

PLANNING FOR INTERNATIONAL CLIENTS WITH REAL PROPERTY IN COLORADO

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Agenda

- Definition of U.S. Citizen
- Snapshot of Transfer Tax Rules for Non-U.S. Citizens
- Determining Residency
- Determining Property Situs
- A Quick Discussion on Treaties
- Planning Opportunities

Definition of U.S. Citizen

- U.S. Citizen
 - Every person born or naturalized in the United States and subject to its jurisdiction.
 - Includes dual citizens
 - Excludes individuals who acquired U.S. citizenship solely by reason of (1) being a citizen of a U.S. possession, or (2) being born or residing within a U.S. possession
- USRNC- Means a person who is a U.S. Resident but not a U.S. Citizen
- NRNC- Means a person who is neither a U.S. Resident nor a U.S. Citizen

Estate Tax Rules for Non-U.S. Citizens

USRNC	NRNC
Gross estate includes worldwide property	Gross estate only includes U.S.-situs property
Current exemption of \$11.18 million	Current exemption of \$60,000
Credit allowed for foreign taxes	No credit allowed for foreign taxes
Form 706	Form 706-NA
Form 8971 includes worldwide property	Form 8971 only for U.S.-situs property
Same Filing Deadlines	
Same Rate Tables	
Income Tax Basis Step-Up Applies	

Gift Tax Rules for Non-US Citizens

USRNC	NRNC
Gift tax imposed on worldwide gifts	Gift tax imposed on gifts of U.S.-situs tangible personal property and real property
Unlimited Marital Deduction to Citizen Spouses	\$152,000 Annual Exclusion for gifts to non-U.S. citizen spouses
Generally, no reporting requirement for donee	Donees are subject to reporting rules under IRC § 6039F

Annual Exclusion
 Exclusion for Direct Payment of Medical and Educational Expenses
 Taxable gifts reported on Form 709
 Same Rate Table
 Income Tax Carryover Basis

Reporting of Gifts or Bequests Received

- Gifts
 - Donee must report gifts received from a foreign entity totaling more than \$15,000 in a taxable year.
 - Donee must report gifts received from an NRNC totaling more than **\$152,000*** in a taxable year.
- Bequests
 - Executor or if none “any person in actual or constructive possession of any property of decedent” must file 706-NA and is liable for the payment of Estate Tax.
 - Transfer Certificate- Relieves a person or entity in actual or constructive possession of property from liability for taxes and penalties so long as the transfer occurs after the person receives the Transfer Certificate.

*Slides in packet have \$100,000, this is the pre-adjusted for inflation number.

Determining Residency

- Single most important task for non-U.S. Citizens
- Income Tax Residence \neq Transfer Tax Residence

Determining Residency-Income Tax Residence

- Income Tax Residence
 - Green Card Holder or another lawful permanent resident who is present in the U.S. for at least one day of a calendar year;
 - Presence in U.S. for 183 days in one calendar year; or
 - Presence in U.S. for at least 31 days in one calendar year and presence in U.S. for an average of more than 121 days per year over current year and the two prior years.
 - If Present for 120 days or less a year, foreigner escapes U.S. Income Tax Residence
 - An individual who is present in the U.S. for fewer than 183 days in a calendar year, but whose three year average is greater than 121 days, can avoid U.S. residence by demonstrating a “closer connection” to a foreign county.

Determining Residency-Transfer Tax Residence

Transfer Tax Residence requires physical presence and the intention to remain indefinitely.

Determining Residence-Intention (Statements Made)

Fifth Ave. Bank of New York, Comm’r., 36 B.T.A. 534 (1937)

- Decedent, a U.S. citizen, was born in New York and frequently traveled back and forth between the U.S. and France. In 1920, the decedent returned to France and lived there until her death in 1932. The reason decedent remained in France was to seek medical advice and to help her cousin who was experiencing marital difficulties.
- Decedent often stated to her cousin that she intended to return to the U.S. when she regained her health and her cousin’s problems were resolved. Whenever decedent renewed her passports, she stated her reason to travel abroad to be “temporary residence and travel”. However, in later renewals she stated that her foreign stay was “indefinite”. Decedent always stated her domicile as the U.S. and she paid U.S. taxes until her death.

Determining Residence-Intention (Statements Made)

Fifth Ave. Bank of New York, Comm'r., 36 B.T.A. 534 (1937)

- ***Court- Decedent maintained U.S. Residency for Transfer Tax Purposes***
 - “Two facts must exist to effect a change over to a new domicile of choice, both residence in the new place and an intention to make the new residence a permanent home. There must be both the fact and intent.”
 - “[W]e believe there is substantial proof from decedent’s own statements in applications for passports, affidavits, and to her cousin that she regarded Paris as a temporary residence and that the purpose of her long sojourn away from New York City was for travel, health, and to be near relatives for a limited period only...The fact that decedent had sold her New York Home does not present an inconsistency. She was unmarried, lived alone, and possessed the means and desire to travel, at least until her health broke.”

Determining Residence-Intention (Actions Speak Louder than Words)

Estate of Julius Block-Sulzberger v. Comm’r, 6 T.C.M. 1201 (1947)

- The decedent was born in Switzerland and came to the U.S. in 1940 because he and his family feared the Germans might invade Switzerland. While in the U.S., the decedent maintained a home and significant business interests in Switzerland and remained active with Swiss charities and civic organizations.
- The decedent stated under oath in various documents, in visas, reentry permits, and tax returns that he was a U.S. resident. Despite these statements, the decedent wrote many letters containing statements that he was unhappy in the U.S. and ashamed that he left Switzerland and was impatient to return to Switzerland.

Determining Residence-Intention (Actions Speak Louder than Words)

Estate of Julius Block-Sulzberger v. Comm’r, 6 T.C.M. 1201 (1947)

- ***Court- Decedent was a Swiss Resident for Transfer Tax Purposes***
 - The problem was not whether or not the decedent obtained U.S. benefits by perjured statements, but whether he was a U.S. resident for estate tax purposes.
 - “[The decedent] never gave any indication, except [in the sworn statements] while he was in the United States, that he had any intention of giving up his home in Switzerland and making a new home in this country. He had no office or business here. He never took an interest in activities in this country similar to those which had previously occupied his time and attention in Switzerland. He did not form any connections in the United States to compare in any way with those which he had established and had continued to maintain in Zurich”.

Determining Residence-Intention (Residence is Where Your Friends Are)

Estate of Paquette v. Comm’r, 46 T.C.M. 1400 (1983)

- The decedent was a Canadian citizen by birth. He operated businesses in Montreal and owned a primary residence and vacation home, both in Canada. Beginning in 1950 and up to the time of his death in 1975, the decedent made yearly “snowbird” vacation trips to Florida.
- In 1955, the decedent retired and sold his businesses. In 1956, the decedent sold his primary residence and shortly thereafter purchased a house in Florida, which was furnished with the contents of the residence he sold in Canada. In 1971, the decedent’s wife became ill in Florida and was not able to accompany the decedent when he returned to Canada for the summer. In the fall of 1971, the decedent sold his Canadian vacation home because it required too much work to maintain and he intended to buy or rent a small home in Montreal.
- In 1972, the decedent began to experience a series of illnesses and was hospitalized and treated in Florida. However, he continued to return to Canada to meet with his professional advisors and friends. In 1974, the decedent executed his Last Will and Testament in Montreal and stated therein that he was a resident of Canada. He returned to Florida in November 1974 and remained there until he died in January 1975.

Determining Residence-Intention (Residence is Where Your Contacts Are)

Estate of Paquette v. Comm’r, 46 T.C.M. 1400 (1983)

- ***Court- Decedent was a Canadian Resident for Transfer Tax Purposes***
 - “In addition to his yearly visits to Canada, decedent maintained numerous contacts with his country of citizenship which evidenced his intention to retain his Canadian domicile...he filed income tax returns in Canada, he voted in Canada, and he maintained a valid Canadian driver’s license as well as a valid Canadian passport”.
 - “Moreover it is not without significance that most of the decedent’s assets...were located in Canada. He met with [his investment advisors] regularly in Canada concerning his investments [which consisted of deposits in Canadian banks and stocks and bonds of Canadian corporations”.
 - “Decedent maintained many contacts with his native country, and followed a 25-year old practice of spending winters in Florida”.

Determining Residence-Intention (Green Cards and Visas)

Estate of Barkat A. Khan v. Comm’r, T.C. Memo 1998-22

- The decedent, a Pakistani citizen, obtained an immigration long-term permanent resident alien green card and a social security number in part to help preserve certain U.S. subsidies. The decedent lived in the United States from 1971 through 1974 and again from 1985 through 1986. Most of decedent’s business and property interests were located in the U.S. After 1986 the decedent returned to Pakistan, where he died in 1991.
- The decedent returned to Pakistan in 1986 (purchased a one-way ticket) to visit with family and to formalize an agreement to divide family property. The decedent’s health declined and he was not able to leave Pakistan.
- Although the 1986 through 1990 U.S. Individual Income Tax Returns for the decedent were filed as nonresident Forms 1040NR, amended Forms 1040 were filed subsequent to decedent’s death.

Determining Residence-Intention (Green Cards and Visas)

Estate of Barkat A. Khan v. Comm’r, T.C. Memo 1998-22

- ***Court- Decedent was a U.S. Resident for Transfer Tax Purposes***
 - The place of birth is one’s first domicile/residence. In order for residence to change there must be the intention to remain indefinitely and actual removal.
 - The Court first determined that the decedent’s original domicile changed to the U.S.
 - The Court next had to determine whether the decedent reestablished Pakistani residence when he returned to Pakistan in 1986. The Court determined he did not reestablish Pakistani residence.
 - “No one, except the individual knows or can know with absolute certainty whether, in fact, he chooses to abandon his domicile and adopt a new one. ‘We can only have a belief of varying degrees of certainty, after considering that person’s declarations, conduct, character, temperament, etc.’” *Bank of New York & Trust Co. v. Comm’r, 21 B.T.A. at 203.*

Determining Residence-Intention (Green Cards and Visas)

Estate of Jack v. Comm’r, 54 Fed. Cl. 590 (2002)

- Decedent was a Canadian citizen employed in the U.S. on the date of his death, having been admitted to the U.S. under a non-immigration, temporary professional classification.
- The Court granted summary judgment holding that for Federal estate tax purposes a Canadian citizen employed in the U.S. on the date of his death, who was admitted to the U.S. under non-immigrant, temporary professional classification, was legally capable of forming an intent to be domiciled in the United States notwithstanding that intent to establish domicile may be in direct violation of the terms of the visa.

Determining Residence-Intention (Legal Status is Irrelevant)

Rev. Rul. 80—209, 1980-2 C.B. 2480

- The requirements for acquiring a domicile are (1) legal capacity to do so; (2) physical presence; and (3) a current intention to make a home in the place.
- “Legal capacity to acquire domicile of choice has been found to exist even when people are subject to transfer to another domicile at the direction of others. Therefore, the fact that the decedent was subject to deportation does not render the decedent legally incapable of acquiring a domicile.”

Determining Residence-Factors

- ***Domicile of origin.*** Remember once domicile is established that local is the presumed domicile.
- ***The amount of time spent by the Non-Citizen in the U.S.*** Compare with the time spent in other countries, and the frequency of travel both between the U.S. and other countries and between places abroad. A period of extended physical presence in the U.S. alone will not suffice to establish U.S. domicile.
- ***The Dwellings of the Non-Citizen.*** The size, cost and nature of dwellings, and whether those places were owned or rented by the non-citizen. For example, in *Estate of Fokker*, 10 T.C. 1225 (1948), the decedent maintained a large home in New York and a smaller home in Switzerland. The Tax Court found the decedent to be a U.S. resident after comparing the size of the houses and their localities. Particular emphasis was placed on the fact that the location of the Swiss home (in St. Moritz) constituted a resolute, pleasure oriented community with international appeal.
- ***Location of Non-Citizen's Personal Possessions.*** Focus is on the location of expensive and cherished personal possessions of the decedent. See, *Farmers' Loan & Trust Co. v. U.S.*, 60 F.2d 618 (S.D.N.Y. 1932).
- ***Location of Non-Citizen's Family and Friends.*** See, *Estate of Nienhuys*, 17 T.C. 1149 (1952); *Estate of Khan*.

Determining Residence-Factors

- **Location of Community Affiliations.** The places where the non-citizen has maintained and participated in civic leagues, churches, clubs, etc. See, *Estate of Nienhuys; Farmers' Loan & Trust Co.*; and *Estate of Block-Sulzberger*.
- **Location of Business Interests.** See, *Estate of Fokker*; and *Estate of Block-Sulzberger*.
- **Location of Professional Advisors.** Are the non-citizen's trusted advisors located in the U.S. or abroad? See, *Estate of Paquette*.
- **Tax Returns.** Where does the non-citizen file tax returns? See, *Estate of Paquette* and *Estate of Khan*.
- **Declarations of Residence.** Look for declarations of residence or intent made in visa applications for reentry permits, wills, deeds of gift, trust instruments, letters, and oral statements made by the decedent. See, *Bank of New York & Trust Co.*; *Fifth Ave. Bank of New York*; *Estate of Fokker*; *Estate of Bloch-Sulzberger*; *Estate of Paquette*.
- **Green Cards and Visas.** Issuance of green card or temporary visas are indicative of domicile but not controlling. See *Estate of Khan* and *Estate of Jack*.

Determining Residence-Hypothetical

Mr. Powers, a retired British citizen, purchased a house in Beaver Creek in 2000. From 2000-2010 he would stay in his BC house from December 1st through April 30th (150days) each year.

In 2011 Mr. Powers spent a couple of weeks in BC during July and realized the summers in the mountains are just as good, if not better, than the winters. From 2011 through his death, in January 2018, he spent his summers and winters in BC and spent the mud season back in England.

Mr. Powers' home in England was a small flat and his home in BC was 15,000 sq. ft. Mr. Powers maintained his British Passport and Drivers License. He had no business interests in England but operated a ski shop in BC. His children were born in England but moved to the U.S. for college, have obtained U.S. citizenship and live in Denver. Mr. Powers stated that he considers England his home as it was his place of birth and he signed his Will in England, which directs that he be buried in England.

Determining Property Situs

- Second most important task for NRNCs
- U.S. Transfer Taxes only apply to properties that are situated within the United States

Determining Property Situs- Estate Tax

Property	U.S. Situs	Foreign Situs	U.S. or Foreign
Land and Improvements	X		
Mortgages			X
Leases			X
Water Rights	X (in Colorado)		
Tangible Personal Property Located within the U.S. Property			X
Tangible Personal Property Located outside of the U.S.		X	
Tangible Personal Property on NRNC's person			X
Hard Currency in U.S.	X		
Currency in U.S. Bank Deposit (Not connected with U.S. Trade or Business)		X	

Determining Property Situs

Property	U.S. Situs	Foreign Situs	U.S. or Foreign
Stock in Domestic Corporation	X		
Stock in Foreign Corporation		X	
Debt Obligations and debtor is U.S. person, entity or government	X		
Debt Obligations and debtor is a foreign person, entity or government		X	
Other forms of intangible personal property			X (Depends on whether issued or enforceable against a domestic or foreign person/entity)
Life Insurance on life of NRNC and owned by NRNC		X	

Determining Property Situs- Partnerships

- The Partnership Conundrum
 - An interest held by NRNC in a foreign partnership is foreign situs so long as it:
 - Holds no U.S. property; and
 - Conducts no business within the U.S.
 - But what about a domestic partnership or a foreign partnership that holds U.S. Property and/or conducts business within the U.S.?

Determining Property Situs- Partnerships

- The Partnership Conundrum
 - Partnership interests should fall within the definition of “intangible property”. See *Blodgett v. Silberman*, 277 U.S. 1 (1928).
 - Rev. Rul. 55-701, 1955-2 C.B. 836
 - Ruling concerning the situs of an interest in a partnership conducting business in the United States, under the estate tax treaty between the U.S. and the United Kingdom.
 - IRS ruled that situs of a partnership interest is where the partnership is engaged in business.

Determining Property Situs- Partnerships

- The Problems with Rev. Rul. 55-701, 1955-2 C.B. 836
 - Issued 3 years prior to the issuance of Treasury Regulations discussing transfer tax treatment of intangible personal property.
 - Relied on *Blodgett v. Silberman* for the proposition that situs should not be the location of the partnership's assets.
 - *Silberman* stands for the proposition that situs of an interest in a partnership is the domicile of the owner of the interest under the maxim “mobilia sequuntur personam.”
 - Relied on a 1907 Australian case *Commissioner of Stamp Duties v. Salting* (1907), A.C. 499 for the proposition that situs of a partnership interest is determined by where the partnership is engaged in business.

Determining Property Situs- Disregarded Entities

- Beware of Single Member LLC's that are disregarded entities for federal tax purposes.
 - Owner of disregarded entity is deemed owner of the underlying assets.

Determining Property Situs- Beneficial Interests in Trusts and Estates

- Transfers with Retained Interests (IRC §§ 2035-2038)
 - Subject to inclusion in the NRNC's gross estate if the property transferred was within the U.S. either when the property was transferred or at the time of the decedent's death.
 - This rule appears to apply even if the situs of the property changed because it was physically removed from the U.S., because it was reinvested in non-U.S.-situated assets, or because the rules determining the situs of the property changed in the interim.

Determining Property Situs- Beneficial Interests in Trusts and Estates

- Revocable Trusts and General Powers of Appointment
 - Trust is treated as a disregarded entity.
- Income Interest in Trusts
 - NRNC is deemed to own the amount of accumulated and undistributed income. Situs of the source income will determine the situs of the income interest.

Determining Property Situs- Hypotheticals

Mr. Powers, a retired British citizen, is domiciled in B.V.I.. Mr. Powers directly owns 45 acres of unimproved land that straddles the Eagle River. If Mr. Powers dies owning the land will the land be included in his gross estate for U.S. estate tax purposes?

Determining Property Situs- Hypotheticals

Mr. Powers decides to build a ranch house on the property. The house adds to the value of the land. Mr. Powers also decides to lease a condo in Denver so he can spend time in Denver with his girlfriend, Ms. Kensington. The lease is for a term of 10 years. If Mr. Powers dies, will the lease and the improvements on the real property be included in his gross estate for U.S. estate tax purposes?

Determining Property Situs- Hypotheticals

Mr. Powers goes on a shopping spree in Vail and buys furnishings for his new home, and a number of Gib Singleton sculptures which he intends to add on to his comprehensive Singleton art collection. On the same day, Mr. Powers checks on his banking affairs at Alpine Bank. He has some Swiss francs in a safety deposit box and some funds on deposit in a checking account. If Mr. Powers dies owning these items, which items will be included in his gross estate?

Determining Property Situs- Hypotheticals

Mr. Powers decides to bring some valuable collections he keeps in his B.V.I. home to his Colorado property in order to show the collections to his neighbors. His intention is to bring the items back to the B.V.I. with him when he returns in a couple of months. The collection is valued at \$1,000,000. If Mr. Powers dies before returning to B.V.I. will the collection be included in his gross estate?

Determining Property Situs- Hypotheticals

Mr. Powers signs a written contract with Eagle Flies, a Colorado for-profit corporation, allowing it to take some drone video of his property for the company's marketing materials in exchange for a total fee of \$10,000, so long as Eagle Flies used the video, in its sole discretion, in the marketing campaign.

Mr. Powers signs a similar contract with a Mexican Travel Agency that is a Mexico for-profit corporation. If Mr. Powers dies a party to each contract, will one or both of the contracts be included in his gross estate?

Determining Property Situs- Hypotheticals

Mr. Powers purchases stock in Vail Resorts Inc., a domestic corporation, stock in British Airways, a U.K. corporation, shares in a mutual fund issued by a Canadian corporation that invests in large Cap U.S. Stock, and shares in a mutual fund issued by a U.S. corporation that invests in emerging international stocks. If Mr. Powers dies owning these assets will any of the assets be included in his gross estate?

Determining Property Situs- Hypotheticals

Mr. Powers wishes to purchase a universal life insurance policy from Any Insurance Company which insures the life of Ms. Kensington. Mr. Powers dies and the cash value of the policy is \$500,000. Is the value included in his gross estate?

Mr. Powers wishes to purchase an annuity from Any Insurance Company. Mr. Powers dies. Is the annuity included in his gross estate?

Determining Property Situs- Hypotheticals

Mr. Powers' Colorado attorney attended today's presentation and suggested that Mr. Powers transfer his Colorado real property to an irrevocable foreign trust established by Mr. Powers, in which Mr. Powers retained an income interest for life and the power to appoint the remainder amongst his descendants. Two years later, the trust sold the land and used the proceeds to buy stock in foreign corporations. Mr. Powers dies ten years later. Is the property in the trust included in Mr. Power's gross estate for U.S. estate tax purposes?

A Quick Discussion on Treaties

Estate and Gift Tax Treaties provide rules that override the Internal Revenue Code and determine:

1. Who is classified as a resident of each of the signatory countries;
2. What property can be included in the gross estate by the country;
3. What exemptions, deductions, and credits are available to the estate of an NRNC;
4. What foreign tax credits are available; and
5. What information will be exchanged by the signatory governments.

A Quick Discussion on Treaties

- Treaty Types

- *Situs-Type*: Designed to avoid double estate tax by allocating primary taxing jurisdiction to the treaty country in which particular property is situated.

- *Domicile-Type*: Designed to avoid double estate tax by allocating exclusive taxing jurisdiction to the treaty country of domicile.

A Quick Discussion on Treaties

Estate and Gift Tax Treaties	Gift Tax Treaties
Australia (ST)	Finland (ST)
Austria (DT)	Greece (ST)
Denmark (DT)	Ireland (ST)
France (DT)	Italy (ST)
Germany (DT)	Netherlands (DT)
Japan (ST)	South Africa (ST)
United Kingdom (DT)	Switzerland (ST)

Planning Opportunities

- A few Investment Alternatives
 - NRNC directly owns USRPI
 - Foreign Company owns USRPI
 - Foreign Company owns U.S. Company which owns USRPI
 - U.S. Company owns USRPI
 - LLC owns USRPI
 - Partnership owns USRPI
 - Irrevocable Trust owns USRPI

Planning Opportunities

- NRNC directly owns USRPI
 - U.S. Estate Tax Issues
 - FIRPTA Withholding
 - Probate issues

TAXABLE ESTATE	RATE
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\$0 – \$10,000	18%
\$10,001 – \$20,000	20%
\$20,001 – \$40,000	22%
\$40,001 – \$60,000	24%
\$60,001 – \$80,000	26%
\$80,001 – \$100,000	28%
\$100,001 – \$150,000	30%
\$150,001 – \$250,000	32%
\$250,001 – \$500,000	34%
\$500,001 – \$750,000	37%
\$750,001 – \$1,000,000	39%
\$1,000,001 +	40%

Planning Opportunities

- Foreign Company owns USRPI
 - Potential U.S. Estate Tax savings

Planning Opportunities

- Foreign Company owns U.S. Company which owns USRPI
 - Potential U.S. Estate Tax savings
 - Potential avoidance of FIRPTA withholding

Planning Opportunities

- U.S. Company owns USRPI
 - Potential avoidance of FIRPTA withholding
 - Can gift U.S. Company shares

Planning Opportunities

- LLC owns USRPI
 - Similar issues to NRNC owning the USRPI directly
 - Potential for some creditor protection

Planning Opportunities

- Irrevocable Trust owns USRPI
 - Probate avoidance upon death of NRNC
 - Remember gifting issues associated with gifts of USRPI

Planning Opportunities- Hypotheticals

- Property currently owned in the name of a NRNC or a single-member LLC
 - Can this be fixed?
 - If so, how?

Planning Opportunities- Hypotheticals

- New property acquisition
 - What steps to take?
 - Various questions that need to be asked and answered?