Gift and Estate Planning for Foreign Nationals

by John A. Oliver, CLU, ChFC

Abstract: *Greater international mobility means that many non-U.S. citizens may reside permanently abroad but own U.S. assets, or they may have migrated to the U.S. but are not, for a variety of reasons, U.S. citizens. There are also a large number of married couples in which one spouse is a U.S. citizen but the other one is not. This article focuses on how the current U.S. transfer tax laws apply to noncitizen individuals and married couples with assets and/or investments in the U.S. In some situations, the transfer taxes can be almost draconian on family wealth so the article explores options in eliminating or reducing these transfer taxes.*

This issue of the Journal went to press in April 2009.
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How would you advise a Chilean client married to a Canadian living full time in Texas? As the global economy continues to evolve, so does the need for international estate planning. This is especially true for wealthy married couples when one or both of the individuals is not a U.S. citizen and for a noncitizen client with assets or investments in the U.S.. In these situations, the failure to plan properly for U.S. transfer taxes could result in the payment of high gift and/or estate taxes that could wipe out over half of the individual's U.S.-based wealth and can also fail to protect the client from any taxes levied by his or her home country.

Determining Foreign National Status

For planning purposes, it may seem easy to determine if an individual is a U.S. citizen, but in some cases it is not. For example, a foreign individual born in the U.S. while his or her parents were working here temporarily or on vacation is a U.S. citizen. However, if a person was born outside the U.S. but one of the parents was a U.S. citizen, he or she may be a U.S. citizen, depending on the law in effect at his or her birth. In both cases, where the individual is a U.S. citizen, he or she will be liable for the payment of gift and/or estate taxes on the transfer of all worldwide assets.

Individuals born in other countries who are not U.S. citizens but have U.S.-based assets are considered foreign nationals. These individuals will be the focus of this article, which will look at some planning options that may help minimize the impact of U.S. gift and estate taxes. For tax planning purposes, non-U.S. citizens are either resident aliens (RAs) or nonresident aliens (NRAs).

An RA is taxed essentially the same as a U.S. citizen, generally resulting in all asset transfers being subject to U.S. transfer taxes with similar credits and deductions. NRAs don't have the same credits as citizens or RAs but are taxed by the federal government only on the transfer of property deemed to be located in the U.S..

Typically, U.S. citizens who are married to non-U.S. citizens (RAs or NRAs) cannot make use of the unlimited marital deduction that allows unlimited amounts to be transferred to a U.S. citizen spouse without being subject to gift or estate taxes. In these cases, proper planning is required to avoid unnecessary taxes on transfers to a non-U.S. citizen spouse.

U.S. citizens who own property abroad are generally subject to gift and estate taxes on the transfer of all of their worldwide assets—except in cases where there is a gift and/or estate tax treaty between the U.S. and the country where the property is located. In these cases, the provisions of the treaty may require that the tax laws of the country in which the property is located apply. Some treaties allow taxation by both countries and include tax deductions or credits to offset the double taxation.

Currently, the U.S. has approximately seven gift tax and 15 estate tax treaties with other countries, compared to the approximately 56 international income tax treaties in existence. The countries with which the U.S. has gift tax treaties include Australia, Austria, Denmark, France, Germany, Japan, and the United Kingdom. The U.S. currently has estate tax treaties with Australia, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Netherlands, Norway, South Africa, Switzerland, and the United Kingdom.[1]

Survey Underscores Need for Planning

A 2003 survey of recent immigrants to the U.S. with net worth of $10 million or more showed that only a little more than one-third of them sought advice on the gift and estate tax consequences of acquiring U.S. residency.[2] Once in the U.S., the numbers improved to just under one-half of the immigrants who sought tax advice. For wealthy foreign nationals, the consequence of not obtaining proper advice is that they or their families may have to pay gift and estate taxes that likely could have been avoided.

Determining Residency for U.S. Taxes

It is important to note that the test to determine residency differs with the type of tax that is being imposed. A foreign national who is classified as a resident for U.S. income tax purposes may not be classified as such for U.S. gift and estate tax purposes.

The Income Tax Test

With the test for income tax purposes, residency status is generally determined by a "substantial presence test" that is based on the number of days a foreign national is physically present in the U.S. This test is met if the foreign national was present in the U.S. for at least 31 days in the current year, and the sum of the number of days he or she was present in the current year and the two preceding calendar years when multiplied by the applicable multiplier (1 for current year, 1/3 for the first preceding year, and 1/6 for second preceding year) is at least 183 days.[3]

A day in the U.S. is considered any moment in the day and includes presence in U.S. waters or airspace. A foreign national is also deemed to be a resident for income tax purposes if he or she is a lawful permanent resident of the U.S.—in other words, if he or she holds a green card.

Example: Ingrid is a German citizen who works part time in the U.S. The following table shows her number of days in the U.S. this year and in the last two preceding years. Her number of days present in the U.S. each year is multiplied by a specific factor for each year. The resulting amounts are added together and if they exceed 183, which in Ingrid's case they do, she is considered a resident for income tax purposes.

Year	Multiplier	Days Present	Amount
Current year	1x	40	= 40
Preceding year 1	1/3x	360	=120
Preceding year 2	1/6x	204	= 34
		Total Days	**194**

Residency Is Different for Gift and Estate Tax

For gift and estate tax purposes, residency is based on whether the foreign national's domicile is in the U.S.[4] If a foreign national has a U.S. domicile, he or she would be classified as having RA status for estate and gift tax

purposes. Conversely, having a non-U.S. domicile results in NRA status.

The determination of one's domicile is a subjective test based on the foreign[5] national's intent to remain in the U.S. indefinitely—even if the person was only in the U.S. for a brief period. If the individual planned to remain in the U.S. indefinitely, he or she would be considered to have a U.S. domicile and would be classified as an RA for gift and estate tax purposes.

Since it is difficult to prove what someone's intent may be, certain factors may be used to determine domicile, such as

- location of a person's permanent residence, compared to other homes
- family, including family immigration history
- close friends, including testimony from friends
- business interests, including number and locations
- visas, work permits, and similar official documentation
- intent and motivation
- community affairs and group affiliations
- most cherished personal possessions
- the duration of the person's stay in the U.S. compared to other countries

Resident Alien Gift and Estate Taxation

Foreign nationals who qualify as RAs for estate and gift tax purposes and are single or married to U.S. citizens are treated the same as U.S. citizens and can take advantage of the unlimited marital deduction, the $13,000 applicable annual gift exclusion, and the lifetime gift ($1 million in 2009) and estate tax exemption ($3.5 million in 2009).

The taxation of RAs for transfer tax purposes is similar to that for U.S. citizens. For example, U.S. citizens and RAs are subject to gift and estate taxes on the transfer of all of their worldwide assets, irrespective of where the assets are actually located. RAs often think that because they are not U.S. citizens, assets located outside the U.S. are not subject to U.S. transfer tax liability. This is not the case, and proper planning may prevent a surprising tax bill for the RA's heirs.

Consider Maria, a single wealthy Mexican national that is living permanently in the U.S. She has a U.S. green card and is considered an RA. Maria has U.S. assets worth $10 million and Mexican assets worth $20 million. For U.S. tax purposes, Maria's estate is worth $30 million even though two-thirds of her wealth is outside the U.S. in Mexico.

If Maria were to die in 2009, just like a U.S. citizen, her estate is comprised of all assets worldwide and is subject to U.S. estate taxes. While she can transfer $3.5 million free of estate taxes in 2009, the remaining $26.5 million estate is subject to tax. The U.S. currently has no treaties with Mexico for gift or estate taxes. However, Maria's estate would have an estate tax credit for some or all of the applicable Mexican death tax. The U.S. does have an income tax treaty with Mexico.

One might argue that U.S. tax authorities will not easily identify all of Maria's assets in Mexico for U.S. taxation.[6] The truth of this statement can be debated, but it doesn't change the requirement of the law to fully report all assets worldwide at the time of death. If Maria was married to a U.S. citizen at the time of her death, she could transfer the $30 million in U.S. assets to him under the unlimited marital deduction and no taxes would be due until his death. However, the tax treatment differs if Maria's spouse is not a U.S. citizen.

Transfers to Non-U.S. Spouses

Transfers to non-U.S. citizen spouses—regardless of whether the spouse making the transfer is an RA or a U.S. citizen—are taxed differently. When such transfer situations occur one should consider the lack of 50/50 presumption of property owned jointly, the disallowance of the unlimited marital deduction, and the "super" annual gift exclusion (a term that will be explained in greater detail shortly).

Generally, property owned jointly (i.e., joint tenants with right of survivorship or tenants by the entirety) by spouses is assumed to be owned one-half by each spouse.[7] If the surviving spouse is not a U.S. citizen, however, the entire value of jointly titled property is included in the estate of the deceased spouse unless the executor can prove that the noncitizen spouse furnished consideration.[8] In contrast, community property laws operate normally even where a noncitizen spouse is involved; each spouse owns half of the couple's community property so half of these assets avoid U.S. estate

taxes upon the death of the first spouse.[9] The rules of contribution from the noncitizen spouse do not apply if property passes to a qualified domestic trust (QDOT). The QDOT will be discussed fully later in this article.

The unlimited marital deduction generally allows an individual to transfer, either by outright gift or bequest, unlimited assets to one's spouse without being subject to U.S. gift or estate taxes. The receiving spouse must be a U.S. citizen—and not an RA—to qualify for the unlimited marital deduction.[10] The unlimited marital deduction is not available for the transfer to a non-U.S. citizen spouse unless the transfer is to a trust that qualifies as a QDOT.

Because the unlimited marital deduction is not available, an increased annual exclusion amount—sometimes called the "super" annual exclusion—is provided for present interest gifts to a non-U.S. citizen spouse who would have otherwise qualified for the marital deduction.[11] For 2009, this exclusion amount is $133,000 and is adjusted periodically for inflation.[12]

If the spouse is an RA, gift splitting is also available.[13] Gift splitting allows a gift by one spouse to be treated as half of the total gift being made by each spouse. Both spouses' annual gift tax exclusion amounts can be used even though only one spouse is making the gift.

Creating a QDOT

A U.S. citizen or RA can include provisions for the creation of a QDOT within his or her testamentary documents. If, however, the decedent spouse fails to plan ahead, there is a second way available to create a QDOT and take advantage of the estate tax deferral. The marital deduction is allowed for property passing directly to the surviving spouse if the surviving spouse irrevocably transfers such assets to a QDOT prior to the filing of the decedent's estate tax return. Once the election is made in the decedent's estate tax return to create a QDOT, the trust is irrevocable.

The QDOT postpones the estate tax on the property held inside the trust until a subsequent taxable event occurs, but the tax always remains that of the first decedent spouse. This means that a surviving spouse's applicable exclusion amount cannot be used to shelter QDOT assets from estate tax. The applicable tax rate of the estate tax due is the rate that was in effect at the time of the first spouse's death. With changes to rates currently scheduled in the tax law and further changes likely, it is possible that at the surviving spouse's death, a higher or lower estate tax rate may be applied to the QDOT assets than would be applicable to other estates if the owner had died in the current year.

Generally, the requirements for a trust to qualify as a QDOT are:

- The trust must meet the code provisions applicable to deductions made for gifts and bequests to a spouse, such as a Qualified Terminal Interest (QTIP) trust, a trust with assets passing to a non-citizen spouse's estate, or a general power of appointment trust.
- The trust instrument must require that at least one trustee (the U.S. trustee) of the trust be an individual U.S. citizen or domestic corporation and the trust must be governed by the laws of a U.S. state or the District of Columbia.
- The trust instrument must provide that no distribution other than a distribution of income may be made from the trust, unless a U.S. trustee has the right to withhold the estate tax imposed on the distribution.
- The trust must meet the requirements of any regulations that may be issued to ensure the collection of any estate tax imposed on the trust.
- The executor must elect that the trust be treated as a QDOT.[14]

While QDOTs do delay estate taxation on assets benefiting non-U.S. citizen spouses, some of their requirements (i.e., that all assets must stay in the U.S. and that any distributions of the trust corpus to the surviving spouse can trigger estate taxes) limit their appeal. Some individuals prefer to plan for liquidity at the death of the U.S.-citizen spouse so the noncitizen spouse can have more options, such as returning to his or her country of origin with inherited wealth.

Additional QDOT Requirements

There are additional security requirements for QDOTs to ensure that certain estate taxes are paid. Within the Internal Revenue Code, QDOTs are classified in two categories, and a different set of rules applies to each.

If the value of the QDOT exceeds $2 million, it is

considered a large QDOT and must either 1) name a U.S. bank or trust company to act as trustee, or 2) post a bond or produce a letter of credit in the amount of 65% of the fair market value of the trust's assets. If the value of the assets held within the trust is $2 million or less, it is considered a small QDOT. Small QDOTs don't have to fulfill the security arrangements if the trust document requires that the value of any real estate located outside of the U.S. cannot exceed 35% of the fair market value of the trust. In the event of a violation of the written trust limitation, there may be penalties and adverse consequences, including loss of QDOT status. Depending on the circumstances, there may also be time allowed to cure the problem. If foreign real estate owned by the trust will exceed 35% of the total trust value, then the trust must fulfill the same security requirements as for large QDOTs.

The determination of whether a trust corpus is less or greater than $2 million occurs at the date of death or alternate valuation date, depending upon which date has been selected by the executor to value all of the estate assets. The calculation does exclude debt and, in certain situations, the personal residence of the surviving spouse.[15]

A planning alternative to avoid the complexity of a QDOT is the use of the super annual exclusion. The U.S. citizen or RA spouse would make annual gifts up to $133,000 to the non-U.S. citizen spouse. The gifting program needs to be established at an early enough date so that a significant portion of the U.S. citizen spouse's estate could be transferred, thereby affecting the amount of estate tax due. Like other gift planning, the more the asset given appreciates after the transfer, the greater the impact on the overall transfer strategy. Also, such gifts may be leveraged through the purchase of a life insurance policy on the life of the spouse making the gift.

Planning for the Non-U.S. Spouse

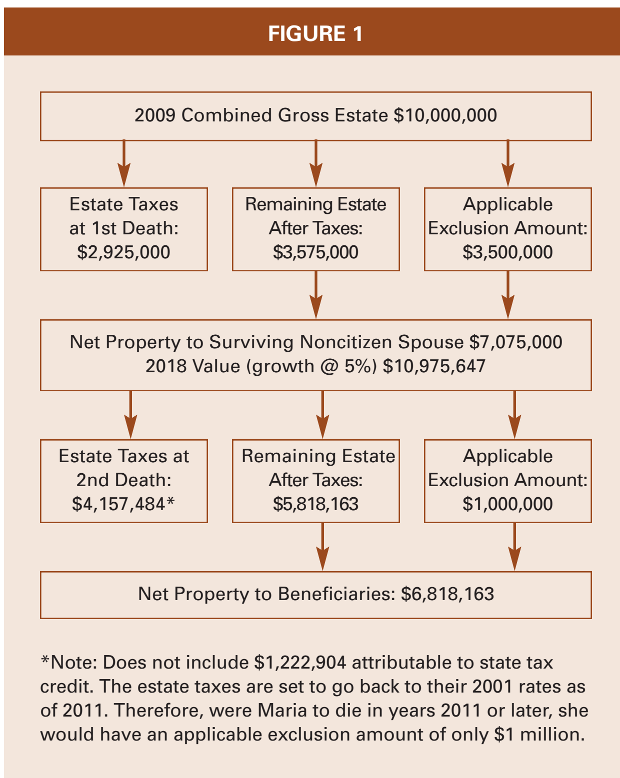
Assume Maria, the RA in our previous example, has married a U.S. citizen, Bill. Through some risky deals, Maria had lost all of her former wealth. She and Bill now own $10 million of joint U.S. assets. The have a revocable trust and own their U.S. real estate in a limited liability company (LLC).

Simple Will—All to Non-U.S. Citizen Spouse

Figure 1 shows what happens at Bill's death in 2009. Because Maria is an RA, Bill is not able to pass his entire estate to her free of estate tax under the unlimited marital deduction. He can leave the $3,500,000 applicable exclusion to Maria free of estate taxes, but the rest of the $6,500,000 is subject to federal estate taxes of $2,925,000 at his death. The $7,075,000 net estate passes to Maria. While there may be state death taxes and administration costs in addition to the federal estate tax, the example given here will concentrate solely on the federal estate tax consequences.

Assume that 10 years have passed and the assets left to Maria have enjoyed 5% growth net of income taxes. Her estate would then be valued at $10,975,647. If Maria passes away in 2019, the estate will be subject to the estate tax rate that was in effect in 2000 due to the sunset of the increased estate tax exemptions and lower estate tax rates in 2011. Because Maria is an RA, at her death her estate is entitled to pass up to $1,000,000 estate tax free assuming no post-2011 change in the

FIGURE 1



*Note: Does not include $1,222,904 attributable to state tax credit. The estate taxes are set to go back to their 2001 rates as of 2011. Therefore, were Maria to die in years 2011 or later, she would have an applicable exclusion amount of only $1 million.

available exemption. The balance of the estate, or $9,975,000, would then be subject to tax at the applicable rates. Under current law, the heirs would see a total reduction in family wealth of almost 38%.

Credit Shelter Trust

Most planners recognize that another way to reduce estate tax and still provide for the surviving spouse is to establish a credit shelter trust (CST) in a will or trust. A CST is established in estate documents to hold property generally equal to the estate tax applicable exclusion amount, thus sheltering the trust assets from the decedent's estate tax, and it can be used to manage assets and provide income/cash flow for the benefit of the surviving spouse. Assets in the CST, although used for the benefit of the surviving spouse, avoid estate taxation in the surviving spouse's estate.

QDOT & CST

Figure 2 is an example of how the combination of a CST trust and QDOT would work for Bill and Maria.

In this situation Bill, still married to Maria, dies in 2009 with $10 million in net worth. Bill created a CST and a QDOT within his testamentary documents. $3.5 million of his estate will be used to fund the CST and the remaining $6.5 million will be paid to the QDOT. There will be no estate tax payable by Bill's estate at the time of his death because (1) the transfer of $6.5 million to the QDOT qualifies for the unlimited marital deduction as long as the QDOT complies with the statutory requirements, and (2) the $3.5 million used to fund the CST equals the 2009 applicable exclusion amount that can be transferred by a U.S. citizen or RA estate tax free.

During Maria's life, she may receive distributions of all the income from the QDOT estate tax free. If she requests any distributions of principal, the trustee must withhold estate taxes from the distribution based on estate tax rates applicable at Bill's death.

Assuming the QDOT has grown over a 10-year time period at 5% net of taxes, it would equal $10,083,633. Similarly, over the same time period at the same rate of interest, the CST would grow to $5,429,649. At Maria's death, the QDOT assets are now subject to federal estate tax. Maria's estate cannot allocate Maria's applicable exclusion amount to the trust assets because the tax is the amount that would have been applied at Bill's death. The trustee pays $3,764,868 in estate taxes. The remaining assets in the QDOT, plus the amount held in the CST (totaling $11,748,414) pass to Bill and Maria's heirs. By using a combination of the CST and the QDOT, the amount passing to heirs is increased by just over 27%.

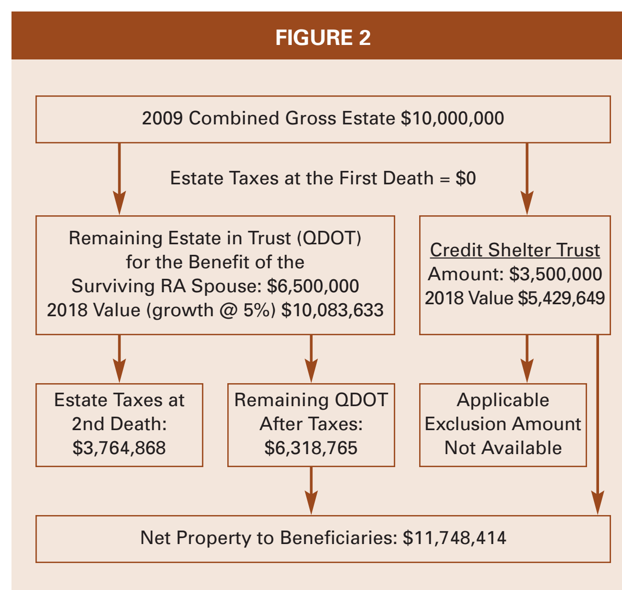
Gift and Estate Tax Overview for NRAs

No Domicile but U.S. Situs

With regard to taxation of U.S. *situs* property, if a foreign national is deemed not to have a U.S. domicile, then he or she will be classified as an NRA for gift and estate tax purposes. NRAs are subject only to U.S. gift and estate taxes when they transfer property—either by gift or bequest—that is determined to be situated in the U.S.

Understanding the *situs* rules for U.S. gift and estate tax purposes can be difficult because the rules differ for each tax. *Situs* rules also vary depending on the type of property being transferred. The scope of situs rules for gift taxes is narrower than that of estate taxes, with intangible property located in the U.S. subject to estate taxes but gifts of such property not subject to gift taxes. These different rules provide unique planning opportunities for foreign nationals.

FIGURE 2



Gift Taxes

U.S. gift tax rates are the same as those for U.S. citizens and RAs for taxable transfers. U.S. citizens and RAs are generally allowed a lifetime gift-tax credit that can be applied directly against the gift taxes. In 2009, this results in the ability to gift up to $1 million in assets without incurring gift taxes. This lifetime gift tax credit is not available for taxable gifts made by an NRA. An NRA is only subject to gift taxes when gifting either real property or tangible personal property located in the U.S. It is the location of the property at the time of the gift that determines whether or not the gift is subject to U.S. gift taxes. Examples of tangible property include cash, jewelry, paintings, and automobiles.

Gifts of intangible property, even if situated in the U.S., are not subject to federal gift taxes.[16] Property likely to be deemed intangible includes stock in a U.S. corporation, U.S. bank deposits, and interest in a U.S. partnership. Although the annual gift tax exclusions of $13,000 are allowed for nonspousal gifts made by an NRA, they cannot be split between spouses.[17] Gift splitting is only allowed if both spouses are either U.S. citizens or RAs.

Strategies for minimizing gift taxes include the removal of tangible personal property from the U.S. If an NRA intends to gift property currently in the U.S., he or she should remove the property to a non-U.S. location before gifting. Additionally, to maintain the integrity of the transfer, the NRA should be careful not to bring the property back into the U.S. Another strategy is to convert tangible property into intangible property. Instead of gifting U.S.-situated cash, the NRA can deposit the funds in a U.S. bank account—which is intangible property—and then gift the bank account.

TABLE 1

Type of Property Transferred	Subject to U.S. Gift Tax	Subject to U.S. Estate Tax
Real property located in the U.S.	Yes	Yes
U.S. tangible personal property	Yes	Yes
Stock of U.S. corporations	No	Yes
Ownership interest in a U.S. life insurance policy on the life of another	No	Yes
Ownership interest in a U.S. life insurance policy on oneself	No	No

Estate Tax Rules for NRAs

An NRA is only subject to U.S. estate taxes on those assets that are determined to be situated in the U.S. at the time of his or her death. Although many of the *situs* rules are similar to rules that apply for gift taxes, in general, the estate tax *situs* rules are more complex and broader than the gift tax *situs* rules.

Taxation of Life Insurance Death Proceeds for NRAs

Table 1 outlines the U.S. gift and estate *situs* rules for NRAs.

NRAs are allowed a U.S. estate tax credit of $13,000, which is not indexed for inflation.[18] This credit shields the first $60,000 of the estate from estate taxes. NRAs do not get the credit for U.S. citizens or RAs, which in 2009 excludes $3.5 million from estate taxes. Because NRAs have very low lifetime credit amounts available, they may face substantial gift or estate tax liability on transfers of U.S. *situs* property. If an NRA owns significant U.S.-based property, a life insurance policy could provide liquidity needed to pay U.S. estate taxes. For U.S. estate taxes, the rates are the same for NRAs as those imposed on U.S. citizens and RAs.

Why Planning Is Important

Let's return to our original example of Maria, a Mexican citizen, but this time she is a resident of Mexico and is not considered an RA in the U.S. Maria owns $10 million in U.S. assets. If she were to die in 2009, without any planning, here are the estate tax consequences:

Gross estate taxes	($4,380,800)
Less credit	$13,000
Net estate taxes	($4,367,800)
Net U.S. assets	$5,632,200
Estate shrinkage	43.68%

Maria's estate is reduced by almost 44% of its U.S. value due to federal estate taxes. Maria's heirs may be forced to liquidate assets at "fire sale" prices in order to provide liquidity to pay the estate taxes.

To minimize estate taxes for these assets, the NRA can employ a gifting strategy that would allow such assets to be removed from the estate without incurring U.S. gift taxes. For example, if an NRA owns shares in a U.S. corporation, he or she can gift them without incurring any gift taxes and effectively remove the share from his or her taxable estate. If the NRA were to die while still owning the shares, they would be included in his or her estate and subject to federal estate taxes.

Many NRAs are unwilling to make gifts of significant amounts of U.S.-based assets to their heirs. In such family circumstances, life insurance can provide an alternative. Life insurance death benefits on the life of an NRA are not U.S. situs property, and, therefore, not included in the NRA's gross estate.[19] This is the case even if the insured NRA is the policy owner. In most situations, the NRA will not own the policy and will likely use a trust established for the benefit of the NRA's heirs. Just as with U.S. citizens, the death proceeds would also be received income tax free by the trust or other named beneficiaries.

Summary

Most foreign nationals are not aware of or do not consider the ramifications of gift and estate taxes, which can be considerable. However, taxes can be reduced, often dramatically, through careful gift planning during an individual's lifetime and through establishing a QDOT or testamentary trust as individual situations dictate, thus delaying and often reducing estate tax impact. Liquidity for remaining estate taxes is needed and often can be met through the placement of life insurance in a U.S.-based trust. ■

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(1) Internal Revenue Service, http://www.irs.gov/businesses/small/article/0,,id=186064,00.html.
(2) R.A. Prince, E.A. Renn, and V.E. Sanborn, "Clueless," *Trusts & Estates* (December 2003): 74.
(3) IRC §7701 (b)(3)(A).
(4) Treas. Reg. Sec. 20.0-1(b)(1); Treas. Reg. Sec. 25.2501-1(b).
(5) See, e.g., *Rodiek v. Comm'r,* 33 BTA 1020 (1936), aff'd, 87 F2d 328 (2d Cir. 1937).
(6) The requirement to file the Foreign Bank Account Report to the Treasury Department by individuals with accounts in foreign countries and the expanded information reporting requirements of banking institutions as a result of the Patriot Act have made significant inroads into the ability of individuals to shield foreign assets from the knowledge of U.S. authorities.
(7) IRS Sec. 2040(b).
(8) IRS Sec. 2056(d)(1)(B).
(9) IRC Sec. 2033.
(10) IRC Sec. 2056(d)(1).
(11) IRC Sec. 2523(i)(2).
(12) Rev. Proc. 2008-66.
(13) IRC Sec. 2513(a)(1).
(14) IRC Sec. 2056(a)(3).
(15) Treas. Reg. Sec. 20.2056A-2(d)(1).
(16) IRC Sec. 2501(a)(2).
(17) IRC Sec. 2503(b); 2513(a)(1).
(18) IRC Sec. 2102(b)(1).
(19) IRC Sec. 2105(a); Treas. Reg. Sec. 20.2105-1(g).

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