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WIGGIN AND DANA

ADVISORY

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2024 NON-CITIZEN U.S. TRANSFER TAX OVERVIEW

OVERVIEW

Individuals who are neither United States citizens nor U.S. "domiciled" (U.S. resident with an intention to remain indefinitely in the U.S.) are subject to a less favorable estate tax planning environment. In 2024, individuals who are U.S. citizens and domiciliaries can transfer $13,610,000 free of estate, gift and GST tax during their lives or at death ($27,220,000 for married couples). In contrast, non-U.S. citizens who are also not U.S. domiciled ("nonresident aliens" or "NRAs") are entitled to an exemption of only $60,000 for their U.S. property. Although U.S. citizens and U.S. domiciliaries are entitled to the high $13,610,000 federal estate and gift tax exemption, they are also subject to U.S. gift and estate tax on their worldwide assets, including assets held in foreign countries. NRAs may also be subject to estate or inheritance tax in their country of residence, resulting in possible double taxation.

RESIDENCY AND DOMICILE

In the United States, there is an objective test for determining whether a non-U.S. citizen is a U.S. resident for income tax purposes. A U.S. citizen is always considered a U.S. resident for U.S. income tax purposes, as is a U.S. lawful permanent resident (a green card holder). An individual who spends enough time in the U.S. under the so-called "substantial presence" test that measures the days of the year that the person is physically present within the United States may also trigger U.S. income tax residency.

The application of U.S. gift and estate tax, on the other hand, is dependent on an individual's domicile rather than residency. Domicile is acquired by living in the U.S. without the present intention of leaving at some later time. U.S. residency, without the requisite intention to remain, will not create domicile. Permanent resident (green card) status will in most cases establish domicile, but not always.

NON-CITIZEN SPOUSE

The unlimited marital deduction allows spouses, both of whom are U.S. citizens, to freely move their assets back and forth without paying any U.S. gift or estate tax. However, if the spouse receiving the assets is not a U.S. citizen, the amount that can be gifted tax-free to such spouse is only $185,000 for 2024 (this amount is indexed annually for inflation). This is true even if the spouse holds a green card. At death, no marital deduction applies unless assets are placed in a specific kind of trust, called a Qualified Domestic Trust (QDOT), that must include very specific provisions pursuant

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to the Internal Revenue Code. Although the surviving, non-U.S. citizen spouse can receive the income of the QDOT without imposition of estate tax, distributions of principal (except in the case of hardship) will suffer the 40% estate tax. Any assets remaining in the QDOT at the spouse's death will also be subject to estate tax. The concern of the U.S. taxing authorities is that the non-U.S. citizen spouse will return to their home country after receiving a gift or after their spouse's death, thereby removing the assets from the U.S. transfer tax system.

NONRESIDENT ALIENS

NRAs are not subject to U.S. estate tax, except for certain assets owned in the United States (U.S. situs assets), primarily, real estate, tangible property physically located in the U.S., stock in U.S. companies, and U.S. mutual funds. However, NRAs are only entitled to an estate tax exemption amount of $60,000. The tax on amounts transferred above $60,000 is charged at the regular gift and estate tax rate of 40%. The gift tax rules applicable to NRAs are similar, however the $60,000 exclusion does not apply to gifts. There is also one notable exception – gifts of stock in U.S. companies are not subject to gift tax (even though subject to estate tax at death). This presents an attractive tax planning opportunity for NRAs.

TAX TREATIES AND FOREIGN TAX CREDITS

The United States has entered into an estate and/or gift tax treaty with a number of countries, including Australia, Austria, Canada, Denmark, France, Germany, Greece, Ireland, Italy, Japan, South Africa, Switzerland, the Netherlands and the United Kingdom. These treaties are designed to sort out primary taxing authority to avoid double taxation. In the absence of a treaty, foreign transfer tax credits may provide some relief from double taxation.

A United States expat, a U.S. person married to a non-U.S. citizen spouse, a non-U.S. person with a home or investments in the U.S., and other cross-border families require more tailored and sophisticated planning in light of the nuanced transfer tax rules which apply to them. Your Wiggin and Dana attorneys are available to advise and help navigate these complex rules.