51	old	
Italy	Yes	No	No	No	5503	10/26/56	old	PR-UC
Japan	No	No	Yes	No	5404	04/01/55	old	PR-UC
Netherlands	Yes	No	No	No	6907	02/03/71	new	
Norway	Yes	No	No	No	4906	12/11/51	old	PR-UC
South Africa	Yes	No	No	No	4704	07/15/52	old	
Sweden	No	No	Yes	No	8306	09/05/84 (through 12/31/07)	new (terminated 01/01/08)	
Switzerland	Yes	No	No	No	5107	09/17/52	Old	PR-UC
U.K.	No	No	Yes	No	7810	11/11/79	new	

***** old or new refers to whether the treaty has the "old" situs rules, or the "new" provisions that generally restrict the U.S. to taxing nonresident aliens' U.S. real estate and business property.

****** the 1995 Protocol had retroactive effect to TAMRA. Claims for refund based upon the treaty had to be filed by 11/09/96.

"**PR-UC**" in comments section above refers to a pro-rata unified credit provision. (The pro-rata unified credit provisions in the German and French treaties apply only to estate tax, not to gift tax.)

C. Purpose

1. Reduction of Tax. Treaties serve to (i) prevent double taxation; (ii) prevent discriminatory tax treatment of a resident of a country; and (iii) permit reciprocal administration to prevent tax avoidance and evasion. Treaties often substantially reduce estate and gift taxes. If an estate claims an estate tax position based on an estate tax treaty with another country, an explanation of the treaty-based position should be attached to the estate tax return. Reg. §301.6114-1. The purpose of the transfer tax treaties is to prevent or minimize the double taxation of both lifetime gifts and transfers at death of domiciliaries of the two (2) contracting states (i.e., treaty countries). This is usually accomplished in one of several ways:

a) Either by giving one country priority in taxing the property deemed by the treaty to be located in that country. This is the case with the U.S. – Japan treaty; or

b) Giving one country priority to tax the estate or the gifts of the individual based on a determination of the decedent's or the donor's fiscal domicile.

2. Incurred Credit. Where application of the treaty gives rise to the imposition of tax in both countries, a credit mechanism is employed to minimize the double tax burden.

3. Deductions. Some of the transfer tax treaties provide for more beneficial deductions, such as the marital deduction and charitable deduction, or a larger exemption from estate tax than otherwise would apply to a non-domiciliary of the United States. See for example the tax treaties with the U.K. and Canada.

4. Savings Clause. Most tax treaties have a saving clause. A saving clause preserves or "saves" the right of each country to tax its own residents as if no tax treaty existed. The treaty will then serve to allow the taxpayer to avail himself/herself of increased deductions, creditors or exceptions from taxation.

VII. <u>REPORTING</u>

A. In General.

When planning for the international client, it will be important to understand the reporting requirements (i.e., what gets reported and to whom the information will be reported) for the client. Over the last several years there have been significant developments in the reporting of account and income information for individuals with accounts outside of their home country. The first major development was when the United States introduced the Foreign Account Compliance Act ("FATCA"), which requires the automatically exchange of information from certain partner countries. The Organization for Economic Cooperating and Development ("OECD") then followed by introducing the Common Reporting Standard or "CRS". Like FATCA, CRS is an information standard for the automatic exchange of information. On May 6, 2014, forty-seven countries tentatively agreed on a "common reporting standard": an agreement to share information on residents' assets and incomes automatically in conformation with the standard. Until now, the parties to most treaties which are in place for sharing information have shared information upon request, which has not proved effective in preventing tax evasion. The new system is supposed to transfer all the relevant information automatically and systematically. As of this writing, more than 96 countries have agreed to share information on residents' assets and incomes in conformation with reporting standards.

B. Information to Be Exchanged.

In general, each country will annually automatically exchange with the other country the following information: a) the name, address, taxpayer identification number and date and place of birth of each reportable person. b) the account number c) the name and identifying number of the reporting financial institution; d) the account balance or value as of the end of the relevant calendar or, if the account was closed during such year or period, the closure of the account.

SCHEDULE A
SUMMARY

1.	U.S. CITIZEN AND RESIDENT ALIEN	NRA
US$14,000 annual gift tax exclusion per donee	Yes	yes
Gift splitting between spouses	Yes	No
Lifetime unified estate and gift tax credit	Yes	no
Unlimited exclusion of gifts to U.S. citizen spouse	Yes	yes
US$148,000 (in 2016) annual exclusion to non U.S. citizen spouse	Yes	yes
Exclusion for direct payment of medical and educational expenses	Yes	yes
Amount of applicable exclusion amount (indexed for inflation in 2016)	US$5,450,000	US$60,000.00
GST exemption of $5,450,000 (2016) available	Yes	No
Taxation on worldwide assets	Yes	No

2. U.S. SITUS PROPERTY FOR US ESTATE TAX PURPOSES	NON-U.S. SITUS PROPERTY FOR US ESTATE TAX PURPOSES
Stock in U.S. corporation	Life insurance proceeds (most)
U.S. debt obligations (including 401(k) plans), etc.	U.S. bank deposits
U.S. real property interests (USRPI)	Foreign branch of U.S. corporations or partnerships in commercial banking business
U.S. brokerage accounts & mutual funds except for underlying assets which are non-U.S. situs	Portfolio debt obligations
Tangible personal property in the U.S.	Certain works of art
Cash in the U.S.	Stock in foreign corporations
	Shares in foreign mutual funds
	Certificates of Deposit