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Estate Planning for Nonresident Aliens with Property in the United States

By
Erica A. Ferranti
Attorney at Law

You have a client who is a nonresident alien but who owns property in the United States. What are the things you should make your client aware of for the purposes of estate and tax planning?

If an individual has property situsued in the United States, first and foremost they should have a Will. There is such a thing as an International Will, which is authorized under the Uniform International Will Act. The U.S. is a signatory to the act but each State must ratify it. Currently, North Carolina has not ratified the Uniform International Will Act. The best option for a nonresident alien is to have two Wills, one in the foreign jurisdiction and one in the U.S. However, the Wills must be carefully drafted so that one does not revoke the other. Common language in Wills is something along the lines of "I hereby revoke any and all previous Wills and Codicils." If there is language like that in the two Wills executed by the nonresident alien, one of the Wills would be revoked (the one that is executed first). If two Wills are executed, each Will should only apply to the property in the country the Will is executed in. A nonresident alien could also execute a Will in the country in which he or she resides and then rely on the North Carolina General Statutes §31-46 which states that in North Carolina, "A Will is valid if it meets the requirements of the applicable provisions of law in effect in this State either at the time of its execution or at the time of the death of the testator, or (i) **its execution complies with the law of the place where it is executed at the time of execution**; (ii) its execution complies with the law of the place where the testator is domiciled at the time of execution or at the time of death; or (iii) it is a military testamentary instrument executed in accordance with the provisions of 10 U.S.C. § 1044d or any successor or replacement statute." The Will, at the time of its execution, must comply with the laws of the place where it is executed when it is executed in order to be accepted into probate here in North Carolina. The Executor must submit a copy of the foreign Will certified by an ambassador, minister, consul, or commercial agent of the United States under his/her official seal. The Executor would also probably have to provide a copy of the foreign statute stating what the requirements for a valid Will are in the foreign jurisdiction.

Does your nonresident alien client have to pay U.S. income tax?

There is a bright line test for income taxes. If an individual is a U.S. citizen or permanent resident or meets the substantial presence test, that individual must file U.S. income tax returns for all the property he or she owns worldwide. The substantial presence test is as follows:

A person will be considered a United States resident for tax purposes if you meet the substantial presence test for the calendar year. To meet this test, you must be physically present in the U.S. on at least:

1. 31 days during the current year, and
2. 183 days during the 3-year period that includes the current year and the 2 years immediately before that,

counting:

- All the days you were present in the current year, and
- 1/3 of the days you were present in the first year before the current year, and
- 1/6 of the days you were present in the second year before the current year.

An individual is a nonresident alien if he or she is not a U.S. citizen or green card holder, or does not pass the substantial presence test. If an individual is a nonresident alien engaged in a trade or business that individual must file a return and report only his or her U.S. source income. U.S. source income is income that is effectively connected with a trade or business or U.S. source income that is fixed, determinable, annual, or periodical. The bright line tests for income taxes makes it straight forward to determine if a nonresident alien should file a Federal income tax return or not.

Will your nonresident alien client be subject to gift and estate tax?

How the estate and gift taxes effects your nonresident alien client depends upon whether your client is considered to be domiciled in the U.S. This is different than residence. An individual can be U.S. domiciled for estate tax purposes but not be a resident for income tax purposes. Once domicile is established, your client keeps the U.S. domicile until your client establishes a different domicile elsewhere. Simply leaving the U.S. is not enough to establish domicile elsewhere. An individual can also be domiciled in two or more countries and be subject to estate and gift tax in more than one country. The test to determine if a nonresident alien is domiciled in the U.S. and is subject to estate and gift taxes is a facts and circumstances test. This means the IRS looks at all the facts and circumstances and the test very subjective. Some of the things the IRS will look at includes, **but is not limited to**:

•Statement of intent
•Type of visa
•Number of days spent in the U.S.
•Comparative size of residence in the U.S. and abroad
•Location of family members
•Length of U.S. residence
•Green card status
•Style of living in the U.S. and abroad
•Ties to former country
•Country of citizenship
•Location of business interests
•Places where club and church affiliations, voting registration, and driver licenses are maintained

If the IRS determines that your client is domiciled in the U.S. for estate and gift tax purposes, then your client will be taxed on their worldwide assets at death in the same manner as U.S. citizens and are entitled to the entire unified estate and gift tax exemption of $11.2 million per person with up to a 40% tax rate and the $15,000.00 annual gift tax exemption.

If the nonresident alien is determined to not be domiciled in the U.S. for estate and gift tax purposes they will be subject to estate and gift tax only on the U.S. situated assets with up to a 40% tax rate. U.S. situated assets include American real estate, tangible personal property, and securities of U.S. companies. Assets not included for estate tax purposes include securities that generate portfolio interest, bank accounts not used in connection with a trade or business, and insurance proceeds. The Executor for the nonresident non-domiciled alien must file an estate tax return form 706NA if the fair market value at the date of the decedent's death the U.S. situated assets exceed $60,000.00 and estate tax will be due on any amount exceeding $60,000.00.

If your client is from a jurisdiction that has a tax treaty with the U.S. that addresses estate taxes, then that treaty will supersede U.S. determination of domicile.