International Estate Planning: Substance, Procedure, and Professional Responsibility

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1. Overview

International estate planning is no longer the domain of professionals who specialize solely in that area! In today's world, these issues can arise for any lawyer whose practice is sophisticated and whose clients are high net worth:

> *U.S. citizens and residents* with property or loved ones in other jurisdictions, *or who are beneficiaries of foreign estates or trusts and/or expect gifts or inheritances from non-U.S. persons in the future*
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> *U.S. citizens residing* in other jurisdictions (including dual citizens)
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> *U.S. "nonresident aliens"* ("NRAs") with property or loved ones in the U.S.

This paper will discuss the important rules and principles for handling these kinds of matters.

> **Professional Responsibility Point:** Lawyer is asked to represent a client who is a high net worth U.S. citizen with significant real estate holdings in Germany and interests in German partnerships. The client wants to leave most of his wealth to his U.S. citizen descendants, but in long-term trusts to the extent of his GST exemption, and age-35 trusts for assets which are not GST exempt. Should Lawyer involve German counsel in the matter?
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> > Definitely! See in particular "Non-Tax Considerations" below.
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> Should Lawyer involve another U.S. lawyer with more knowledge and/or experience in international estate planning matters?
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> > It depends on the scope of Lawyer's expertise and experience. As explained in this paper, this particular example is not particularly complex from a U.S. tax perspective (the main issue being foreign death tax credits). But when in doubt, ask for help!

2. "Worldwide" or "Situs" Taxation

Under U.S. tax laws, there are two general regimes for international taxpayers:

Persons who are U.S. citizens and/or residents ("U.S. persons") – worldwide taxation

These individuals are subject to U.S. gift, estate, and GST tax on a "worldwide" basis. If U.S. tax is imposed with respect to property that is also subject to tax in another jurisdiction, a foreign tax credit against U.S. tax may be allowed under the Code or a treaty. These individuals also get a "full" estate and gift tax exemption (more thab $13 million in 2024, or more than $27 million for a married couple

combined) and a "full" GST exemption (also more than $13 million in 2024 or more than $27 million for a married couple combined). Estate and gift tax exemption which has not been fully utilized at death is "portable" to a surviving spouse if so elected on Part 6 of the deceased spouse's estate tax return (Form 706), but GST exemption is not portable.

Basis step-up at death: regular rules of I.R.C. § 1014 apply.

Limited treaty benefits: in most cases, the U.S. tax payable by these individuals will not be reduced by reason of treaty benefits, because of the treaty's "savings clause." (For this kind of taxpayer, if a treaty applies, it will usually decrease the tax payable in the *other* jurisdiction – and correspondingly the foreign tax credit that may otherwise have applied.) Possible exceptions to this general statement include (1) treaty benefits for gifts or bequests to foreign charities,[1] (2) foreign social security and/or pension benefits, (3) enhanced marital deduction for non-citizen spouse, (4) special foreign tax credits, and (4) "mutual agreement/competent authority" proceedings. *See, e.g.*, Article 11(1), U.S.-Germany Estate Tax Treaty.

Persons who are not U.S. citizens or residents ("NRAs") – situs taxation

These individuals are subject to U.S. gift, estate, and GST tax only on "U.S. situs" property. Moreover, these individuals are not subject to U.S. *gift tax* on *lifetime* gifts of "intangible" property, even if that property has U.S. situs. I.R.C. § 2501(a)(2).[2] These individuals aren't allowed foreign tax credits because they're only subject to tax on U.S. situs property. They only get a very small estate tax exemption ($13,000 protecting $60,000 of value) unless a treaty provides for a pro-rated exemption. I.R.C. § 2102(b).[3] (These individuals get no gift tax exemption at all, and if they previously used gift tax exemption when they were formerly U.S. citizens or residents, their $13,000 estate tax credit is reduced by the amount used.)

Basis step-up at death: Many of the section 1014 basis step-up rules, including for probate property described in section 1014(b)(1), apply regardless of whether the property has been subject to U.S. estate tax. But the regulations under section 1014(b)(9) provide that *non-*

[1]Unlike the *income tax* charitable deduction, gifts and bequests to foreign charities, or to be used exclusively for charitable purposes outside the United States, can qualify for the estate and gift tax charitable deduction. I.R.C. §§ 2522, 2055; Rev. Rul. 74-523, 1974-2 C.B. 304. But many treaties nonetheless include a provision confirming this point for bequests to charities in the other treaty jurisdiction.

[2]Before the mark-to-market exit tax of I.R.C. 877A was enacted in 2008, the intangibles exclusion did not apply to certain former citizens and long-term green cards for ten years after expatriation, and a number of other special rules applied during this ten-year period. Under current law, expatriates who are subject to the exit tax aren't subject to these special rules under prior law, e.g., they can still make gifts of intangible property without being subject to U.S. gift tax. I.R.C. § 877(h). But the same law that enacted the exit tax also extended U.S. estate and gift tax to gifts and bequests that U.S. citizens or residents *receive* from a "covered expatriate" as defined in the exit tax rules. I.R.C. § 2801. (The application of treaty rules to the section 2801 tax is unclear.) Because of time limitations, this presentation won't spend a lot of time on expatriation or the exit tax rules.

[3]NRA residents of possessions get a pro-rated $175,000 exemption if more than $60,000. I.R.C. § 2102(b)(2); Treas. Reg. § 20.2102-1(c)(3).

probate property described in that paragraph does not get a basis step-up if the property is acquired from an NRA decedent and is not U.S. situs property. Treas. Reg. § 1.1014-2(b)(2).[4]

Expansive treaty benefits: NRAs aren't subject to the savings clause, except that some treaties entered into before 2008, when the former 10-year rules that applied to former citizens and long-term green card holders were replaced with the mark-to-market exit tax, apply the savings clause to those individuals for ten years. *See, e.g.*, Article 1(4), U.S.-France Estate Tax Treaty; *see note supra*.

Deductions: Deductions under sections 2053 and 2054, including administrative expenses, debts, and uninsured casualty losses, must be pro-rated based on the proportion of the gross estate that is situated in the United States. I.R.C. § 2106; *but see* Treas. Reg. § 20.2053-7 (nonrecourse indebtedness may be deducted in full).[5] A similar rule applies to state death taxes now that they are deductible rather than creditable. I.R.C. § 2106(a)(4). Charitable bequests are deductible only if (1) to a U.S. corporation or association or to trustees for use within the United States and (2) funded with property included in the U.S. gross estate. I.R.C. § 2106(a)(2)(D); *Estate of Silver v. Commissioner*, 120 T.C. 430 (2003). A marital deduction may be allowed for property situated in the United States if not disallowed by the non-citizen spouse rules. I.R.C. § 2106(a)(3).

Procedural Point: to claim pro-rated deductions, or a pro-rated exemption under a treaty, all property included in the gross estate but situated outside the United States must be disclosed on the NRA's estate tax return. Treas. Reg. § 2106(b).

No foreign death tax credit (because an NRA's property situated outside the United States is not subject to U.S. estate tax).

> **Professional Responsibility Point.** U.S. tax advice for NRAs will almost always be provided by working in cooperation with the client's domestic lawyers and advisors. There may be limited contact with the actual client, particularly if there are language barriers. Many professional liability claims involve lawyers who deal with the client's "intermediaries" ("Go-Betweens"). Follow these general guidelines:
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> > Always analyze professional responsibility issues on the assumption that you are representing the client and not the Go-Between. Even if you document the matter as representing the Go-Between (such as the foreign law firm), since the Go-Between is the client's agent, you will probably be treated as having represented the client for purpose of professional liability claims.
> >
> > Always try to involve the client directly in the advice being provided unless language barriers or other considerations make this impossible. Provide your

[4]Is the regulation's interpretation of the statutory language, which refers to inclusion in the gross estate, correct? For example, under I.R.C. § 2106, such property is referred to as being included in the gross estate but situated outside the United States.

[5]The rule of pro-rating deductions also applied to former citizens and long-term green card holders who were subject to the special 10-year rules that were replaced with the mark-to-market exit tax in 2008. I.R.C. § 2107.

advice in writing and consider obtaining accurate translations of your most important written advice.

If the Go-Between is not a lawyer, be attentive to attorney-client privilege issues.

If the Go-Between will direct your work and/or be responsible for follow-up items, returns, and reports, communicate this directly to the client and explain any drawbacks you think are presented by the arrangement.

Many matters involve certain decisions that should only be made by the client. Establish ground rules at the outset.

Exercise extreme caution if it appears that the Go-Between may be providing dubious advice to the client. Even if the scope of your engagement is limited, some matters are best not accepted at all.

3. "Residency"

For estate, gift, and GST tax purposes, residency is determined by *domicile*; i.e., U.S. residency means domicile in one of the fifty states or the District of Columbia (*not* possessions). Treas. Reg. §20.0-1(b)(1), (2); *see, e.g., Pacquette v. Commissioner*, 22 T.C. 975 (1954). *The "days of presence" test in I.R.C. § 7701(b) that applies for determining U.S. income tax residency does not apply for estate, gift, and GST tax purposes.* It's not unusual for an individual to be subject to worldwide U.S. income tax based on days presence in the United States but still be an NRA for U.S. estate, gift, and GST tax purposes (e.g., E visa holder from non-treaty jurisdiction).

> **Professional Responsibility Point:** Technically the "green card automatic rule" of I.R.C. § 7701(b)(1)(i) that applies for determining *income tax* residency does not apply for estate, gift, and GST tax purposes, so theoretically an individual holding a green card on the date of death might not actually have been domiciled in the U.S. on that date. *Cf.* Rev. Rul. 80-209 (possible to acquire U.S. domicile while unlawfully living in the U.S. without a green card). In reality, the lawyer has a professional responsibility to advise the client (1) not to live in the United States unlawfully, (2) not to unlawfully obtain a green card by misrepresenting that the client intends to permanently reside in the United States, and (3) not to continue holding a green card that has actually been "abandoned" by no longer residing permanently in the United States. If the client follows that advice, in virtually all cases, green card holders should be considered domiciled in the United States, and non-citizens without green cards should not be.

4. Citizens of Possessions

An individual who is a U.S. citizen *solely* by reason of (1) being a citizen at time the possession became a possession, or (2) birth or residence in a possession, is treated as an NRA if domiciled in that same possession at the time of making a gift or on the date of death (as the case may be) – but of course such an individual might be subject to death taxes imposed by the possession in which domiciled. Otherwise, individuals who are U.S. citizens by reason of birth in a possession are taxed like other U.S. citizens.

I.R.C. §§ 2501(b), 2208, 2209; Treas. Reg. §§ 20.2208-1, 25.2501-1(c), 26.2663-2(b).[6] For example, an individual born in a possession but *also* having statutory U.S. citizenship based on a U.S. citizen parent from a state or the District of Columbia would be subject to worldwide U.S. estate tax based on citizenship – but in such a case any death taxes imposed by the possession on property situated in the possession would qualify for the foreign death tax credit.

5. "Situs" (non-treaty rules)

NRAs are subject to U.S. estate, gift, and GST tax on their "U.S. situs" property. The situs rules provided under the Internal Revenue Code and other U.S. internal law may be varied by an applicable treaty.

<u>Tangible</u> property (real estate and tangible personal property)

Directly held real estate located in the U.S. (i.e., fifty states and the District of Columbia, *not* possessions). Treas. Reg. § 20.2104-1(a)(1). (This rule is never overridden by treaty.) Mortgages and leases are generally *not* real property, but there may be exceptions (thousand-year lease; mortgage to secure nonrecourse debt in excess of value of encumbered property).

Directly held tangible personal property physically located in the U.S., except for certain artworks on loan for exhibition (see below). Treas. Reg. § 20.2104-1(a)(2). This rule should not apply to tangible personal property "in transit." *Delaney v. Murchie*, 177 F.2d 444 (1st Cir. 1949).

Cash and currency. Checks and wire transfers should *not* be treated as tangible personal property, and *should* be treated as intangible personal property for U.S. gift tax purposes.[7] It may be safer to deliver checks outside the U.S. or make wire transfers to the donee's foreign bank account, but should not be required.

> **Procedural Point:** if a wire transfer is made to the donee's foreign bank account and the done is a U.S. person, file FBAR and Form 8938.

The I.R.S. does appear to view *currency* (paper money or coins) as tangible personal property. Treas. Reg. §§ 20.2104-1(a)(7), 25.2511-3(b)(4); Rev. Rul. 55-143, 1955-1 C.B. 465. This is certainly correct as to *defunct* currency, but questionable as to currency in force. In the rare case of a gift of currency, make sure delivery is outside the U.S.

> **Professional Responsibility Point:** check applicable laws when transporting currency across borders.

Artworks on loan are non-U.S. situs for *estate tax* purposes if (1) in the U.S. solely for exhibition purposes, (2) loaned for that purpose to a nonprofit public gallery or museum, (3) on exhibition in the public gallery or museum, or en route to or from, at the time of death. I.R.C. § 2105(c), Treas. Reg. §§ 20.2104-1(a)(2), 20.2105-1(b).[8]

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[6]This rule does *not* apply for U.S. income tax purposes, but other income tax exclusions and benefits are provided to U.S. citizens who are bona fide residents of a possession.

[7]GCM 36860 (Sep. 24, 1976) reaches a contrary conclusion, but its reasoning is unpersuasive and its proposed revenue ruling was never published, indicating that the author's reasoning was rejected by the Commissioner.

[8]There's no similar rule for U.S. gift tax purposes, but a living donor can control the time of gift so that it doesn't happen while the artwork is in the U.S.

Diplomats are generally protected by diplomatic immunity if their U.S. property is reasonably necessary to their official mission. Rev. Rul. 53-187, 1953-2 C.B. 291; Rev. Rul. 56-52, 1956-1 C.B. 448.

Intangible property (usually subject to *estate tax* but not *gift tax* if the donor is an NRA)

Stock is U.S. situs if the company is incorporated in the United States, unless a treaty overrides this rule. *Exception:* look-through rules applied to RIC shares from 2004 to 2012. I.R.C. § 2105(d); CCA 20103013 (Jan. 22, 2010) (shares of foreign mutual funds treated as stock for these purposes even though organized as trusts under local law).

> **Professional Responsibility Point:** if a foreign corporation's business was formerly conducted by a U.S. corporation, consult with corporate tax counsel regarding foreign inversions under I.R.C. § 7874(b).

Debt obligations are U.S. situs if the obligor is a U.S. person or a U.S. federal, state, local, or D.C. governmental entity. I.R.C. § 2104(c); Treas. Reg. § 20.2104-1(a)(7), unless one of the following exceptions applies.

Deposits with a U.S. bank, S&L, or insurance company are non-U.S. situs if not effectively connected with a U.S. trade or business.[9] Deposits with a foreign branch of a U.S. corporation or partnership engaged in the commercial banking business are non-U.S. situs *even if* effectively connected with a U.S. trade or business. I.R.C. § 2105(b)(1), (2). This covers most conventional deposits but not fiduciary accounts managed by a bank and not currency in a bank's safe deposit box.

Portfolio indebtedness is treated as non-U.S. situs. I.R.C. § 2105(b)(3). "Portfolio indebtedness" means (1) in registered form, (2) not effectively connected with a U.S. trade or business, (3) not received by a "10% shareholder"[10] of the issuer applying constructive ownership rules, and (4) income is not contingent on receipts, sales, cash flow, income, profits, change in property value, or dividends or distributions of the debtor or a related person. "Registered form" means that the obligation is not in bearer form and can't be transferred without the knowledge of the issuer, i.e., must be transferred by surrender of the old instrument or through a book-entry system. (Certain bearer obligations issued before March 19, 2012 can also qualify as portfolio indebtedness if there are reasonable measures to prevent re-sale to U.S. persons and interest can only be paid outside the U.S. and its possessions.) I.R.C. § 871(h)(7); id. § 163(f); Treas. Reg. §§ 5f.163-1(a), 5f.103-1(c), (e), 1.871-14(c).[11]

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[9]Because section 2105(b)(1) refers to deposits that would not be subject to U.S. income tax under I.R.C. § 871(i)(3), is such a deposit non-U.S. situs property if the decedent is an NRA for estate tax purposes based on domicile but a resident alien for income tax purposes based on days of presence? A technical reading of the Code might suggest that such a deposit is subject to U.S. estate tax, but it does not appear that Congress intended this result. The same question arises with respect to portfolio indebtedness described below.

[10]Measured by voting power of a corporation or capital or profits interest of a partnership.

[11]If a debt obligation has no stated interest and is exempt from the OID rules, does it qualify as non-U.S. situs under section 2105(b)(3) if the other requirements are satisfied? One would think so from the words "would be" in section 2105(b)(3), but in 1993, the I.R.S. concluded that after Congress had exempted short-term debt obligations (183 days or less) from the OID rules in 1986 (I.R.C. § 871(g)(1)), they were no longer described in

Negotiability. A negotiable instrument is not in registered form, because it can be transferred by indorsement without the knowledge of the issuer. It could be many years after indorsement before the instrument is presented for payment, and even then, the indorsements on the instrument would only show the identities of the prior holders, not the periods for which they respectively held the instrument.

Active foreign businesses. For decedents dying before 2011, an obligation of a domestic corporation is non-U.S. situs if the corporation meets an 80% active foreign business requirement. I.R.C. § 2104(c) (pre-2011).

Life insurance proceeds. Proceeds of insurance on the decedent's life are non-U.S. situs. I.R.C. § 2105(a); Treas. Reg. § 20.2105-1(g). It's not clear whether the insurance policy must comply with I.R.C. § 7702, but most U.S. policies do comply with those rules, and foreign insurance policies are always non-U.S. situs. Annuity contracts are not insurance, but in a PLR the I.R.S. concluded that annuity proceeds are non-U.S. situs as amount on deposit with an insurance company. Priv. Ltr. Rul. 200842013 (June 13, 2008). *Note:* if the decedent owns an insurance policy on another person's life issued by a U.S. insurance company, the cash value of the policy at the time of death is U.S. situs (because it is not insurance on the decedent's life).

Other intangible property is governed by a "catch-all" rule: the intangible property is U.S. situs if enforceable against a U.S. person and written evidence of the obligation is not treated as the property itself. Treas. Reg. §§ 20.2104-1(a)(4), 20.2105-1(e). If the written evidence is treated as the property itself *and the decedent died before November 14, 1966*, its situs is determined the same as tangible personal property (where the written evidence is physically located at the time of death). Treas. Reg. §§ 20.2104-1(a)(3), 20.2105-1(c); Rev. Rul. 66-236, 1966-2 C.B. 442 (pre-1966 rule applied to convertible debentures even though convertible into stock when conversion had not been made at time of death). *Remember*: This rule only applies if the intangible is not covered by a more specific rule (for example, the treatment of debt obligations does not depend on whether the written evidence is treated as the property itself).

Special situations

Partnerships: no clear answer under Code; "look-through" under some treaties (but application of treaty rules is optional). *Cf.* Rev. Rul. 55-701, 1955-2 C.B. 836; *Blodgett v. Silberman*, 277 U.S. 1 (1928).

Interests in trusts or estates: look through to underlying assets. *Swan Estate v. Commissioner*, 247 F.2d 144 (2d Cir. 1957); Rev. Rul. 82-193, 1982-2 C.B. 219. But this rule does not apply to trusts which are treated as corporations (e.g., Massachusetts business trust). Rev. Rul. 55-163, 1955-1 C.B. 674.

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section 2105(b)(3). Tech. Adv. Mem. 9422001 (Feb. 16, 1993). Congress added section 2105(b)(4) in 1997 to make it clear that short-term OID obligations *do* qualify as non-U.S. situs property if not effectively connected with a U.S. trade or business. *See* Pub. L. 105-34 § 1304(a) and Conference Report. What is the current status of state and local bonds exempt from the OID rules under section 871(g)(2)? *Cf. Namik v. Wachovia*, 279 Ga. 250 , 612 S.E. 2d 270 (2005) (General Ali instructed the bank to invest in government securities; instead bank invested in money market funds which were subject to U.S. estate tax when General Ali died in 1990: would U.S. estate tax have been owed anyway if the government securities had been *short-term*?).

Disregarded entities: disregarded for all federal tax purposes. *But see Pierre v. Commissioner*, 133 T.C. 24 (2009).

Stock options and retirement plans. Stock options are probably general intangibles, and retirement plans are probably debt obligations. But because there is no clear guidance, it may be possible to take other positions.

Unincorporated businesses ("permanent establishments")*, including goodwill.* Some treaties specifically give the U.S. the right to tax this property, but there is no clear authority as to how the U.S. actually taxes this property. It would seem that situs is determined on an asset-by-asset basis, and that goodwill is a general intangible – but against whom is goodwill "enforceable"? A better approach would be that goodwill has situs where the business is located – but there is no authority for that conclusion.

Licenses: situs where the licensee is located.

Copyrights and other intellectual property: U.S. rights are U.S. situs, and non-U.S. rights are non-U.S. situs (probably). What about deferred compensation for services performed outside the U.S.?

Tort claims and other lawsuits: general intangible; U.S. situs if enforceable against U.S. person.

Professional responsibility point.

Example 1. Lawyer is retained by the estate of a famous deceased film star, who on his date of death held film "residuals," i.e, deferred compensation payable over and above his regular fee, over time based on a film's performance. Knowing that there is no clear rule for determining the situs of these residual rights, Lawyer asks the executor for a list of each film for which residuals are payable, showing the nationality of the company that made the film, the location where the film star's services were performed, and the nationality of the company responsible for paying the residuals on the date of death. The executor asks for a memo explaining how the situs of film residuals is determined under U.S. law, that he can review before providing the list. Can the Lawyer provide the memo?

> Not if the Lawyer expects that the executor will use the memo to falsify the list. VOELKER, J.D., ANATOMY OF A MURDER (1958) (Biegler's "Lecture" is clear violation of ABA Model Rule of Professional Conduct 1.2(d)). (In the film version, Paul Biegel is played by Jimmy Stewart, and the client and his wife are played by Ben Gazzara and Lee Remick.)

Example 2. Same as previous example except that Lawyer explains to the executor that, because the situs of the film residuals is unclear, he wants to see the list first in order to decide which legal theory is most favorable to the estate. Is Lawyer's conduct appropriate?

Yes, because Lawyer is not trying to falsify information but rather is trying to determine which legal theory is best for his client.

6. Foreign death tax credits

NRAs: no foreign death tax credit because only U.S. situs property is subject to tax.

No foreign gift tax credit under the Code. But a credit may be available under an applicable treaty (savings clauses do not apply to treaty credits).

U.S. citizens and residents: unless the President suspends for non-reciprocity, a U.S. citizen or resident gets a credit for foreign death taxes paid on non-U.S. situs property, determined under the rules discussed above. I.R.C. § 2014. (In other words, if another jurisdiction imposes a tax on property the U.S. considers to have U.S. situs under its internal law, the foreign tax is not creditable unless a treaty applies.) A capital gains tax triggered by death is not a death tax but a credit may be allowed by treaty. Rev. Rul. 82-82, 1982-1 C.B. 127; *Ballard Estate v. Commissioner*, 85 T.C. 300 (1985); *See* U.S.-Canada Income Tax Treaty, Article XXIB, ¶ 7.

The credit for foreign death tax paid to any country can't exceed the lesser of:

(1) the amount of such tax, multiplied by the ratio that (a) property situated in that country subject to that tax and included in the gross estate bears to (b) all property subject to that tax; or

(2) the amount of U.S. estate tax, multiplied by the ratio that (a) property situated in that country subject to that tax and included in the gross estate, reduced by the amount of such property that qualifies for the marital or charitable deduction, bears to (b) the entire gross estate, reduced by the marital and charitable deductions.

This can get complicated! *See* Treas. Reg. §§ 20.2014-1 – 20.2014-7.[12] But even in a simple situation, the results can be surprising.

Example: The gross estate includes $1 million of U.S. real estate and $1 million of foreign real estate (and no other assets), and the decedent used all of his estate and gift tax exemption during his life. The foreign county imposes foreign death tax of $200,000 on the foreign real estate but does not tax the U.S. real estate. The foreign death tax credit will be (1) $200,000 if the foreign real estate is specifically bequeathed to the son and the U.S. real estate to the wife, (2) zero if the foreign real estate is specifically bequeathed to the wife and the U.S. real estate to the son, and (1) $100,000 if the entire estate is bequeathed to the wife and son 50/50.[13] Treas. Reg. § 20.2014-3.

7. Additional Procedural and Other Considerations

[12]In some cases, an election can be made to *deduct* foreign death taxes instead of claiming them as a credit. The decrease in tax must inure solely to charity or must be equitably apportioned. I.R.C. § 2053(d).

[13]Unless the Will provides that the marital share will not be funded with property qualifying for the foreign death tax credit to the extent other assets are available, in which case the credit should be $200,000.

Foreign trusts. Because of time limitations, this presentation won't spend a lot of time on foreign trusts. But here are a few points to remember:

Foreign trusts created by U.S. persons will either be grantor trusts or result in gain recognition under I.R.C. § 684.

Foreign grantor trusts will be reportable by the grantor on Form 3520.

U.S. beneficiaries of foreign trusts will be subject to reporting on Form 3520 (generally when distributions are received) and Form 8938 (generally when the beneficiary knows about the trust).

When a U.S. beneficiary receives a distribution from a foreign nongrantor trust, Form 3520 is used to compute the "foreign trust throwback" tax on that distribution. The throwback rules are beyond the scope of this presentation! In general, avoid creating foreign nongrantor trusts for U.S. beneficiaries whenever possible.

U.S. recipients of foreign gifts and bequests are subject to reporting on Form 3520 (subject to a $100,000 threshold if received from an individual).

U.S. grantor trust rules cannot be applied to result in deemed foreign ownership (subject to limited exceptions in I.R.C. § 672(f)).

"FBAR reporting" applies to a broad range of persons with ownership interests and/or signature authority over foreign bank accounts.

Professional Responsibility Point. Who should assume responsibility for calendaring and/or preparing FBARs and Forms 3520 and 8938?

8. Non-tax considerations

In order for the client's tax planning to be carried out, his or her property needs to be distributed as intended! And as explained in this presentation, how the client's property is distributed, including how each beneficiary's share will be funded, can have significant tax implications. In a perfect world, the client would have <u>one</u> Will, which would be valid in both jurisdictions, and which would provide a single plan of disposition for all the client's property. What if this is not possible? Use the following checklist:

Is each property the client owns effectively disposed of by a valid dispositive instrument?

Is any item of property disposed of by *more than one* dispositive instrument with conflicting provisions?

Does any instrument dispose of property in a way that will not be recognized under applicable law (e.g., trusts)?

Example: The client's U.S. Will disposes of all U.S.-situs property as defined for U.S. estate tax purposes. The client's foreign Will disposes of the client's property with situs in Country X. At the time of the

client's death, he is domiciled in the U.S. and his only non-U.S. property is a bank account in Country X. Under the law of Country X, and the law of the state where the client is domiciled at death, the foreign bank account is part of the domiciliary probate estate in the U.S. and no probate proceedings in Country X are required or permitted. Unless the foreign Will is valid in the state of the client's domicile at death, the client has died intestate with respect to the foreign bank account.

Experienced estate planning attorneys can represent clients with international issues if they study the applicable rules and ask for help when they need it. Always involve foreign counsel!