



## U.S. Income, Estate and Gift Tax Planning for Nonresident Aliens



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# **U.S. INCOME TAX PLANNING FOR NONRESIDENT ALIENS**

# Factors to be Considered When Determining U.S. Income Tax Status

- U.S. citizenship: Only 2 countries have citizen-based taxation-United States and Eritrea
- Permanent residence visa (green card)
- Number of days physically present in the U.S.-183 or more in a calendar year
- Number of days physically present in the U.S.-183 or more over a three-year period
- Exceptions-income tax treaty tie-breaker rules or closer connection and tax residence with another country
- Immigration laws different than tax laws

# Income Tax Reporting Requirements of Residents vs. Nonresidents

- Residents are required to report worldwide income
- Nonresidents required to report U.S. source income, with exceptions (sale of U.S. stock, bank interest)
- Residents are required to disclose non-U.S. income and assets
- Nonresidents are not required to disclose non-U.S. income and assets (unless violate the physical presence test)

## Income Tax Reporting on Rental Income

- Married nonresidents must file separately-no provision to allow for joint filing
- If title to property is held jointly, each titleholder must report their respective share of income and expenses
- Default tax is 30% of gross rental income
- May submit Form W-8ECI to elect to file a U.S. income tax return, treating the rental activity as effectively connected with a U.S. trade or business
- If making the election, tax is based on net income, subject to graduated rates
- Tax returns are due by June 15 of the following year, but can be extended until December 15, subject to exception if reporting U.S. wages. If reporting U.S. wages, the due date is April 15.

## Individual Taxpayer Identification Number (ITIN)

- Unless an individual possesses a visa, which allows him/her to work in the U.S., cannot obtain a U.S. social security number
- Same format as social security number. All start with a 9.
- Must have a reporting requirement to the IRS to apply
- Must submit supporting documentation to prove foreign status and identity
- All supporting documents submitted to the IRS with the application must be certified or original
- Effective January 1, 2017, ITINs began to expire. Must be renewed before filing U.S. tax returns after expiration.

## Foreign Investment in Real Property Tax Act (FIRPTA)

- Foreign person subject to 15% of the gross sales price to be withheld at closing and remitted to the IRS within 20 days
- Definition of foreign “person” includes nonresident alien individual, foreign corporation, foreign partnership, foreign trust, or foreign estate
- Withholding is not the tax. Actual tax is based on the profit of the sale.
- Must file U.S. income tax return to report the sale, calculate tax, and in most cases, apply for a refund
- Exceptions to the withholding. Can be at 0% or 10%, depending on the buyer’s intended use.
- Can apply for a reduced withholding based on maximum tax. Not generally advantageous under current IRS conditions.
- Applicability to the sale of real estate by U.S. limited liability companies
- FIRPTA withholding on like-kind exchanges



## Miscellaneous Foreign Issues

- Withholding on foreign partners of U.S. partnerships
- Reporting requirements of disregarded entities with a foreign owner
- Withholding on sale of U.S. partnership interest by foreign owner



**U.S. ESTATE AND GIFT TAX  
PLANNING FOR NONRESIDENT  
ALIENS**

# U.S. Estate Tax and Non-U.S. Domiciliaries

- Non-U.S. domiciliaries subject to U.S. estate tax if the date of death value of U.S. situs assets exceeds \$60,000
- Jointly-held property includible at 100% of value unless proof of consideration provided
- Deductions subject to limitation of proration of U.S. assets to worldwide assets. Exception of non-recourse debt.
- Generally, no marital deduction. Exceptions: Allowed under treaty, surviving spouse is U.S. citizen, use of a Qualified Domestic Trust
- \$60,000 exemption equivalent to \$13,000 credit
- Estate tax treaties with 14 countries; estate tax provisions included in the income tax treaty with Canada
- Estate tax filing reported on Form 706-NA, due within 9 months of date of death, 6 month extension available
- Estate tax rates range from 18% to 40% at \$1,000,000 and above

## Miscellaneous Provisions in Various U.S. Estate Tax Treaties

- Pro-rata unified credit provision contained in treaties with Australia, Canada, Finland, France, Germany, Greece, Italy, Japan, and Switzerland
- Marital credit-Canada; marital exemption and/or deduction-Germany, France
- “As if domiciled” provision-United Kingdom
- Mortgages on U.S. property allowed in full-Germany
- Can include shares of foreign corporation-France

## U.S. Gift Tax and Non-U.S. Domiciliaries

- Unified credit cannot be used to reduce U.S. gift tax. Applies to U.S. estate tax only.
- Can use annual gift tax exclusion (\$16,000 in 2022)
- Annual exclusion for gifts to non-citizen spouse (\$164,000 in 2022)
- Cannot split gifts with spouse
- Gift tax rates same as estate tax rates
- No gift tax on the transfer of intangible assets
- Gift tax does not apply at the creation of a tenancy by the entirety with spouse. Applies at termination other than by death.
- Caution should be taken in executing deeds to add or remove names from the title. This could result in unintended gift tax liability. Cannot “undo” to correct.

## CASE STUDY

### Facts:

- US real estate was purchased by A, a tax resident of Canada, on March 30, 1992.
- Warranty deed executed on November 2, 2011, to add A's three daughters (B, C & D) to title as joint tenants with right of survivorship (JTWROS). No consideration was provided by B, C, or D. All daughters are also Canadian tax residents.
- Property was rented during the entire time of ownership. Only A filed Form 1040NR to report the rental activity. A reported 100% of the activity.
- A died on October 1, 2020.
- Property was sold on January 14, 2021, for \$133,000. No US estate tax return, Form 706-NA, was filed.
- FIRPTA withholding of \$19,950 ( $\$133,000 \times 15\%$ ) was remitted to IRS on the sale of the property. The entire amount was reported in the name and US tax identification number of A, who was deceased at this time.

## CASE STUDY

### Issues:

- Gift tax on adding daughters to title without consideration.
- After daughters were added to title on November 2, 2011, all four owners should have reported the rental activity at 25% each.
- At the mother's death on October 1, 2020, a US estate tax return was required to be filed within nine months after the date of death. The property sold on January 14, 2021, for \$133,000, so the value at the date of death clearly exceeded \$60,000.
- Since the property was held as JTWRROS, the remaining three sisters were the sellers of the property. Since none of the three sisters had ever filed US income tax returns, they did not possess US tax identification numbers. FIRPTA withholding remitted in the name and US tax identification number of the deceased mother. Will be challenging to obtain a refund of FIRPTA monies as a deceased mother does not have an income tax filing required on the sale as neither she nor her estate was a seller of the property.

Questions?



Thank You!

**Scan the QR  
code for the  
handouts!**



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