Taxing Decisions

EB-5 Investor Visa and U.S. Tax Issues

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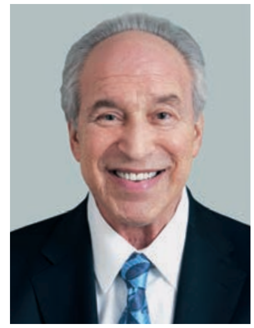
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On September 3, 2011, the Los Angeles Times published an article, *In U.S. Visa Program, Money Talks*. On September 6, 2012 the New York Times published *Visas-For Dollars Program—A Boon to Hotel Developers*. Over the past few years, EB-5 Investor Visas have gained in popularity and have received recognition as an excellent opportunity for foreign investors looking for freedom and flexibility to live and work in the United States. The EB-5 Program allows investors and their families to become permanent residents in a relatively short period of time.

The Immigrant Investor (EB-5) Program was established in 1990 and is administered by the U.S. Citizenship & Immigration Services ("USCIS"). The EB-5 program encourages foreign investors to invest their way to living in the U.S.A. On September 28, 2012 President Obama signed S.3245, extending the EB-5 Regional Center Program for an additional three years until September 30, 2015.

There are 10,000 EB-5 green cards available every year, and historically the program has been underutilized. In 2011 only 3,463 were issued and last year, in excess of 6,200 immigrants got their green cards via EB-5. For 2013, Charles Oppenheim, Chief of the Visa Control and Reporting Division at the U.S. Department of State has predicted an increase in use for EB-5 with a 120 percent increase compared to last year, with 80 percent of the allocated numbers going to Chinese nationals. This and other trends indicate that 2013 will be a record-breaking year for the EB-5 program resulting in over $2 billion in investment and creating over 40,000 U.S. jobs. There are two EB-5 programs, the Regular program and the Regional Center program

The Regular Program And History Of EB-5

In order for an applicant to qualify under the initial or regular program, the following three basic requirements must be met:

- Investment in a new commercial enterprise;
- Investment of at least $1 million (or $500,000 in certain cases) into the business; and
- Creation of employment for at least 10 fulltime U.S. workers.

For the first two years, the program was only set up for those who were willing to invest and create their own business that would produce at least ten jobs. However, in 1993, the government began to designate certain businesses as regional centers: they were primarily businesses that were started or expanded usually in a Targeted Employment Area ("TEA"), an area where the unemployment rate exceeded the national average by 150 percent or the rural population is less than 20,000. These regional centers fit within the $500,000 investment designation and were duly ap-proved by the USCIS.

Between 1993 and 1998, several companies were designated as regional centers. These companies all competed for foreign capital from the foreign investors involved in the EB-5 Visa program. The competition that existed for the foreign capital and the newness of the EB-5 program led to abuses of the system. A few of the companies didn't offer sound investments and were really in business to collect fees rather than to fund an ongoing business. Many investment opportunities didn't raise the full $500,000 investment capital or hire the required number of employees.

USCIS wanted to stop these abuses of the program. In 1998, USCIS wrongly applied their revised rules retroactively to people who already had approved conditional Green Cards. USCIS attempted to deny permanent visa petitions, which started an onslaught of litigation, causing the program to be put on hold from 1999-2002.

In 2002, Congress passed a new law to protect the pre-1998 investors. Also, in 2002, in a case commonly known as "Chang" the Ninth Circuit Court of Appeals ruled that USCIS may not apply their new rules retroactively. In August of 2003, USCIS began approving regional centers and EB-5 Visa petitions pursuant to the newer law for the first time since 1998.

Regional Centers

The second program within the EB-5 category, i.e. the Regional Center program, is ideal for the retiree or inactive investor due in large part to the "indirect employment" feature of this program. The Regional Center program advantageously removes the 10 full-time employee requirement of the Regular program and substitutes the less-restrictive "indirect employment creation," which allows the investor to qualify by proving 10 direct and/or indirect employees who are new to the Regional Center.

continued

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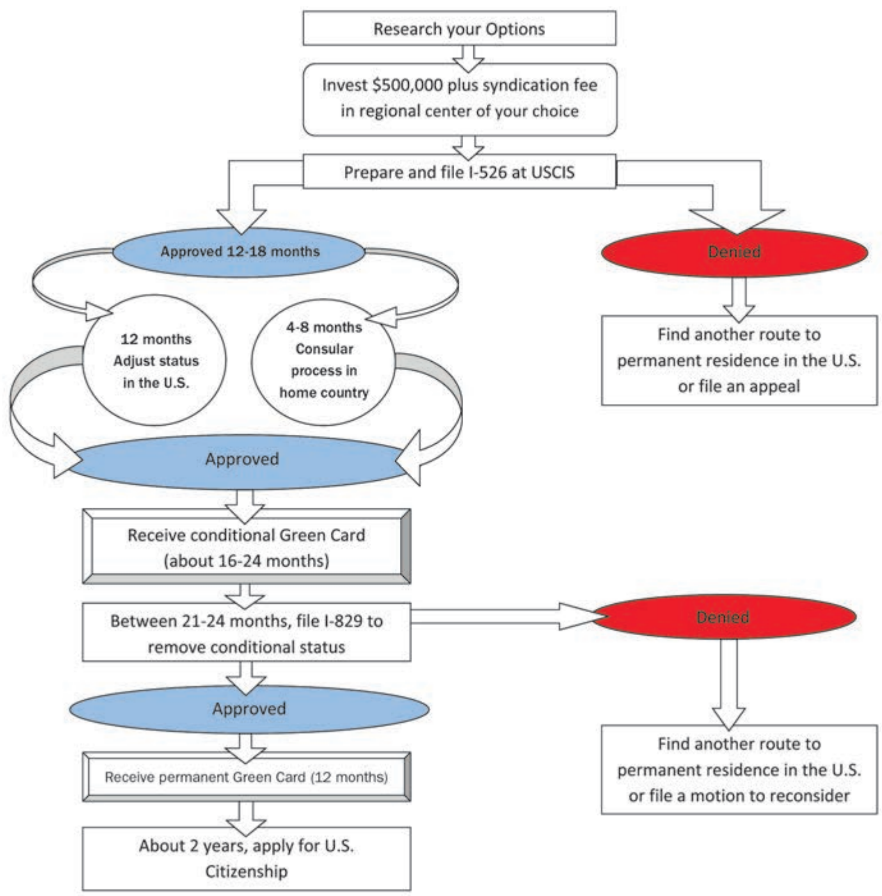
Another advantage of Regional Center programs that adds to the flexibility of the Green Card category is that the investor is not required to live in the place of investment; rather, he or she can live wherever he or she wishes in the United States.

Each Regional Center program must be preapproved by USCIS in order to be eligible to qualify for EB-5 Green Cards.

Regional Center EB-5 Immigrant Investor Flowchart



Procedures And Timelines For Filing EB-5 Investor Green Card Petition

The procedure for filing an EB-5 Investor Green Card petition is relatively straightforward. The investor must present evidence that traces the source of funds through bank transfers and other documentation, from the investor directly to the enterprise. The money can be the investor's own funds or in the form of a loan or gift, which would allow a parent to gift a son or daughter.

After the investor completes a thorough business and financial due diligence analysis of the viability of the Regional Center business opportunity, the investment is made and an I-526 petition is filed by the foreign investor with USCIS, requiring the agency to approve that the applicant (source of funds) and the investment are eligible for EB-5 status, which takes an average of 12 to 18 months.

If the investor is already in the U.S., generally in valid work status, he or she then applies for a Green Card through USCIS. No interview customarily is required, and approval for most cases is currently taking about 12 months. If the investor resides abroad, an application for the Green Card is generally made at the U.S. Embassy or Consulate in the investor's home country, where an interview is necessary. Approval of the Green Card in this case takes on average about 4 to 8 months. Thus, the entire immigration process generally takes about 16 to 24 months, depending on where the Green Card processing occurs. This is the situation for most Regional Center applicants based on December 2013 USCIS and State Department Consular processing times, however times will vary depending on the facts of each case.

Once USCIS or a U.S. Consulate approves the investor's Green Card, it is conditional for a period of two years. Conditional Green Card status confers the same rights as the permanent Green Card. Between 21 to 24 months after the conditional Green Card has been approved, the investor must reconfirm that the investment has been made and that the employment requirement has been fulfilled. An I-829 application to remove the conditional Green Card status is then filed with USCIS, which takes about 12 months for processing.

Once the condition has been removed, a full Green Card is granted for permanent resident status. From the filing of the I-526 application until approval of the Removal of Conditions usually takes about 4-5 years. Thereafter, in an approved EB-5 case, even if the investment is sold, the investor will still maintain the permanent Green Card.

Statistics For Applications, Approvals And Denials For EB-5 Visas

Through September 30, 2012, the USCIS received 6,041 EB-5 Investor Visa petitions (Form I-526), processed 4,634, and approved a record number (3,677), a 79 percent approval rate. Through September 30, 2012, the USCIS received 240 Regional Center Applications (Form I-924), processed 108 with 35 approved and 63 denials. The approval rate of 36 percent was a significant drop-off from the prior two years: 2011 (68 percent), 2010 (65 percent), and a significant drop-off in the number of approvals: 2011 (123) and 2010 (78).

Regional Center Applications (Form I-924)

Fiscal year	Receipts	Approvals	Denials
2010	152	78	41
2011	278	123	58
2012	240	35	63

The USCIS is currently scrutinizing Form I-924 applications, leading to a lower approval rate and number of approvals.

Currently, there are over 400 approved Regional Centers operating in 40 states (including District of Columbia and Guam). A complete list of Regional Centers is available at www.USCIS.gov/EB-5centers.

Form I-526: Immigrant Petition by Alien Entrepreneurs

Fiscal year	Receipts	Approvals	Denials	Approved percent
2009	1028	126	207	86 percent
2010	1955	1369	165	89 percent
2011	3805	1563	371	81 percent
2012	6041	3677	957	79 percent

Form I-829: Petition by Entrepreneurs to Remove Conditions

Fiscal year	Receipts	Approvals	Denials	Approved percent
2009	437	347	56	86 percent
2010	768	274	56	83 percent
2011	2345	1067	46	96 percent
2012	712	736	60	92 percent

The annual limit for EB-5 visas is approximately 10,000 visas (7.1 percent off the total 140,000 employment-based immigrant visas); (changing the visa allocation would require an Act of Congress).

EB-5 Visas Issued And Adjustments Of Status [2011]

China (Mainland born)—2408
Korea (South)—254
China-Taiwan (Burma Born)—122
Iran—117
Great Britain—57
Mexico—53
Venezuela—46
India—37
Russia—30
Vietnam—26
Canada—26
Netherlands—26
Japan—20
Turkey—20
South Africa—19
Italy—16
Brazil—16
Germany—15
Egypt—12
France—10
All other countries—133
TOTAL—3,463

The number of EB-5 visas has tripled since 2009, with over 6,200 EB-5 visas approved in FY2012 (thru 9/30/12). According to Alejandro N. Mayorkos, Director, USCIS, the USCIS has created a new office in Washington DC dedicated to the EB-5 visa program in mid-2013.

In summary, freedom to live anywhere in the United States, a passive form of investment with no required direct management responsibilities, no employer sponsor required within the immigration process, and an accelerated path to Green Card procurement—all are important factors which make the EB-5 Green Card Regional Center category an ideal vehicle for the inactive investor or retiree who wishes to live and/or work in the United States. As with other U.S. Immigration visas, applicants also need to take into account U.S. and foreign tax and other business and personal planning considerations, which are covered below.

The above immigration part of this article has been updated from February 2013 with December 2013 figures and information.

EB-5 Investor/U.S. Tax Issues

Once an EB-5 investor enters the U.S., he becomes a U.S. income tax resident, i.e. a conditional permanent resident immediately subject to tax on worldwide income — income from inside the United States and income earned outside the United States. Upon entry into the U.S. from the date entered, the EB-5 Investor is subject to U.S. Income Tax compliance annually, which includes filing the following:

- Form 1040, report worldwide income;
- Foreign Financial accounts over $10,000 file Form TDF 90-22.1, Report of Foreign Bank and Financial Accounts, "FBAR Filing," due June 30th following tax year (separate tax filing);
- Foreign Financial Assets valued in excess of $50,000 file Form 8938, "Specified Foreign Financial Assets" attached to Form 1040 (Foreign Account Tax Compliance Act "FATCA Filing").

Note that filing Form 8938 (with Form 1040) does not relieve U.S. taxable residents of the requirement to file FBAR Form TDF 90-22.1 if FBAR filing is otherwise due.

For willful failure to report the foreign bank and financial account (under Form 1040/Schedule B (Part III, Foreign Accounts and Trusts) and TDF 90-22.1, the taxpayer faces criminal penalties of up to 10 years in jail, a $500,000 fine and civil penalties of 50 percent of the account balance computed annually. So, for example, if the FBAR is not filed for four years, the civil penalty is 200 percent of the account balance. Until such time as the investo receives the EB-5 visa, they are classified as a nonresident alien and are subject to a flat 30 percent tax on U.S. source income that is not effectively connectedwith the conduct of a U.S. trade or business.

A tax withholding agent must withhold 30 percent of the gross amount paid to a foreign taxpayer, who is subject to tax; unless the withholding agent obtains valid documentation (IRS Form W-8) that the U.S. payee (Foreign National) is a "beneficial owner," and subject to a tax exemption, or a reduction of tax.

U.S. Estate And Gift Tax

Once an EB-5 investor becomes a "conditional permanent resident," it may be considered an indicia of U.S. domicile (i.e., the investor intends to permanently reside in the U.S.). If the investor is audited by the IRS, and is determined to have a U.S. domicile, they will be subject to U.S. estate and gift tax. Domicile is a defined term: "A person acquires a domicile in a location by living there, even for a brief period" with "no definite present intention" of later removing from that location. Treas. Reg. sec. 20.0-1(b)(1)(b)(2), *Estate of Edouard H. Paquette v. Commr.* (T.C. Memo, Par. 83,571 (1983).

EB-5 Investors U.S. Estate And Gift Tax Planning

U.S. citizens and U.S. domiciliaries are subject to U.S. Estate and Gift tax on their world-wide assets. Non-U.S. domiciles are subject to U.S. Estate and Gift Tax on U.S. assets. A non-citizen who holds a green card is a "permanent resident" of the United States subject to U.S. income tax on their world-wide income. Code §7701(a)(30)(A); Treas. Reg. sec. 301-7701(b)-1(b)(1). The immigration laws do not require a green card holder to intend to remain permanently in the U.S. since the definition of a U.S. tax resident, for U.S. estate and gift tax purposes, focuses on intent, a green card holder may be a U.S. income tax resident, but under the residency "intent" test, may not be a U.S. tax resident for estate and gift tax purposes. The EB-5 investor, who is present in the U.S. under an EB-5 visa and intends to permanently remain in the U.S. can be classified as a U.S. resident for estate and gift tax purposes and will be subject to estate and gift taxes in the U.S.

EB-5 Investors, before they immigrate to the U.S., may be classified as non-resident aliens ("NRA") with no U.S. domiciles, not subject to U.S. estate and gift tax except for specified assets: (i.e. U.S. real estate, tangible personal property). EB-5 investors who immigrate to the U.S. may be classified as either a U.S. estate and gift tax resident, or non-resident. An EB-5 Investor who is a non-citizen, and is not domiciled in the U.S., is an NRA for U.S. estate and gift tax purposes. A NRA is subject to U.S. gift tax only on gifts of interests in U.S. real estate and tangible personal property located in the U.S. (e.g. cash, art, jewelry). A NRA is not subject to U.S. gift tax on gifts of intangible personal property (including stock in U.S. corporations) even if that property has a connection to the U.S. Code §2501.

U.S. Estate And Gift Tax (NRA)

Under Code section 2103, the federal estate tax applies more broadly (than gift tax rules) to NRA estates. A NRA estate is subject to U. S. estate tax on property located in the U.S. including: real property, tangible personal property, stock in U.S. corporations and debt obligations of U.S. persons. Property located in the U.S. may include: interests in U.S partnerships and limited liability companies but the law is not definitive.

A NRA's U.S. estate will not include proceeds of insurance on the decedent's life, certain bank accounts, and portfolio debt, the income from which is exempt from U.S. income tax. Code §2105. The portfolio debt exception exempts U.S. Company publicly traded debt securities and U.S. government obligations.

Under Code section 2103, the value of a NRA's gross estate, which at the time of his death is "situated in the U.S." is subject to U.S. estate tax.Treas. Reg. 20.2103-1.

NRA estates receive a credit against the U.S. estate tax of $13,000 which shelters $60,000 of property from transfer tax. Code §2102(c). Tax rates are the same as for U.S. citizens and resident aliens. Code §2001(c).

A marital deduction is allowed for property in the U.S. under Code section 2056, and if applicable, Code section 2056A (assets passing to a decedent's non-citizen spouse, through a Qualified Domestic Trust, Code §2056(d)(2)(A)). There is no gift tax or marital deduction for otherwise taxable gifts to non-citizen spouses. Code §2523, Treas. Reg. Sec 25.2523 (1)-1(a). However, under Code section 2523(i)(2) the annual exclusion amount for gifts to non-citizen spouses is $139,000.

An estate tax of a NRA must file a federal estate tax return if the decedent's gross estate exceeds $30,000. Treas. Reg. §20.6018-1(b).

Resident Aliens

An EB-5 Investor who is a resident alien, and is classified as a U.S. estate and gift tax resident, based on having a U.S. domicile, is subject to U.S. gift tax on lifetime transfer of assets, wherever located, and is subject to U.S. estate tax on their world-wide assets. Code §§2001(a), 2031(a).

A resident alien has the same applicable credit and GST exemption as a U.S. citizen. Code §§2010(a), 2505(a), 2631. The same annual gift tax exclusions (Code section 2503), and the same spousal "gift-tax splitting" rights as long as that spouse is a U.S. citizen or resident alien. Code §2513.

Reporting Gifts From Foreign Person

Code section 6039F imposes annual information reporting requirements on any U.S. person who receives a foreign gift (i.e. a gift from a foreign corporation or partnerships) in excess of $14,723 (2012) (Rev. Proc. 2011-52) or receives a gift of $100,000 from a foreign individual or estate (IRS Notice 97-34).

The gift must be reported on IRS Form 3520 (Part IV) describing the property received, the FMV of the property and the gift date when the donor is an individual or an estate. Form 3520 does not require the donor name and address except where the foreign donor is a partnership or corporation.

U.S. beneficiaries who receive distributions from foreign trusts should report the amounts under the trust reporting rules of Code section 6048(c), rather than gift reporting rules of Code section 6039F. U.S. beneficiaries are not required to report contributions by foreign persons to trusts in which the U.S. beneficiaries have an interest, unless the U.S. beneficiaries are treated as receiving the contribution in the year of transfer (the U.S. beneficiary has a Code section 678 power). A domestic trust that receives a contribution from a foreign person must report the gift unless the trust is treated as owned by a foreign person (e.g., a foreign person creates a U.S. revocable trust).

According to IRS Notice 97-34 (and Form 3520 instructions), a U.S. beneficiary who receives a distribution from a domestic grantor trust, owned by a foreign grantor, must report it under Code section 6039F as a gift from a foreign person (i.e. the deemed foreign owner of the domestic trust). A U.S. person who fails to report such foreign gifts will be subject to penalties equal to five percent of each gift for each month of non-compliance (not to exceed 25 percent of the aggregate foreign gifts).

In 2012-13, U.S. Estate & Gift Tax Rates for U.S. citizens and domiciliaries are as follows:

- Estate tax exemption is $5,250,000 ($10,500,000 husband and wife) excess assets taxed at 40 percent (2013);
- Lifetime gift tax exemption is $5,250,000 ($10,500,000 husband and wife) excess assets taxed at 40 percent (2013);
- Generation skipping tax ("GST") exception, assets over taxed at 40 percent (2013);

- Marital deduction gifts up to $139,000 in annual gifts to an alien spouse (non-citizen) are exempt from tax. Rev. Proc. 2011-52, Code §§2503(b),2523(i);
- Annual gifts received from foreign persons (i.e. foreign corporations and partnerships) are reportable if they exceed $14,723 for the year. Rev. Proc. 2011-52, sec 3.35, 2011-45 I.R. B.;
- Annual gifts received from foreign individuals and estates are reportable once they reach the annual reporting threshold of $100,000 (IRS Notice 97-34); and
- Annual Gift Tax Exclusion is $14,000 ($28,000 husband and wife). Gifts in excess of the annual exclusion amount must be reported on Form 709. Taxpayers who fail to attach Form 709, past gift tax returns, to Form 706: Estate Tax Return may trigger an audit. The IRS is aggressively pursuing this tax issue.

"Succession Tax" under Code section 2801, gift tax at the highest applicable gift or estate tax rates, is imposed on the gift recipient, who receives a "covered gift" (i.e. a direct or indirect bequest) from a "covered expatriate." Code section §877A. The Succession Tax (gift tax) does not apply to annual exclusion gifts in 2013: $14,000 per year, or gifts entitled to a marital or charitable deduction.

For EB-5 investors the critical estate and gift tax planning issue is Domicile. Non-Domicile international investors may gift unlimited non-U.S. situs assets with no U.S. Gift Tax. U.S. Domicile international investors are subject to estate and gift tax on transfers of world-wide assets that in 2012 exceed the following exemptions:

- $5,250,000 Estate Tax and Lifetime Gift Tax exemption ($10,500,000 husband and wife);
- $14,000 annual gift tax exemption ($28,000 husband and wife).

Domicile Test

Domicile is determined by the facts (there is no bright-line test). A foreigner living in the U.S. will be treated as domiciled in the U.S. if:

- He or she resides in the U.S. (the "presence test"); and
- He or she intends to reside in the U.S. indefinitely (The "intent test").

The Intent Test

Under the intent test, a foreigner briefly living in the U.S. with no intention of later leaving the U.S., can lead to a determination of U.S. domicile. If the foreigner has no intention to reside in the U.S. indefinitely, the foreigner can never become domiciled in the U.S. even if he or she lived in the U.S. for many years.

The Presence Test

Under the presence test, the IRS examines facts and circumstances to determine whether foreigners plan to stay in the U.S. The presence test (facts and circumstances) includes:

- Residence location(s), value and size and the amount of time spent on each residence;
- Location of Family and friends;
- Location of personal possessions;
- Location of their businesses;
- Where they are licensed to drive;
- Where they are registered to vote
- Location of their religious organization;
- Location of their social organization;
- Location of any burial plots;
- Terms of immigration status;
- Whether they have a green card or visa;
- Whether they have a U.S. Social Security number;
- Where they declared their residence to be in a will or trust; and
- Where they declare their residence in an application for a visa or "green card."

Non-Domicile Status

A foreigner who wants to establish non-domicile status should do the following in their home country:

- Purchase a principal residence and spend as much time there as possible;
- Purchase burial plots;
- Join clubs and religious organizations;
- Engage in business activities;
- Register to vote; and
- Obtain a driver's license.

For U.S. gift tax purposes a foreigner who lives in the U.S. and intends to leave is better advised to seek a visa instead of a "green card" (since the green card is an indicia of domicile). If the IRS accepts a foreigner as a non-domicile, they may gift (U.S. gift tax-free) unlimited non-U.S. situs assets (including stock in U.S. corporations). If the foreigner is treated as a U.S. domicile, they will be subject to gift tax on transfer of world-wide assets that exceed applicable exceptions (e.g., $14,000 annually, $5,250,000 lifetime gift tax exemption).

U.S Estate Tax Planning (Non-Domicile)

Non-domicile should reduce possible U.S. estate tax exposure:

- Make unlimited gifts of non-U.S. situs tangible personal property (e.g., shares of stock in non- U.S. corporations, tangible property located outside of the U.S. at the time of the gift (i.e. art, jewelry, cash);
- Make unlimited gifts of shares of stock in U.S. corporations (not subject to U.S. gift tax, would be subject to U.S. estate tax); and
- Make unlimited gifts of real property located outside the U.S. If the transfers are within the $5,250,000 gift/ estate tax exemption they will remain tax-free in the event of an adverse domicile determination under an IRS tax audit.

U.S. Gift Tax Planning

U.S. gift tax is imposed on U.S. Real Property and U.S. tangible property (e.g., cash, art, jewelry) physically located in the U.S. as well as stock in U.S. corporations is not U.S. situs property for gift tax purposes (but is U.S. situs property for U.S. estate tax purposes.)

U.S Gift Tax: Non-U.S. Situs Property

For U.S. Gift Tax purposes, assets that are deemed outside of the U.S. (non-U.S. situs) include:

- Real, and personal property located outside the U.S.;
- Shares of stock issued by a foreign corporation;

- Life insurance proceeds on a non-resident individual's life;
- Deposits with a foreign branch of a domestic corporation (or partnership) engaged in the commercial banking business;
- Deposits with U.S. commercial or foreign commercial banks; and
- Many types of bonds or notes.

Tax treaties between the U.S. and a foreigner's home country may provide further exceptions which qualify assets as non-U.S. situs for U.S. estate and gift tax purposes.

Spousal Gifts

Spouses who are non-domiciliaries, can make unlimited gifts to each other, outside the U.S., gifttax free. Non-U.S. citizen foreigner spouses, who are considered to have a U.S. domicile may each only gift the other $139,000 (2012), without using up the $5,250,000 exemption to which they will be subject. If domicile status is unclear, in order to avoid U.S. gift tax exposure the foreigner spouse should:

- Establish an offshore trust (irrevocable trust);
- Establish an offshore account in their name;
- Transfer $5,250,000 to the offshore account in their name; and
- Gift $5,250,000 from the offshore account in their name, to the offshore trust account.

In the event of an IRS gift tax audit using the gift tax exemption, there would be no U.S. gift tax exposure on the $5,250,000 gift. For the non-domiciliary, there would be no U.S. gift tax. For the domiciliary, the $5,250,000 gift would be U.S. gift-tax free, using the $5,250,000 lifetime gift tax exemption. A wealthy non-domiciliary may gift non-U.S. property, beyond the $5,250,000 exemption which will be U.S. gift tax-free. This gift would be subject to classification as a non-domiciliary, since if the IRS determines domicile the foreigner will owe gift tax, interest and penalty on the transferred amount that exceeds the $5,250,000 exemption.

Cash Gifts (Non-Domiciliary)

In order to avoid U.S. gift tax, non-domiciliaries should make cash gifts outside of the U.S. as follows:

- Establish a non-U.S. account in the non-domiciliary's name and transfer funds to it;
- Have the U.S. donee (whether an individual or trust) set up a non-U.S. account in the donee's name;
- Gift from the non-domiciliary's non-U.S. account to the U.S donee's non-U.S. account; and
- The U.S. donee may then wire transfer funds from the non-U.S. account to the U.S. donee's account.

Stock: U.S. Corporation (Non-Domiciliary)

A non-domiciliary, who owns stock in a U.S. corporation, should gift the stock while alive so there will be no U.S. estate tax on death. The nondomiciliary's gift of U.S. stock is U.S. gift-tax-free. A non-domiciliary, who is concerned that he or she may be deemed domiciled in the U.S., under an IRS gift tax audit, should gift the stock (under the gift tax exemption i.e. $5,250,000). If the gift is made while alive, it will either be not subject to IRS gift tax audit (with no tax imposed) or if subject to IRS gift tax audit, exempt from U.S. gift tax, up to $5,250,000 in value (if U.S. domicile is deemed established by the IRS, under the audit).

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