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INSIDE THIS ISSUE

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When e-Sports Meet U.K. Tax: Domestic and International Considerations

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THE RISE OF E-SPORTS

The world of video games and video game tournaments, known as e-Sports, has come a long way since the days when Space Invaders, Pacman, and Donkey Kong were state of the art. And while competitive gaming may be new to some, including tax authorities, the first tournament of the game Spacewar! took place at Stanford University in 1972, 48 years ago.

According to a 2019 report, there are now an estimated 2.5 billion gamers worldwide, and gaming revenues are on the rise. Last year, the video game market was expected to generate the head-turning figure of $152.1 billion, up 9.6% from the previous year[1].

E-Sports have seen a tremendous increase in recent years. It is believed that the e-Sports market was worth around $130 million in 2012. For 2019, the estimated worth was $1.1 billion. It is expected to grow to around $1.7 billion by 2022[2].

The global interest in this sport is evident from the fact that the International Olympic Committee and the Global Association of International Sports Federations jointly hosted an e-Sports forum in Lausanne, Switzerland, on 21 July 2018[3], and Intel has announced that it will host the Intel World Open, an e-Sports tournament that will take place on the lead-up to the 2020 Olympic Games in Japan[4].

Nonetheless, a number of issues may prove to be barriers to e-Sport becoming a full-fledged Olympic sport. As expressed by Olympic President Thomas Bach in September 2018, some video games are simply 'too violent'[5]. Furthermore, a practical hurdle is that many video games are backed by gaming publishers. This means that significant commercial discussions would be necessary in order to acquire the appropriate rights to events and participants.

Not surprisingly, no specific tax rules currently exist for e-Sports. Consequently, it is necessary to apply general principles when contemplating the way tax would be imposed on income generated from

the sport. This is not a simple task, particularly in an area which changes rapidly and involves various groups at the national and international levels. As with the digital economy in general, the e-Sports world has challenged, and continues to challenge, the fabric of the international tax model.

RELEVANT TAX ISSUES FOR U.K. RESIDENTS

In the U.K., the principal domestic tax issues are (i) whether the activity is taxable, (ii) whether there is a trade that is being carried on, and (iii) if no trade is carried on, whether there is income tax.

Is e-Sports activity a trade or a hobby?

The first test in the U.K. generally is whether the individual or entity conducting the activity is trading or if the participant is engaging in a hobby. Depending on the result, income from e-Sports may fall under s.3 of the Income (Trading and Other Income) Act 2005 (I.T.T.O.I.A.) or s.34 of the Corporation Tax Act 2009 (C.T.A.).

Determining whether a person is carrying on trading activity is not a straightforward task. Significant case law in the U.K. addresses the question, and because the answer is fact specific, there are as many answers as there are fact patterns. A report was published by the Royal Commission on the Taxation of Profits and Income in 1955[6]. It sets out six 'badges of trade', which essentially still hold true in combination with an additional three have been added over time:

- profit seeking motive
- number of transactions
- nature of the asset
- existence of similar trading transactions
- changes in the asset
- way in which the sale was carried out
- source of any finance
- interval between purchase and the sale
- method of acquisition

The application of these tests to any particular set of facts in order to distinguish a trade from a hobby is a dauntless task. If it is determined that a trade exists, it is appropriate to identify the scope and net profits, or losses, generated by the trade under generally accepted accounting principles. If the activity does not rise to the level of a trade, it is considered a hobby.

Where a trade is carried on, most types of income will be characterized as income of the trade. Included are as winnings, sponsorships, and endorsement income. Even where the activity does not reach the level of a trade, positive net income likely will be taxed under the U.K. Miscellaneous Income rules contained in ss.687-689 I.T.T.O.I.A. or ss.979-981 C.T.A.

Given the nature of gaming, it is necessary to consider the case where the activity is recognised as a hobby. Hobbies, *per se*, are not taxable in the U.K., but that does not mean that any income arising when participating in a hobby is not taxable, especially when stakes are high and prizes are substantial. This is where the Miscellaneous Income rules come in again.

Nonetheless, an important distinction exists between a hobby and trade. Whether income is taxable as part of a trade or as miscellaneous income, deductions will still be available to determine taxable 'profit'. As such, it is very important to appreciate, that even if expenses are deductible under generally accepted accounting principles, they will not always be allowable for U.K. tax purposes. U.K. law requires expenses to be 'wholly and exclusively' related to the trade in hand. Clearly, if there is no trade, certain expenses will not be allowable or may possibly be restricted. This can be the case with loan interest. However, where a participant is engaged in an e-Sports activity and generates income categorized as winnings, sponsorships, and endorsement income, the participant is likely not participating in a hobby, where most people lose large sums and attempt to write-off losses against income.

What about losses?

Similar to other countries, claiming tax benefits for losses is controversial in the U.K. Numerous rules and restrictions exist regarding the losses that can be set off against trading income or general income.

Losses arising on a trade receive the most favourable treatment, but even in cases where a trade exists, further restrictions can still arise. S.66 of the Income Tax Act 2007 (I.T.A.) provides for the restriction of trading losses where the trade is not conducted on a commercial basis with the view to the realisation of profits from the trade. Again, there is significant case law in this instance. But even here, big players in e-Sports who generate winnings and endorsement revenue one year and losses in the next without an increase in the scope or character of expenses should be viewed to conduct their trade on a commercial basis with a view to profit, especially if e-Sports activity is the participant's principal or only business activity.

E-Sports teams

If a participant is employed by an e-Sports team by way of a Contract of Services (as opposed to a Contract for Services), their 'earnings', including benefits in kind, will be taxed under the provisions of Income Tax (Earnings and Pension) Act 2003 (I.T.E.P.A.). If associated with the contract, this may well extend to sponsorship, endorsement income, and expenses paid to or on behalf of the employee. Expenditure that is wholly, exclusively, and necessarily incurred as part of the duties, may well qualify for a deduction. This should apply to expenditures incurred in connection with a visit a temporary workplace, a more tax technical way to describe 'away matches'.

As e-Sport teams have become highly organised, as possible employers, the current hot issue to consider in the U.K. is the outsourcing of employees to a wholly owned personal services company that contracts to provide the services of the e-Sports participant. This is especially of interest when e-Sports events may be viewed as a sector of the high-tech industry. Consequently, the 'IR35' rules, involving payment through third parties in connection with the performance of services of a common law employee, may come into play. The Disguised Remuneration rules introduced by part 7A I.T.E.P.A. in December 2010, are also particularly relevant in this context.

The issue of maintaining the integrity of employment tax and National Insurance revenue is a focus of the U.K. government, and again, there is significant case law. There is also a huge amount of anti-avoidance legislation to limit the opportunity to circumvent the U.K. employment tax rules.

The U.K. employment tax rules require the deduction of income tax and National Insurance contributions at source on Pay As You Earn (P.A.Y.E.) income. P.A.Y.E. income is made up of employment, pensions, and social security income that is caught under the U.K. employment tax rules. In some circumstances a non-resident employer is required to deduct and account to H.M.R.C., amounts of P.A.Y.E. and National Insurance contributions. Penalties arise for non-compliance. As a result, an industry has sprung up regarding shadow payroll service providers who submit payroll taxes and contributions that should be collected from compensation of foreign employees seconded to the U.K.

An e-Sports team may also have value-added tax (V.A.T.) issues to consider. A U.K.-resident company providing goods or services to another U.K. company or individual customer in the course of business will have to pay V.A.T.

Sponsorship

A key source of income for any player or team is sponsorship and endorsement income. As stated above, the receipt of sponsorship revenue will likely constitute taxable income when the e-Sports activity rises to the level of a trade. Should any sponsorship costs or other costs associated with advertising arise, the allowance of a tax deduction will depend on

whether the sponsorship costs are wholly and exclusively incurred for the purposes of the trade. If the sponsorship is viewed to be an entertainment expense, it will not be allowable for corporation tax purposes and V.A.T.

Costs of sponsorship which are of a capital nature will be disallowed, although there may be separate allowances, possibly under the U.K. Intangible Assets regime at part 8 C.T.A. 2009, or capital allowances under the Capital Allowances Act 2001.

When looking at sponsorship matters, it is important to recognise that the recipient may have V.A.T. to collect if the amounts are paid in return for the performance of services. In may be necessary to register with H.M.R.C. and fulfil all the associated administrative tasks such as issuing invoices and accounting for V.A.T. collections.

CROSS-BORDER TAX ISSUES

Non-residents operating in the U.K.

Individuals

The above rules with regard to individuals rely on the participant being a U.K. tax resident. Since 6 April 2013, the U.K. has a Statutory Residence Test (S.R.T.). The S.R.T. is broken down into a series of tests. One test applies for those individuals who have been U.K. residents in any of the previous three tax years and a different test may apply for those who do not meet that test. Remember, the U.K. tax year runs from 6 April to 5 April, and the tests are applied on the basis of the tax year. For a detailed breakdown of these tests, see "Statutory Residence Test (SRT) notes" from H.M.R.C.

Any individual who has been present in the U.K. for 183 days or more within a single tax year, or who is employed on a full-time job in the U.K., would be a U.K. tax resident in all circumstances. The S.R.T. is applicable where that is not the case and provides 'substantial presence' tests to determine residence. Should these tests be inconclusive, one could resort to the 'sufficient ties' tests to prove non-residence.

In general, a non-resident is taxable only on earnings from duties performed in the U.K. General earnings from employment with a foreign employer are not taxable where performed overseas and not remitted to the U.K.

Entities

The position for companies is different. In addition to the residence rules that are based on the jurisdiction of incorporation or the place of control and management, a non-resident company might still have taxation liabilities in the U.K. if it conducts trade there through a Permanent Establishment[7].

Non-domiciled individuals

The U.K. 'Non-Dom' rules at part 14 of the I.T.A. allow any individual who is a U.K. resident but has a permanent home ('domicile') outside the U.K. to limit any U.K. taxation to U.K.-source income and gains, and to overseas income and gains remitted to the U.K. A separate set of rules applies to inheritance tax.

If the Non-Dom is resident in the U.K. for income tax purposes, rules introduced on 6 April 2014 prevent contract-splitting as a tool for limiting exposure to U.K. taxation. Similarly, persons operating as sole traders or via partnerships may be taxed under S.6 of the I.T.T.O.I.A. That provision treats the profits of a trade arising from a U.K.-resident business as taxable 'wherever' activity is carried on. As a result, the sole trader or the partners are potentially taxable on a worldwide basis no matter where the performance takes place.

Along with the introduction of the S.R.T., the U.K. introduced overseas workday relief (O.W.R.) under ss. 26-26A of the I.T.E.P.A. for non-residents coming to the U.K. The O.W.R. offers Non-Doms further limits on the scope of U.K. taxation in the first three years of U.K. residence. In order to claim the relief, an arriving Non-Dom must elect to be taxed on the

'remittance basis' and employment activities must be carried out wholly or partly outside of the U.K. If claimed, there is no tax on the earnings in any of the first three years after arrival, as long as the proceeds of the foreign activity are not remitted to the U.K.

Treaty rights: Withholding tax and double taxation

The international tax principles contained within Article 17[8] of both the O.E.C.D. and U.N. Model Tax Conventions (M.T.C.s) provide taxing rights foreign jurisdictions where entertainers or sportspersons perform in the course of an international tour.

The Commentary on Article 17 of the O.E.C.D. M.T.C. states:

> Whilst no precise definition is given of the term 'sportsperson' it is not restricted to participants in traditional athletic events (e.g. runners, jumpers, swimmers). It also covers, for example golfers, jockeys, footballers, cricketers and tennis players, as well as racing drivers. * * * The Article also applies to income from other activities which are usually regarded as of an entertainment character, such as those deriving from billiards and snooker, chess and bridge tournaments[9].

Therefore, if a non-resident individual or company derives income related to entertainment or sport in the U.K., withholding tax may be applied to payments at the U.K. basic rate of 20%, under the U.K. Foreign Entertainers rules at Chapter 18 Part 15 I.T.A. Given the broad definition of 'sportspersons', it would seem that the U.K. Foreign Entertainers rules would apply to payments made to non-resident e-Sports athletes. In these cases, H.M.R.C. will enter into negotiations to reduce withholding tax by allowing expenditures that constitute deductions against U.K. revenue to reduce the withholding tax base.

Image rights

As with many more traditional sports, there is scope for successful, high-profile players to license image rights to third parties for commercial exploitation. In the U.K., a number of tax cases support such arrangements, most notably the well-recognised case of *Sports Club plc and others v CIR*[10].

The U.K. has no statutory law on image rights, so the exploitation of images for commercial gain will involve various intellectual property rights, such as contractual rights, trademarks, goodwill, and copyright. The issue regarding image rights is controversial with tax authorities, and arrangements are scrutinized carefully.

Careful planning is required where a Contract of Services exists that creates an employment relationship. Where such a relationship exists, any consideration received may be characterized as employment income taxable in the U.K. rather than profits of an offshore image rights company located in a paradise jurisdiction.

V.A.T. for foreign e-Sports teams

Previously, we discussed the V.A.T. issues relevant to U.K. teams. For a team located overseas, the issue will be different depending on whether the team is based in a Member State of the E.U. It will be necessary to identify whether goods or services are being provided and possibly to consider the 'Distance Selling Regulations'[11]. Given the significance of technology in the e-Sports space, it may also be necessary to consider the 'Online Selling Regulations'[12].

Through consideration of all of the above, V.A.T. may be due at 20% or 0%, or it may be out of scope. Given the significant penalties which arise upon the failure to account for V.A.T., it is essential that a full analysis is undertaken, even where there is no physical attendance in the U.K.

Digital economy

A significant area to consider is the developing approach to taxation around the challenges to the tax models arising from the digital economy. The O.E.C.D. Base Erosion Profit Shifting (B.E.P.S.) programme is now in an advanced phase, with the publication of the 15 Actions in 2015 and with most O.E.C.D. Member States amending tax treaties to adopt the B.E.P.S. measures.

One of the final challenges of B.E.P.S. is the taxation of the Digital Economy (Action 1)[13]. In the last 12 months we have seen the O.E.C.D.'s proposals for Pillar 1 and Pillar 2, which will ultimately seek to create a new tax nexus in any country where a non-resident company undertakes significant digital activity directed at local online users.

In the meantime, many countries have introduced Digital Sales Taxes (D.S.T.s). The U.K. D.S.T. will impose a 2% charge on entities with online search, online marketplace, or social media platforms when the company's U.K. income exceeds £25 million and group income exceeds £500 million. The U.K. has also introduced a new tax on those receiving royalties in overseas territories that do not have in effect a tax treaty with the U.K. At the 2020 World Economic Forum Annual Meeting in Davos, the O.E.C.D. asked the U.K. to delay the introduction of the D.S.T. However, the U.K. government plans to introduce the tax from 1 April 2020.

OTHER CONSIDERATIONS

Significant penalties arise for gambling without the correct regulatory authority. Many video games are structured in such a way as to potentially fall within the definition of gambling. Although this article will not cover that issue, the spectre of fines for illegal gambling are high and can be problematic for e-Sports competitions.

CONCLUSION

It is clear that the world of e-Sports is already past its infancy. The 2018 World Championship Finals for the role-playing game League of Legends had 99.6 million unique viewers online, while only 98.2 million watched the 2019 Super Bowl. Significant businesses are being created, with significant financial rewards for participants. As we enter a new decade, this will only accelerate. Tax authorities will, of course, also seek to grab their fair share.

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[1] Tom Wijman, "The Global Games Market Will Generate $152.1 Billion in 2019 as the U.S. Overtakes China as the Biggest Market" (Newzoo, 18 June 2019).

[2] Christina Gough, "e-Sports Market – Statistics & Facts" (Statista, 7 March 2019).

[3] International Olympic Committee, "Olympic Movement, e-Sports and Gaming Communities Meet at the e-Sports Forum" (ICO, 21 July 2018).

[4] Eva Martinello, "Intel World Open brings esports to 2020 Summer Olympics" (ESI, 11 September 2019).

[5] BBC News, "Esports 'too violent' to be included in Olympics" (BBC, 4 September 2018).

[6] James Kessler, "Royal Commission on the taxation of profits and income (1955) Cmd. 9474 Comments on what is a trade".

[7] A Permanent Establishment is where a company has a presence in a country through which trade is carried out. There are two types of Permanent Establishments: 1) a fixed place of business and 2) a dependent agent.

[8] O.E.C.D. (2017), "Articles of the Model Convention with Respect to Taxes on Income and on Capital", O.E.C.D. Publishing, Paris.

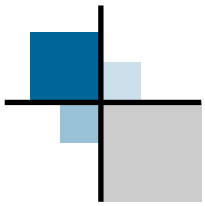
[9] O.E.C.D. (2017), "Commentary on Article 17", in *Model Tax Convention on Income and on Capital*, O.E.C.D. Publishing, Paris, para. 5-6.

[10] *Sports Club plc and others v CIR* (SpC253, [2000] STC (SCD) 443).

[11] The Consumer Protection (Distance Selling) Regulations 2000.

[12] *Id.*

[13] O.E.C.D. B.E.P.S., "Action 1".



The Ultimate Beneficial Owner Register and the Netherlands

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INTRODUCTION

The 5th Anti Money Laundering Directive of the European Union (the Directive)[1] is, in fact, an amendment to the 4th Anti Money Laundering Directive[2]. It provides for the introduction of the Ultimate Beneficial Owner (U.B.O.) Register throughout the E.U. The provisions are required to be included in the Member States' legislation and to be effective by 20 January 2020. The original directive required the provisions to be included in domestic legislation by 26 June 2017, but only three countries met this target. Even the current date will not be achieved throughout the E.U.

In the Netherlands, the legislation has not yet passed all legislative stages and, therefore, will be among those which are late. Nevertheless, the current drafts are unlikely to change significantly.

Those outside the E.U. may think that they will not be particularly affected by this. However, while the legislation covers most E.U. business entities, it can have important consequences for individuals living anywhere if they have an interest in an E.U. entity. In certain cases, it may even impact an individual who has no economic interest but takes part in the management of another entity (whether E.U. or foreign) somewhere within a structure.

The Directive places obligations on individuals to provide information, and some of this information will be publicly available. Being shown as a U.B.O. of an entity may give the impression that an individual has an economic interest in an entity where in fact this is not the case.

WHAT DOES THE DIRECTIVE SAY?

The Directive states:

> Member states shall ensure that corporate and other legal entities incorporated within their territory are required to obtain and hold adequate, accurate and current information on their beneficial ownership, including the

details of the beneficial interests held. Member states shall ensure that breaches of this article are subject to effective, proportionate and dissuasive measures or sanctions.

The register is intended to fight financial and economic crimes such as money-laundering, corruption, tax evasion, fraud, and the financing of terrorism.

Basically, the Directive stipulates that there should be two levels of access to the U.B.O. Register:

- The information in the register should be accessible to competent authorities and financial intelligence units without restrictions.
- Part of the information should be available to certain other entities and also to any member of the general public.

Trusts (and similar arrangements) are also referred to in the Directive, but as they fall under separate rules, they are covered at the end of this article.

As is normal with an E.U. directive, the various countries are free to implement it into their legislation as they wish and, in certain cases, can go further than the requirements of the Directive.

WHO IS A U.B.O.?

According to the legislation, a U.B.O. is a natural person who is the ultimate owner of, or has control over, a company or other legal entity. The law itself does not state when an individual is considered a beneficial owner. This is dealt with in an implementation decree. However, the Dutch decree does not give a complete definition. It only states who will be treated as a U.B.O. in any event.

For a company, a U.B.O. is anybody who has:

- More than 25% of the shares
- More than 25% of the votes
- More than 25% of the ownership interest
- Actual control over the business

If nobody falls under the above categories, a so-called pseudo-U.B.O. has to be registered. This will normally be a person or persons in the senior management of the company itself, such as a C.E.O. or, in the case of a partnership, the general partner(s).

The first two categories above are fairly clear, but in the third, issues can arise where there are classes of shares with different rights. This can be the case with preference and priority shares which have a priority right to a certain part of the profit (or assets on a liquidation) but not to the excess. Depending on the result of the company in a particular year, these shareholders may or may not have a 25% ownership interest.

It is not clear how some types of shares which have (extra) voting rights in certain situations should be treated. However, where such rights allow appointment of more than half the managing or supervisory directors, this would most likely qualify as actual control.

Actual control over the business may be difficult to determine. In such cases, the 25% limit does not apply. The decree refers to the consolidation of the annual accounts as one means of control. This would seem to be reverse logic since the consolidation of accounts does not, itself, give control over anything. However, the requirement to consolidate may be an indication of control.

It is conceivable that one could also have control over a business if one is a major supplier or a major financier. Arguably, therefore, a bank could be the U.B.O. of a business. While the bank itself does not have to register its U.B.O.'s if it is listed on a stock exchange, the entity being financed would still need to register. According to a strict interpretation of the legislation it would then be necessary to determine whether the bank has a shareholder with more than a 25% interest.

The pseudo-U.B.O. rule applies where no other U.B.O. can be determined. It should be noted that in such cases the legislation provides for the senior management of the company to be treated as the U.B.O., rather than going up the structure to the management of the 'top' entity. The Bureau for Financial Supervision (*Bureau Financieel Toezicht*), one of the regulatory bodies, already follows the approach in the decree. However, the Dutch Central Bank, which is also a regulatory authority, takes the view that one should look at the management of the entity furthest up the structure with an interest of more than 25%. While there is some logic to this, it is not what the legislation states.

All entities must have a U.B.O. (or a pseudo-U.B.O.), even if there is no individual with an interest of more than 25%. Registration is required, and it is simply not possible to report that there is no U.B.O.

It is clear that a legal entity could have many U.B.O.'s, since the legislation does not look at who has 'most' control.

Remarkably, even charitable foundations are required to register a U.B.O. It is difficult to see how such entities can be considered to have a U.B.O. Even more remarkable is that the board of the foundation will generally be considered to be the U.B.O. despite the fact that (at least under Dutch law) they are specifically excluded from benefiting from the foundation.

There is no guidance in the Dutch legislation as to how one is to treat a trust which is a beneficial owner. There are also no provisions or guidance covering the situation where a company is indirectly controlled or where an insurance company is an owner.

A U.B.O. is legally required to provide information to the relevant legal entity.

WHO AND WHAT IS COVERED?

The most obvious entities to which the legislation applies are Dutch B.V.'s (*Besloten Vennootschap*) and Dutch N.V.'s (*Naamloze Vennootschap*) not listed on a stock exchange.

It is understood that listed N.V.'s already provide sufficient information with respect to ownership; therefore, they are not required to register their pseudo-U.B.O.'s. In practice, it is open to question whether similar information is provided by a listed company.

Other legal entities are also covered:

- Foundations
- Associations
- Mutual insurance companies
- Cooperatives
- So-called administration foundation and charities
- An association without legal personality but with a business
- A partnership, including a limited partnership
- Shipping companies (these are special types of entity in the Netherlands)

A European Company (*Societa Europea* or S.E.) or European Cooperative Society (S.C.E.) with its statutory seat in the Netherlands is also covered. A European Economic Interest Grouping (E.E.I.G.) is covered, although it does not need to have its statutory seat in the Netherlands.

Stock exchange listed companies and their 100% subsidiaries are excluded. Non-100% subsidiaries (even 99% subsidiaries) are not excluded.

Other exclusions are:

- Sole traders
- Public bodies
- Residential associations
- Certain historical entities

- Associations without legal personality and without a business
- Churches (required to maintain U.B.O. information but not to register)

The legislation does not apply to foreign entities, for instance branches or companies with a head office in the Netherlands but not incorporated there. The Netherlands has a concept of the 'formal foreign company', which is a foreign entity run from the Netherlands and which for all other registration purposes is considered Dutch. While a formal foreign company must comply with many Dutch corporate requirements, it will not fall under these rules. Foreign entities incorporated in other E.U. countries will need to register their U.B.O.'s in their own country. Non-E.U. entities will not be required to register any U.B.O. unless that country has legislation of its own.

An interesting point is that, for the purposes of this legislation, a company which has moved its domiciled out of the Netherlands and registered in another (normally E.U.) country is still considered to be incorporated under Dutch law. In theory, it is required to re-register in the Netherlands simply for the purposes of U.B.O. reporting. This would seem to be overkill in view of the fact that such companies will almost always be located in another E.U. jurisdiction and should be subject to similar legislation there. This provision also applies to the S.E., S.C.E., and E.E.I.G. It is conceivable that any such an entity would be required to register in two (or more) jurisdictions if it moves from one country to another.

WHEN MUST ENTITIES REGISTER AND HOW LONG SHOULD INFORMATION BE KEPT?

New entities must register their details immediately, while existing entities have 18 months to comply with the legislation.

In the Netherlands, information should be available for 10 years after the de-registration of the company. There is no indication of how long it should be kept otherwise, and presumably, there is no limit. It is questionable as to whether this complies with data protection rules.

WHAT WILL BE MADE PUBLIC?

The register will be managed by the Dutch Chamber of Commerce, which is also the companies and foundations registrar. Companies are required to maintain the information in respect of the register even in cases where the U.B.O. is exempt from being made public.

Where applicable, the following information will be public:

- Full name
- Month and year of birth
- Nationality
- Country of residence
- Type and extent of interest in bands (i.e., more than 25% but less than 50%, 50% but less than 75%, and over 75%)

Even where personal information of a U.B.O. is exempt from public access, the extent of the interest still must be shown.

What has to be registered but is not public?

- Tax identification number (both the Dutch number and the foreign number if one has been granted on the basis of residence elsewhere)
- Day of birth
- Place and country of birth
- Address
- Copy of valid identity documents and other documentation to support the personal details above

- Copy of documentation showing type and extent of interest

Access

The public part of the register is open to anybody on payment of a fee. A search is only possible on the basis of the entity, not on the basis of the U.B.O. However, the Dutch Chamber of Commerce frequently sells information, and it is not clear whether other parties will be allowed to purchase and repackage this information to make such a search possible.

The legislation has been amended to provide that anybody wishing to access the register will have to identify themselves. This is likely to delay matters somewhat.

The non-public part of the register is accessible to authorised agencies such as supervisory authorities (the Dutch Central Bank, Financial Markets Authority (A.F.M.), etc.), tax authorities, and the Financial Intelligence Unit. Organisations which are subject to anti-money-laundering provisions, such as banks, lawyers, accountants, car dealers, and estate agents, will not have access to this part of the register.

A U.B.O. will be entitled to see whether there are significant numbers of requests concerning their ownership (except if these are from the authorities) but will not be able to see who has made the requests.

Exemptions

Under the Directive, a U.B.O. is entitled to an exemption from public (but not government) access to their information where there is a risk of kidnapping, violence, blackmail, or intimidation. Under the Dutch legislation, a request for exemption will only be granted if the person concerned has police protection under Dutch law or similar protection under the laws of another country.

It seems that the exemption will not be available to anyone else at risk of kidnapping, violence, blackmail, or intimidation. This appears to contravene the letter and, certainly, the spirit of the Directive. It also goes further than other rules applying to directors of charitable entities, where an exemption from publication is available to directors and their family members if there is real danger to their personal safety, whether or not they have police protection.

The Dutch data protection regulator had, apparently, no comments on this or other aspects of the legislation.

Minors and individuals without legal capacity are exempt from public access to their information.

In all cases an application must be made for the exemption, even in the case of minors where one might expect that the exemption would be granted automatically. If a request is made, the information will not be made public until it has been rejected and any objection or appeal procedure is completed.

ISSUES FOR ADVISORS

Accountants, tax advisors, notaries, and banks are not permitted to rely on the register and, therefore, must obtain identity information on U.B.O.'s for compliance purposes. This seems a substantial duplication of effort (already banks are often required to have the same information and generally will not provide the information to advisors). However, advisers are required to check the information in the U.B.O. register, and if there is a discrepancy with the information they have, they are required to report this to the Dutch Chamber of Commerce.

Regulators, such as the Dutch Central Bank and the A.F.M., sometimes take a different view as to exactly who should be considered the U.B.O. An example might be where somebody has a loan which gives rise to a profit share but does not actually give control over the business and is, technically, not an entitlement to any part of the profit.

As indicated above, the Bureau for Financial Supervision, supervising *inter alia* tax advisers and notaries, uses a different U.B.O. definition than the Dutch Central Bank, which supervises banks and corporate service providers. This could result in discrepancies so that both banks and advisers must file a notification. And it raises the question of which definition prevails. The view of the author is that a discrepancy in such a case would not warrant notification if it is justified and explainable, but there is no guidance on this.

Under separate legislation, which will shortly apply for mandatory disclosure of certain tax structures by advisers, advice to avoid being shown as a U.B.O. will be a disclosable matter.

FOUNDATIONS

In the Netherlands, foundations are treated as legal entities and, therefore, fall under the company U.B.O. register. In some jurisdictions a foundation is considered to fall under the trust register. This will be important, partly in relation to the entry of the trust into the trust register and partly because the information is then available only to a natural or legal person who can demonstrate a legitimate interest.

Foundations are required to keep a register with the names and addresses of everyone to whom a distribution has been made which does not exceed 25% of the amount available for distribution in a particular financial year, together with the amount and the date.

In certain cases, Dutch foundations are used as a so-called 'administration office'. The foundation owns shares of an entity and in turn issues a depository receipt giving the holder the economic rights of a shareholder but not the voting rights. It should be noted that the depository receipt holder can reasonably be considered a U.B.O. where he or she has an interest of more than 25%. Since the foundation, generally, will exercise the voting rights, it will normally also be considered a U.B.O. One would not look through the foundation to its beneficiaries since they would not have an economic or voting interest in the underlying company. The depository receipt holders are not beneficiaries of the foundation.

POLICING

Failure to register or registering incorrectly is an economic crime. Sanctions for minor infringements will be administrative, while there can be criminal sanctions for providing incorrect U.B.O. information.

The tax authorities are responsible for policing the legislation through the Bureau of Economic Enforcement (*Bureau Economische Handhaving*). They will only take action if informed of an issue by the Dutch Chamber of Commerce.

The tax authorities have produced a report which states that the legislation is implementable but that enforcement will have only a limited effect. While it is relatively easy to check whether information filings are timely, the tax authorities anticipate that confirming the accuracy of the information is likely to be difficult. In general, information cannot always be obtained from other countries, and information on deliberately non-transparent structures will be difficult to acquire. They also consider the proposed legislation to be susceptible to fraud since people who do not want to be shown as a U.B.O. are likely to provide incorrect or incomplete information. Furthermore, they may decide to use entities which do not fall under the legislation.

COSTS

The government has determined that the costs of complying with the legislation are negligible. The U.B.O. is required to provide information to the company. It is estimated that the company will take an average of one to two hours to register at a cost

of €39 per hour. If it has to use external advisors, this can be done for €60. However, for most international businesses, these figures will not be anywhere near realistic.

TRUST REGISTER

Article 31 of the Directive contains a separate provision covering trusts:

> Member states shall ensure that this article applies to trusts and other types of legal arrangements, such as, inter-alia, fiducie, certain types of treuhand or fideicomiso where such arrangements have a structure or functions similar to trusts. Member states shall identify the characteristics to determine where legal arrangements have a structure or functions similar to trusts with regard to such legal arrangements governed under their law.

The provisions apply to any express trust administered in the relevant member state and require information on the beneficial ownership of the trust, including:

- The settlor
- The trustee
- The protector
- The beneficiaries or class of beneficiaries
- Any other natural person exercising effective control over the trust

Under the Directive, information in the trust register will not be accessible to the general public except if they have a legitimate interest, unlike that in the company register. A trust will also be required to provide information to a company which needs the information for its own U.B.O. filing. It is interesting to note that certain countries, including the Netherlands, treat foundations as regular legal entities falling under the same rules as companies, while others consider them to fall under the trust register.

In the Netherlands, the trust register will be implemented later and will include the so-called fund for common account. This is a purely fiscal concept.

Since the Netherlands does not have legislation governing trusts, it is unlikely that this register will be very extensive.

CONCLUSION

The new rules are more complex than they look and can affect individuals located around the world, not just in the E.U. It is not difficult to become a U.B.O., even if you are not a shareholder in an entity.

Advisers also need to be aware, both where there is a discrepancy between the U.B.O. in their compliance documentation and the U.B.O. in the register and also where they are advising on when an individual should or should not be registered as a U.B.O.

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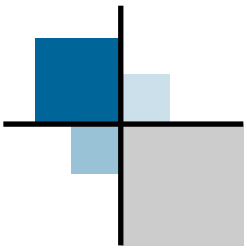
[1] Directive 2018/843.

[2] Directive 2015/849.



China Eases Requirements for Claiming Treaty Benefits

By Yang Sun and Xiuning Hao
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On 14 October 2019, China's State Taxation Administration (S.T.A., formerly S.A.T.) issued Bulletin 35. This provides revisions to the rules for non-residents who wish to claim benefits under China's double taxation treaties. The new rules apply from 1 January 2020, replacing the administrative measures in Bulletin 60, which date from 2015. Bulletin 35 aims to standardise the administration of the entitlement to treaty benefits for non-resident taxpayers and to further simplify the declaration procedures.

BACKGROUND

The development of China's tax treaty implementation process can be divided into four stages:

- Early 1990's: The comprehensive approval system
- 2009: The partial approval system
- 2015: The comprehensive record system
- 2020: The reform of the comprehensive record system

On 25 June 2019, Premier Li Keqiang delivered a speech on planned reforms to 'streamline administration, delegate power, strengthen regulation and improve services' to optimize the business environment in China. On 1 August 2019, the General Office of the State Council issued a work plan to implement the reform, which was followed by the S.T.A.'s issuance of Bulletin 35, an important step in the furtherance of this reform.

MAJOR CHANGES

One of the most significant changes made by Bulletin 35 is the simplification of the procedure to claim treaty benefits from 'filing documents for record' to 'retaining documents for follow-up administration' (i.e., 'self-assessment of eligibility, declaration for entitlement, and retention of relevant documents for follow-up administration'). Bulletin

35 defines the responsibilities of non-resident taxpayers and withholding agents, respectively, and stipulates that tax authorities should strengthen the follow-up administration.

Simplification of procedures to claim treaty benefits

The simplification of the procedures is reflected in the changes to the declaration approach and documentation requirements outlined in the following table:

China Eases Requirements for Claiming Treaty Benefits

Under the prior rules set out in Bulletin 60, a non-resident recipient of Chinese-source income must submit two forms containing detailed information as well as specified documents to the appropriate tax authorities before treaty benefits are granted. This procedure can be burdensome and effectively allows the Chinese tax authorities to assess a non-resident's eligibility for treaty benefits, which, in practice, can become an examination and approval procedure.

	Bulletin 60 'Filing Documents for Record'	Bulletin 35 'Retaining Documents for Follow-up Administration'
Documents for declaration	**Reporting Forms**	**Reporting Forms**
	• Information Reporting Form on Tax Residence Identity of Non-resident Taxpayers • Information Reporting Form on Treaty Benefits to be Enjoyed by Non-resident Taxpayers	• Information Reporting Form for Entitlement to Treaty Benefits for Non-resident Taxpayers ('Information Reporting Form')
	Documents for filing	
	• Tax residence certificate • Copies of individual passports and company certificates in the case of 'international transportation income' • Documents evidencing ownership of the income received (e.g., contracts, board resolutions, shareholder meeting minutes, or payment slips) • Other documents specifically required by other tax regulations	
Documents to be retained	• N/A	• 'Documents for filing' specified in Bulletin 60 • Information showing 'beneficial ownership' in the case of dividends, interest, and royalty payments • Information regarding the calculation of the real estate company in the case of 'property income' • Judgment data in the absence of a 'permanent establishment'

Moving forward, Bulletin 35 will require the submission of a single Information Reporting Form, which may be submitted by the non-resident or the withholding agent. The new form will require considerably less information. Required disclosures include the taxpayer's name, Chinese taxpayer identification, tax agreement clause, and contact information. The taxpayer must also make a statement confirming that:

- The taxpayer is a resident of the other contracting state based on the laws and regulations of that state and under the relevant tax treaty.
- The principal purpose of the arrangement or transaction at issue is not to obtain treaty benefits.
- The taxpayer believes that it meets the requirements of self-assessment and takes legal responsibility for claiming treaty benefits.
- The taxpayer will retain relevant documentation for review by the Chinese tax authorities and will cooperate with the authorities.

The simplification of the procedure to claim treaty benefits should alleviate the burden on non-residents and withholding agents. At the same time, it will also mean that the tax authorities will not be able to assess eligibility for treaty benefits at the stage of filing.

Non-resident taxpayers who receive dividend, interest, and/or royalty payments should pay attention to Item 16 when filling out the Information Reporting Form. According to the alternative policies provided for in the form, the taxpayer may indicate their basis for being identified as the 'beneficial owner' per (i) Article 2, (ii) Clause 1 of Article 3, (iii) Clause 2 of Article 3, or (iv) Article 4 of Bulletin of the S.A.T. on Matters Concerning 'Beneficial Owners' in Tax Treaties (Bulletin of the S.A.T. [2018] No. 9). In other cases, non-resident taxpayers are required to provide a written explanation for making the determination.

Regarding the disclosures, it is worth noting that, under Bulletin 60, non-residents who made the same claim to the same tax authority with no changes to the reporting information, were exempt from submitting supporting documentation repeatedly within three years. However, there is no similar provision in Bulletin 35. Therefore, under the new policy, it appears that non-residents must (i) fill out and submit the Information Reporting Form, either to the tax authorities (if self-filing) or through a withholding agent (in withholding-at-source situations), and (ii) collect relevant materials to retain for future inspection each time they claim treaty benefits. As such, the change may increase the frequency with which non-resident taxpayers gather relevant materials (e.g., obtaining a Tax Resident Certificate from another contracting jurisdiction).

Responsibilities of non-residents and withholding agents

Another significant change made by Bulletin 35 is the delineation of responsibilities between non-residents and withholding agents (who are normally the payers). The sharing of legal responsibility has always been a focus when non-resident taxpayers enjoy treaty benefits. After the announcement of Bulletin 35, this problem persists.

The responsibilities of non-residents under Bulletin 35:

- A non-resident must complete the Information Reporting Form accurately and submit the form directly to the withholding agent.
- Where a non-resident's self-assessment is not correct (i.e., the taxpayer is not eligible for treaty benefits), the taxpayer must report the underpaid tax to the tax authorities.

- Where a non-resident has underpaid because they claimed treaty benefits to which they were not entitled (unless the underpaid tax is the fault of the withholding agent), the non-resident will be deemed to have failed to declare and pay taxes in accordance with the relevant tax rules and may be subject to penalties and interest for failure to pay on time. However, in the case of withholding at source, a non-resident taxpayer who (i) takes the initiative to report and settle the underpaid tax before being ordered to do by the tax authorities and (ii) does not fall within the circumstances set out in Clause 2 of Article 9 of the Bulletin of the S.T.A. [2017] No. 37, 'shall be regarded as having made the tax payment on time'. In this regard, late payment surcharges cannot be exempted under such circumstances.
- A non-resident must collect and retain documentation supporting a claim for treaty benefits to enable the Chinese tax authorities to conduct a follow-up review, and timely submit the documents to the authorities upon their request. This documentation must be kept for a prescribed time period as determined by law.

The responsibilities of withholding agents under Bulletin 35:

- The withholding agent must verify the completeness of the Information Reporting Form and conduct the tax filing accordingly.
- If a non-resident does not submit an Information Reporting Form to the withholding agent or the form is not complete, the withholding agent must withhold tax according to domestic laws without regard to any claimed treaty provisions. Failure to do so will subject the withholding agent to penalties.
- If underpaid tax is due to the withholding agent's failure to (i) file the form properly, (ii) withhold tax, or (iii) submit documents to the tax authorities, the withholding agent will be subject to penalties.
- During the follow-up administration process, the tax authorities may require the withholding agent to cooperate in the investigation and provide relevant documents within a timeline specified by the tax authorities.

Bulletin 35 clearly places the responsibility on non-residents to correctly assess entitlement to treaty benefits. It also distinguishes between the legal liabilities of non-resident taxpayers and withholding agents in the event of misapplication of the treaty by non-resident taxpayers. This should provide certainty as to the allocation of responsibilities between the parties in cross-border transactions and potentially avoid disputes. In practice, however, if the payer is responsible for the tax as agreed in the contract, the non-resident taxpayer may, in the follow-up investigation, demand compensation from the withholding agent after paying the tax. Experts suggest that when non-resident taxpayers and withholding agents sign a contract, they should make clear agreements on the duty commitment, the obligation to provide information, and the subsequent obligation to cooperate, so as to avoid disputes.

Key issues for individual non-resident taxpayers

When an individual non-resident taxpayer, namely an individual who is a tax resident of the other contracting jurisdiction under the relevant tax treaty referred to in Bulletin 35, claims treaty benefits for personal income under the articles dealing with employment, independent personal services or operating profit, director's fee, royalties, or technical service fees, that individual shall refer to the relevant provisions in the Public Notice on Individual Income Tax Treatments for Non-resident Individuals and Non-domicile Individuals (the Bulletin of the Ministry of Finance and the S.A.T. [2019] No. 35) with regard to individual income tax treatment and submit the Information Reporting Form as well as retain the relevant materials for inspection as stipulated in Bulletin 35.

The treaty rules may provide favourable treatment. For example, if the individual is a tax resident of another contracting jurisdiction, the condition for applying Formula 1 may be extended from 'not more than 90 days' to '183 days'. This is a more favourable time apportionment formula than under the domestic regulations. However, it will still result in that individual submitting the Information Reporting Form and retaining the relevant materials for future inspection as stipulated in Bulletin 35. One of the materials required to be retained for future inspection is the Tax Resident Certificate issued by the authority in charge of the other contracting jurisdiction. Relevant individuals should pay particular attention to this compliance requirement, otherwise they may not be able to enjoy the tax treaty benefits.

STRENGTHENING FOLLOW-UP ADMINISTRATION

Bulletin 35 empowers the tax authorities to require non-residents to produce documents supporting a claim for treaty benefits within a specified time period. In addition to the documents stipulated in Bulletin 35, the authorities may request other relevant documents.

Nevertheless, there are some issues in Bulletin 35 which need further clarification, for example:

Bulletin 35 listed some materials that have to be retained for future inspection but did not include any detailed explanation. For example, further clarification is needed on what supporting documents are required to justify beneficial ownership status under the articles relating to dividends, interest, and royalties. In this regard, a further comparative analysis of Bulletin of the S.A.T. [2018] No. 9 and its interpretation may help to better understand the requirement for supporting materials.

Under the procedures for self-filing by non-resident taxpayers, it is not clear when the late payment surcharge would commence if the eligibility for treaty benefit is denied in follow-up administration and the tax authorities go after the non-resident taxpayer for its responsibility relating to the delayed payment.

Bulletin 35 requires the withholding agent to provide relevant materials and cooperate in the investigation. It is not clear to what extent the withholding agent has to 'cooperate' in order to be clear of the relevant liability. In practice, it is recommended to sufficiently communicate with the tax authorities in charge of the investigation.

As previously mentioned, Bulletin 35 defers the submission of relevant documents from the time treaty benefits are claimed to the follow-up administration stage. It is likely that the tax authorities will intensify follow-up administration on non-residents claiming treaty benefits as a result of the simplification of the filing procedure. To manage potential risks, non-residents who have claimed treaty benefits under China's tax treaties should retain relevant documents in a timely and complete manner.

CONCLUSIONS AND PROJECTIONS

Non-resident taxpayers should pay special attention to some policy details:

Bulletin 35 has added a principal purpose test whereby claims for treaty benefits may be rejected if it is reasonable that principal purpose of the arrangement or transaction is the enjoyment of those benefits. In the subsequent administration, the competent tax authorities shall apply the relevant provisions of existing general anti-tax avoidance legislation if they find it necessary to apply a bilateral principal purpose test or domestic general anti-tax avoidance rules. When enjoying the treatment of a bilateral tax agreement, non-resident taxpayers should pay attention to the reasonableness that an arrangement is artificial. They may be subject to a special tax adjustment by the authorities if the arrangement lacks reasonable commercial purpose and substance.

In the actual review process, due to the existence of various subjective or objective factors, the review time may exceed the legally stipulated 30 days. Non-resident taxpayers should make corresponding preparations.

In the case of a tax refund, non-resident taxpayers shall communicate fully with the withholding agent and obtain necessary information. If the tax authorities require non-resident taxpayers to provide information related to withholding agents, they cannot do so if there is no relationship between the withholding agent and the non-resident taxpayer. This may lead to the stagnation of the tax refund process. Therefore, non-resident taxpayers and withholding agents should communicate well in advance, and withholding agents should be fully prepared for the refund.

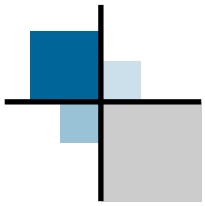
Regarding the requirement to retain data for follow-up administration, Bulletin 35 stipulates that the time limit shall follow the provisions of the law on Tax Collection and Administration and the detailed rules for its implementation. According to the 'detailed rules for the implementation of the Tax Collection and Administration law', accounting books, accounting vouchers, statements, tax payment vouchers, invoices, export vouchers, and other tax-related information should be kept for 10 years. Experts suggest that non-resident taxpayers refer to this provision and keep the relevant information for a period of 10 years to enable follow-up administration.

With the full implementation of the new Individual Income Tax Law, especially the establishment of the cross-departmental individual tax-related information sharing system and the joint incentive and disciplinary mechanism, tax authorities will be empowered to carry out follow-up administration regarding individuals with cross-border activities enjoying tax treaty benefits. Therefore, enterprises need to pay close attention to the activities of their employees and the potential impact of these activities. At the same time that they begin monitoring compliance on individual income tax matters, enterprises should also effectively manage their tax risks (e.g., regarding permanent establishments) and related costs.

China Eases Requirements for Claiming Treaty Benefits

Previously, one of the difficulties in managing cross-border personnel activities was the collection of accurate and timely information on the relevant individual's length of stay in China and abroad. Enterprises can now use scientific and technological methods and tools to quickly and effectively collect information and enable efficient management of personnel and risks.

While these advances offer some relief, it should be noted that non-resident enterprises continue to appeal for a more convenient tax declaration system and certainty regarding tax treatment in China. Due to the relatively principled terms of some agreements and policy guidelines, the tax authorities may provide inconsistent treatment when dealing with complex matters such as multiple shareholding structures and group payment arrangements. China has not formally established the advance tax ruling system, and non-resident taxpayers have limited channels to communicate effectively with tax authorities. Furthermore, the cancellation of pre-filing management seems to have deprived taxpayers of the opportunity to communicate with tax authorities in advance, increasing the uncertainty of relevant tax matters.



Global Mobility from a U.S. Perspective: How and When Foreign Parents with U.S. Children and U.S. Assets Are Taxed

By Stanley C. Ruchelman
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INTRODUCTION

When individuals outside the U.S. contemplate an initial investment in the U.S., certain issues pop up when charting a tax plan:

- Should I invest directly, through a corporation, or a trust?
- Will the U.S. investment be subject to estate tax in the U.S.?
- If I form a trust, should it be formed in the U.S. or abroad?
- If I have a child in the U.S., will my investment affect the child?
- Is my child affected already because of U.S. reporting rules?

When a non-U.S. individual has children that attend university in the U.S., other questions arise:

- When my children inherit property, will they be subject to inheritance tax in the U.S. as a result of receiving the bequest or the inheritance?
- If my property is located outside the U.S., will my children be subject to estate tax in regard to that property?

Both sets of questions reflect a world without borders where parents are resident outside the U.S., but children or investments are located in the U.S.

In question and answer format, this article addresses tax issues often encountered by non-U.S. individuals. It begins by looking at trusts as vehicles to obtain a tax benefit and then looks at the tax implications of continuing direct ownership by the non-U.S. individual. Whether property is owned through a trust or directly, planning is required to avoid the imposition of unnecessary tax that can be penal in amount.

TRANSFER OF ASSETS TO A TRUST

Question 1: I am planning to move to the U.S. and arranged the formation of a trust to hold certain assets. Will the income of the trust be taxed immediately in the U.S.? If so, will the trust be taxed, will I be taxed, or will all beneficiaries be taxed?

In broad terms, the income of the trust will be taxed at some level. But identifying the party that is taxed, the income that is taxed, and the time when the tax is imposed will depend on the answers to several questions:

- Is the trust foreign or domestic for U.S. income tax purposes, and how does that affect the imposition of tax?
- Is the trust a taxpayer in its own right or is someone else the taxpayer?
- Does it matter whether the trust is 'revocable' or 'irrevocable'?
- If U.S. tax is imposed on beneficiaries, is the tax affected by the residence or citizenship of the beneficiaries?
- How do the investments held in trust affect the imposition of tax?
- Will the pattern of trust distributions among beneficiaries in earlier years affect the way tax is imposed in a subsequent year?

Foreign trusts and domestic trusts

Question 2: The trustee is my attorney in my present country of residence. The trust contains no provision for a protector and no one other than the trustee has powers over possible distributions to beneficiaries or the making of an investment. Local courts have primary jurisdiction to hear disputes over trust administration. All the assets will be in the U.S. Will the trust be considered to be a foreign trust for U.S. income tax purposes?

Yes, the trust will be a foreign trust. Under U.S. tax law, a foreign trust is defined to be any trust that is not a domestic trust[1].

For a trust to be a domestic trust, two tests must be met. First, a U.S. court must exercise primary supervision over the trust's administration (the Court Test). Second, one or more U.S. persons must have the authority to control all substantial decisions affecting the trust (the Control Test)[2].

The Court Test is met where:

- The trust instrument does not direct that the trust be administered outside the U.S.
- The trust, in fact, is administered exclusively in the U.S.
- The trust is not subject to an automatic migration provision, i.e., a provision that provides that a U.S. court's attempt to assert jurisdiction or otherwise supervise the administration of the trust directly or indirectly would cause the trust to migrate from the U.S. (but not if it applies only in the case of foreign invasion of the U.S. or widespread confiscation or nationalization of property in the U.S.).

The Control Test requires that one or more U.S. persons (e.g., a U.S. citizen, U.S. resident, or U.S. corporation) have authority to control all substantial decisions of the trust. The term 'substantial decisions' means all decisions other than ministerial decisions that any person, whether acting in a fiduciary capacity or not, is authorized or required to make under the terms of the trust instrument or applicable law. These include decisions regarding:

- Whether and when to distribute income or principal
- The amount of any distributions
- The selection of a beneficiary
- The power to make investment decisions
- Whether a receipt is allocable to income or principal
- Whether to terminate the trust
- Whether to compromise, arbitrate, or abandon claims of the trust
- Whether to sue on behalf of the trust or to defend suits against the trust
- Whether to remove, add, or replace a trustee
- Whether to appoint a successor trustee or trustees

If either the Court Test or the Control Test is not met, a trust is considered a foreign trust.

Question 3: I plan to make certain revisions to the trust instrument in Question 2. A court in Wyoming will be given primary supervision over the trust under the terms of the revised instruments, and two trustees will be appointed, of which one will be my current attorney, whom I trust, and the other will be a trust company in Wyoming. The trustees must act in unanimity. Is the trust a U.S. trust?

No, the trust is not a U.S. trust even though the Court Test is met because the Control Test is not met. For the Control Test to be met, one or more U.S. persons must have the authority to control all substantial decisions. 'Control' means having the power, by vote or otherwise, to make decisions affecting the trust, none of which can be vetoed by a person who is not a U.S. person[3]. If more than one trustee exists and the trustees must act by unanimity, the presence of a non-U.S. person as one trustee will prevent the trust from meeting the Control Test[4].

Question 4: I plan to have the relevant jurisdiction of the trust moved to Wyoming and to have a Wyoming trust company be appointed as successor to the current trustee once the move is effected. As the trustee, the Wyoming trust company will have the sole power to make substantial decisions with one exception. My first cousin is an excellent financial planner. He resides in Scotland and is not a U.S. person. I want him to continue as financial manager of the trust with discretionary authority to make investment decisions. Will my cousin's appointment cause the trust to be a foreign trust?

No, the cousin's appointment as investment manager will not cause the trust to be a foreign trust even though the cousin is not a U.S. person. As long as the Wyoming trust company retains the power to terminate the agreement under which the Scottish cousin serves as investment manager, investment decisions will be considered to be substantial decisions controlled by a U.S. person[5].

Question 5: What decisions are not substantial decisions?

The following decisions are ministerial and, for that reason, are not substantial:

- Bookkeeping
- Collection of rents
- Execution of investment decisions[6]

Grantor v. non-grantor and revocable v. irrevocable trusts

Question 6: I understand that U.S. tax law provides one type of treatment for trusts referred to as 'grantor trusts' and a different type of treatment for trusts referred to as 'non-grantor trusts'. What is the difference?

Non-grantor trusts

A non-grantor trust is treated as the taxpayer and, as such, is taxable on trust income that is undistributed by the end of the year. To the extent that income is distributed to beneficiaries in the year recognized by the trust, the trust is a modified conduit to the beneficiaries.

The modified conduit treatment accorded to a non-grantor trust is achieved in the following way. First, the trust recognizes, for tax purposes, all income and gains realized during the year. Second, in computing its net taxable income, the trust is allowed a deduction for (i) all amounts that are actually distributed during the year and, if an election is made by the trust, (ii) amounts that are recognized in the year but are distributed within the first 65 days of the following taxable year. The election is made on a timely-filed return of the trust. Finally, the beneficiaries realize income equal to the amount of the distribution. The character of each dollar received in the distribution as foreign- or domestic-source ordinary income, qualified dividends, or long-term capital gain is the same for all beneficiaries receiving distributions. The total amount included in income by the beneficiaries as a result of the distribution and the amount deductible by the trust are limited by the distributable net income (D.N.I.)[9] of the trust. The beneficiaries will include the distribution in taxable income, and the distributed income will have the same character in the hands of the beneficiary as it had in the hands of the trust.

Grantor trusts

In comparison, a grantor trust generally will be disregarded for U.S. income tax purposes. The grantor will be considered the owner of the trust assets and of the trust income.

If the trust is a grantor trust, the grantor is considered the taxpayer[10]. The grantor is not necessarily the person who settles the trust. Rather, the grantor is any person who gratuitously transfers assets to the trust. A grantor trust may have more than one grantor, each being a grantor over the portion he or she contributes.

When a beneficiary of a grantor trust receives a distribution from a grantor trust, the distribution is treated as a gift from the grantor for substantive income tax purposes. Nonetheless, if the grantor trust is a foreign trust, a U.S. beneficiary must report the distribution solely for information reporting purposes. See the answer to Question 8, below, for additional information on the reporting obligation.

Question 7: My plans may change, and I may remain a non-resident of the U.S. In that case, I intend to form a trust for the benefit of my children and a charity. The trust will be irrevocable. Is the trust a grantor trust or a non-grantor trust?

The trust is a non-grantor trust.

A non-U.S. person can be treated as a grantor of a grantor trust in only two fact patterns[11]. The first fact pattern involves a non-U.S. person who makes a gratuitous transfer of assets to the trust but retains the right to revoke the trust and to be revested absolutely in the title to the property[12]. The revocation must be exercisable at the sole discretion of the non-U.S. person without the need to obtain the approval or consent of any other person, other than a related or subordinate party who is subservient to the grantor. The non-U.S. person must be able to exercise this power on at least 183 days during the taxable year[13]. The second fact pattern involves a non-U.S. person who makes a gratuitous transfer of assets to the trust where the trust deed provides that only the grantor and the grantor's spouse may receive distributions from the trust during the lifetime of the grantor[14].

The trust is a non-grantor trust because neither fact pattern exists. The trust is irrevocable, and the beneficiaries include persons other than the grantor or the grantor's spouse.

Question 8: If my plans change, I may want to take back the funds from the trust that I settle for the benefit of my children and a charity. For that reason, the trust may be revocable so that I can do so without the approval or consent of any other person. The trust may also be formed outside the U.S. When the trust makes a distribution to a beneficiary that is resident in the U.S., must any information be reported to the I.R.S.?

Yes. The distribution should be reported by the U.S. beneficiary on Part III of Form 3520, *Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts*[15]. Part III is used to report trust distributions, even if the distribution is treated as a gift for substantive tax purposes in the U.S. In addition, the trust must provide the U.S. beneficiary with a Foreign Non-grantor Trust Beneficiary Statement. In this case, a Foreign Grantor Trust Beneficiary Statement appears to be inappropriate because there is no U.S. person that transferred assets to the trust.

The Foreign Non-grantor Trust Beneficiary Statement must include the following items:

- An explanation of the appropriate U.S. tax treatment of the distribution or sufficient information to enable the U.S. beneficiary to establish the appropriate treatment of the distribution for U.S. tax purposes
- A statement identifying whether any grantor of the trust is a partnership or a foreign corporation
- A statement that the trust will permit either the I.R.S. or the U.S. beneficiary to inspect and copy the trust's permanent books of account, records, and other documents necessary to establish the

appropriate treatment of any distribution for U.S. tax purposes

- The first and last day of the tax year of the foreign trust
- A description of property (including cash) distributed to the U.S. beneficiary during the tax year, and the fair market value of the property distributed
- A statement as to whether the foreign trust has appointed a U.S. agent and the name, address, and taxpayer identification number of any such agent

Accumulation distributions

Question 9: Several years ago, I formed an irrevocable trust for the benefit of my wife and children. The trust owns several apartment buildings in my home country. The buildings generate rental income. The rents have been retained in the trust. Under the terms of the trust, earnings that are not distributed are allocated to capital. One of my children moved to the U.S. several years ago and is now in the process of becoming a U.S. citizen. One day, the trust is expected to make a large capital distribution to my children. Will that distribution result in a U.S. tax problem for my U.S. child?

Yes. The distribution will generate adverse tax consequences for the child that is U.S. person.

The adverse tax consequences arise from the way U.S. tax law treats distributions that arise from accumulated income. If a non-U.S. trust accumulates *income* – up to the amount of D.N.I. – the treatment of the accumulations for U.S. tax purposes will diverge from the treatment of the accumulations for trust law purposes. Retained D.N.I. is not treated as capital for U.S. income tax purposes. Rather, it is converted into undistributed net income (U.N.I.). Should the trust ever make a distribution of *income* that exceeds D.N.I. for that year, the excess amount will be treated as a distribution made from U.N.I., until the balance of the U.N.I. is fully distributed.

Note that D.N.I. is a cap and does not mean income. The term 'income', when not preceded by the words 'taxable', 'distributable net', 'undistributed net', or 'gross', means the amount of income of the trust for the taxable year determined under the terms of the governing instrument and applicable local law. Typically, that means income actually received by the trust and not income that is attributed to the trust because, for example, it invests in a tax transparent entity. This will be important in relation to planning opportunities discussed below in the answer to Question 10.

Distributions from U.N.I. are taxed under a 'throwback rule' that allocates the distributed U.N.I. to prior years[16]. The application of the throwback rule causes the D.N.I. of prior years to be taxed as if received in the prior years. This increases the tax in earlier years and the increased tax is deemed to be paid late. An interest charge is applied to the late tax payment. The throwback tax is intended to produce a rough approximation of the tax the beneficiary would have been required to pay if the foreign non-grantor distributed income to the beneficiary in the year earned. The computation is made under a formula provided in the statute. Two methods are provided to calculate the throwback tax. One is the actual method which requires detailed information for the entire period of existence of that trust, and the other is a default method which extrapolates information for a relatively current period of time to a period consisting of half the number of years in which the trust was in existence.

In making the computations, all long-term capital gain items that have not been distributed on a current basis lose their character as long-term capital gains and do not benefit from favourable tax rates. Similar treatment applies to qualified dividends. In addition to income tax, net investment income tax of 3.8% may be imposed.

Note that the tax cannot be eliminated by having the trustee treat the distribution as a capital distribution. As mentioned above, all distributions are deemed to

consist of (i) income and gains of the current year, to the extent thereof, (ii) then to U.N.I. from earlier years, to the extent thereof and (iii) finally to capital of the trust on a pro rata basis[17]. Once the D.N.I. and U.N.I. are fully distributed, the balance of a distribution may be treated as tax-free capital.

Question 10: Are there any planning tools that can be used to mitigate accumulation distributions to U.S. citizen beneficiaries?

Several planning opportunities may be considered to mitigate adverse U.S. income tax consequences.

Form a holding partnership below trust

Perhaps the most effective way of limiting accumulation distributions is to have the trust form a partnership that will be the vehicle used for making all investments. Although a partnership is generally viewed as transparent for purposes of computing income tax liabilities of its members, the local law applicable to trust accounting often treats a partnership as a separate entity so that a trust does not realize income for trust accounting purposes until all events have taken place indicating that the trust is entitled to a current distribution from the partnership. Under applicable I.R.S. regulations, local law controls the term 'income' for purposes of U.S. tax law applicable to trusts[18]. Thus, income generated at the partnership level is not income of the trust for fiduciary accounting purposes until actual distributions are made. Hence, a partnership can be used as an aggregator of income to prevent the build-up of income in the trust. When distributions are to be made by the trust, they are preceded by distributions from the partnership that create D.N.I. when and as made. This planning alternative cannot help to reduce U.N.I. from years that preceded the creation of the partnership.

Establish second trust non-U.S. children

The principal problem for the U.S. beneficiary is the cost of the throwback tax on accumulation distributions. One way to address the issue for existing U.N.I. involves the establishment of a second trust for the benefit of children that are not U.S. citizens. The establishment of the second trust would align the client's estate planning goals with the child's new status as a U.S. citizen. At the same time, it would remove existing U.N.I. from the existing trust and prevent a build-up of U.N.I. in future years. Here are the elements of the plan:

- A second trust would be formed for the benefit of the non-U.S. children.
- The U.S. child will remain a beneficiary of the first trust.
- The second trust would be become a beneficiary of the first trust, and the non-U.S. children will be removed as beneficiaries of the first trust.
- A substantial distribution equal to the current year's D.N.I. and the balance of the U.N.I. would be made to the second trust.
- The U.S. beneficiary and the second trust, or just the second trust, would take current year distributions eliminating the D.N.I. of each year.
- The non-U.S. children would receive distributions only from the second trust.

Distributions of fixed amounts

When a foreign trust is newly formed, the trust deed can provide for up to three distributions of fixed amounts over a period of time to a U.S. beneficiary. The trust instrument cannot direct that the distribution is payable only from trust income. When this type of provision is in the original documentation of a trust, the act of carrying out the transfer is not treated as a distribution. Rather, it is a form of deferred gift that does not come from D.N.I. or U.N.I.[19]. It can be received tax-free by the recipient.

Distribution of high-value/low-basis assets

With the exception of a required distribution of trust accounting income or other fixed amount, the taxable amount of a distribution of property other than cash

to a beneficiary is the lesser of the trust's basis in the distributed property or its value at the time of distribution. This reflects the rule that the trust generally does not recognize gain at the time of the distribution. This leaves the gain recognition event to the beneficiary at the later date when the beneficiary sells the property[20]. The beneficiary's basis for computing gain or loss on the sale will be the same as the trust's basis.

When an asset is distributed and the asset has a value reflecting significant built-in gain, the U.S. beneficiary's tax burden in the year of the distribution can be reduced significantly. D.N.I. is not created, and in circumstances where total distributions to all beneficiaries exceeds D.N.I., non-U.S. persons receive cash, and the U.S. beneficiary receives appreciated property, throwback tax may be reduced.

U.S. ESTATE & GIFT TAX

Scope of tax

Question 11: I have one child who is a U.S. person, and my wife has passed away. I have executed a will providing that my entire estate will be left to that child. Most of my property is located in my home country. Will the child be subject to inheritance tax on the receipt of the bequest?

No. Estate tax in the U.S. is imposed on the estate of the decedent, not on the heirs or legatees who receive property.

The taxable estate of an individual decedent who is neither a citizen nor a resident of the U.S. is computed generally by taking into account only property situated in the U.S. and often referred to as 'U.S.-situs property'[21]. This limitation in scope affects both assets included in the gross estates and liabilities and costs that reduce the estate.

Examples of U.S. situs property include:

- Real estate located in the U.S.
- Debt instruments issued by U.S. companies or U.S. citizen or resident individual (other than debt having the character of portfolio debt[22], U.S. bank accounts[23], and short-term commercial paper[24])
- Shares of stock of U.S. corporations
- Personal property located in the U.S. at the time of the decedent's death[25]

Generally, indirect ownership of U.S.-situs assets through a foreign corporation is not sufficient to expose the estate of a non-domiciled, non-citizen individual to U.S. estate tax. Consequently, no tax is imposed when a foreign individual owns shares of stock of a foreign corporation that, in turn, owns U.S.-situs property such as shares of stock in a U.S. corporation. These foreign corporations are referred to as blocker corporations and have a long history of being allowed. Nonetheless, where a non-U.S. person ignores most or all of the corporate formalities so that the blocker corporation is viewed to be an alter ego of its shareholder, the blocker corporation may be ignored[26]. As a rough rule of thumb, if a non-U.S. person ignores the separate status of a blocker corporation, it should be expected that the I.R.S. will do so as well.

Second, the amount of funeral expenses, administration expenses, claims against the estate, and unpaid mortgages that may be applied to reduce the U.S. gross estate of a non-U.S. is limited to a percentage based on the portion of the worldwide estate that is located in the U.S.[27]. A true and accurate accounting must be made in the U.S. estate tax return of the worldwide assets of the non-U.S. decedent. If not made, none of the expenses, losses, indebtedness, and taxes are available to reduce the gross estate[28].

While there is no estate tax imposed on foreign assets owned by a non-U.S. individual, the U.S. child is obligated to report the receipt of the inheritance to the I.R.S. The report is made on Form 3520, *Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts*, which is more of an anti-money laundering form than a tax return. If the U.S. child fails to file the form fully and on time, a

penalty may be imposed of up to 25% of the amount that goes unreported.

Question 12: At the conclusion of my U.S. child's lifetime, will the child's property located outside the U.S. received from me in prior years as a gift or bequest be subject to U.S. estate tax? If the property is subject to inheritance tax in the country where situated, how will double tax be avoided?

Yes, the property situated outside the U.S. will be subject to U.S. estate tax if the decedent child is a U.S. citizen at the conclusion of lifetime or is domiciled in the U.S. even if not a citizen. Double taxation is alleviated through a foreign tax credit mechanism.

All property owned at the time of death by (i) U.S. citizens and (ii) non-U.S. citizen individuals who are domiciled in the U.S. is subject to U.S. estate tax. It does not matter where the property is located.

The estate may be reduced by funeral and administration expenses, indebtedness, and claims against the estate[29]. In addition, U.S. tax law allows a credit that is the equivalent of a lifetime gift tax and estate tax exemption for individuals. For 2020, the exemption amount is U.S. $11.58 million[30]. Cumulative lifetime taxable gifts are added to the taxable estate to unify the gift and estate tax system[31]. Married couples may combine the exemptions so that if the first spouse to die owns insubstantial assets, the unused exemption may be claimed at the time of death of the survivor[32].

If the surviving spouse is a U.S. citizen and the decedent is a U.S. citizen or domiciled in the U.S., the decedent is entitled to an unlimited marital deduction for amounts bequeathed to the spouse[33]. If the surviving spouse is not a U.S. citizen, the deduction is allowed only if the property is transferred to a qualified domestic trust[34].

If the property is located outside the U.S., a foreign tax credit may be claimed for the amount of any estate, inheritance, legacy, or succession taxes actually paid to another jurisdiction in respect of any property situated within that country and included in the gross estate of the decedent under foreign law[35]. The U.S. is a party to only 17 estate tax treaties and one income tax treaty that covers U.S. estate tax.

Residence for estate tax purposes

Question 13: I own a condominium in Florida where I spend several months each winter. I return to my home country for the balance of the year. Will my annual stay in Florida and the ownership of the condominium cause me to become a resident of the U.S. for estate tax purposes?

No. A substantial presence test is not applied to determine residence for estate tax purposes.

The U.S. estate tax rules differ from the U.S. income tax rules. For income tax purposes, residence is based on objective factors such as the number of days present in the U.S. or the issuance of a permanent resident visa. In comparison, residence for estate tax purposes is based on concepts of domicile. A person acquires a domicile in a place by living there, for even a brief period of time, without the presence of a definite intention to leave. Consequently, a facts and circumstances test is used to determine domicile. On the other hand, if a non-U.S. individual is a permanent resident of the U.S. who holds a 'green card', the I.R.S. will presume that the individual is domiciled in the U.S. This can be overcome, in principle, by demonstrating the existence of facts to the contrary. The burden of proof will be on the estate of the decedent.

Scope of estate tax for non-residents

Question 14: Even though I am not domiciled in the U.S., will my condominium in Florida be subject to U.S. estate tax?

Yes. Florida law provides that a condominium is a form of ownership of real property, created pursuant

to Chapter 718 of the Florida Statutes, which is comprised entirely of units that may be owned by one or more persons and in which there is, appurtenant to each unit, an undivided share in common elements[36]. Therefore, the condominium is an item of U.S.-situs real property. The unit and all belongings located in it will be included in a U.S. taxable estate.

Question 15: Will the answer change if I transfer the condominium to a discretionary, irrevocable trust for the benefit of myself and my descendants?

No. The answer will not change.

In some instances, property not legally owned at the conclusion of lifetime may be included in a taxable estate. For this to occur, the decedent must have transferred property during his or her lifetime but retained sufficient interest in or control over the transferred assets for the remainder of their life or for any period not ascertainable without reference to their death. An asset will be included in a taxable estate if the decedent retained the possession or enjoyment of, or the right to the income from, the property[37]. Also included are assets that the decedent transferred during life but with regard to which the decedent had the power to alter, amend, revoke, or terminate the enjoyment of the property through retained powers[38]. This rule applies to a revocable or amendable trust.

Question 16: Will I be subject to U.S. gift tax if I transfer the condominium to a discretionary, irrevocable trust for the benefit of myself and my descendants?

Yes. The transfer will be subject to gift tax.

The transfer of the U.S. condominium to the irrevocable trust will give rise to gift tax because a condominium unit generally is viewed to be real property and transfers of real property are subject to gift tax. When determining estate tax, a credit against estate tax due is allowed for previously paid gift tax[39].

In comparison, if a foreign person owned shares of a cooperative and a proprietary lease to an apartment instead of a condominium, the assets owned by the individual would be considered to be intangible personal property. Such property is not subject to gift tax.

Question 17: My condominium in Florida is held by a U.S. corporation that I own. I understand that the shares of the U.S. corporation will be subject to U.S. estate tax. I am considering a transfer of the shares of the U.S. corporation to a new corporation that I recently formed in my home country in return for shares of stock in the acquiring corporation. Will the contemplated transaction insulate me from U.S. estate tax?

No. Under the anti-inversion rules of U.S. tax law[40], the foreign corporation that receives the shares of the U.S. corporation in return for newly issued shares of the acquirer is treated as a U.S. corporation for all purposes of U.S. tax when more than 80% of the shares of the acquirer are held because its shareholders were shareholders of the target.

Question 18: I understand that U.S. estate tax law provides for a unified credit that can be applied to reduce gift and the estate taxes on a specified amount of income. Someone told me that the basic exemption under the credit is $11,580,000 for 2020 and that it is raised each year to reflect inflation. If I retain my condominium for the balance of my life, will my estate be subject to U.S. estate tax if the value of my condominium is $6.0 million, which is much less than the amount of the basic exemption of the unified credit in 2020?

Yes. The $6.0 million value of the condominium will likely be taxed.

The basic unified credit amount is $11,580,000 in 2020[41]. However, it applies only if a decedent is a U.S. citizen or a non-citizen who is domiciled in the U.S. When the decedent falls in neither category, the basic exemption is $60,000, which produces a credit of $13,000 against estate tax[42]. and applies only with

regard to estate tax. Assuming the representative of the estate does not report the value of the worldwide assets owned by the non-resident, non-citizen decedent at the time of death, the taxable estate cannot be reduced by claims against the estate and costs of administration. Consequently, after the basic exemption is used up, and assuming the decedent dies in 2020, the taxable value of the condominium will be $5,940,000. At current rates, the estate tax on the first $1.0 million of taxable value is $345,800, computed at graduated rates. The remaining value of $4,940,000 is taxed at a flat 40%, which results in additional tax of $1,976,000. The U.S. estate tax will be $2,321,800.

CONCLUSION

In a time of global mobility of individuals and capital, the exposure to unexpected income, gift, and estate taxes that can be imposed in unanticipated ways and in material amounts has become highly problematic. The old ways of tax planning, in which advisers focused on one country only, are gone. When an individual expands his investment horizon to the U.S. or has adult children moving to the U.S., parents must be aware of potential tax exposure areas at home and the U.S. and expand the time horizon of the plan not simply to the individual's lifetime, but to the lifetime of the next generation.

Note: This article is adapted from "Tax 101: Foreign Settlors, U.S. Domestic Trusts, and U.S. Taxation" by Fanny Karaman, Stanley C. Ruchelman, and Kenneth Lobo.

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[1] Code §7701(a)(31)(B).

[2] Code §7701(a)(30)(E).

[3] Treas. Reg. §301.7701-7(d)(1)(iii).

[4] Treas. Reg. §301.7701-7(d)(1)(v), ex. 1.

[5] Treas. Reg. §301.7701-7(d)(1)(ii).

[6] Id.

[7] Code §663(b); Treas. Reg. §1.663(b)-2(a).

[8] Code §652 or Code §662.

[9] Code §661.

[10] Code §671. A trust can be a grantor trust for some its income and assets and a foreign non-grantor trust for other assets and income.

[11] Code §672(f).

[12] Code §672(f)(2)(A)(i).

[13] Treas. Reg. §1.672(f)-3(a)(2).

[14] Code §672(f)(2)(A)(ii).

[15] See p. 13 of the Instructions for Form 3520 for tax year 2018.

[16] See Code §§665-668.

[17] Code §662(a)(2).

[18] Treas. Reg. §1.643(b)-1.

[19] Code §663(a)(1).

[20] Alternatively, the trustee may make an election to recognize gain at the time of the distribution. Where that occurs, the gain is a taxable event, creating D.N.I. and the amount of the distribution is the value of the property.

[21] Code §2103.

[22] Code §2105(b)(3).

[23] Code §2105(b)(1).

[24] Code §2105(b)(4).

[25] Treas. Reg. §20.2104-1.

[26] See, e.g., *ASA Investerings Partnership v. Commr.*, Tax Court Memo 1998-305.

[27] Code §2106(a).

[28] Treas. Reg. §20.2106-2(a).

[29] Code §2053(a)

[30] Rev. Proc. 2019-44.

[31] Code §2001(b)(1)(B).

[32] Code §2010(c)(5)(A).

[33] Code §2056

[34] Code §2056(d).

[35] Code §2014.

[36] Section 718.103, Florida Statutes.

[37] Code §2036(a)(1).

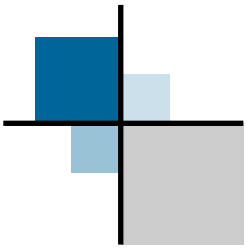
[38] Code §2038.

[39] Code §§2102 and 2012.

[40] Code §7874.

[41] Rev. Proc. 2019-44.

[42] Code § 2505.



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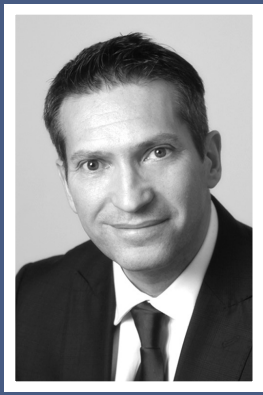

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- Frequent lecturer on international taxation for organizations including the Practicing Law Institute, New York University Tax Institute, the American Bar Association, the International Fiscal Association and The Society of Trust and Estate Practitioners.
- Author or co-author of numerous articles on international taxation, including "Outbound Acquisitions: European Holding Company Structures" published annually by the Practicing Law Institute, "Hybrid Entities In Cross Border Transactions: The Canadian Experience-the U.S. Response," published annually by the Practicing Law Institute, "The Good, The Bad, & The Ugly: Recent Cases Addressing International Tax Transactions," Vol. 24, No. 2 International Tax Journal 1 (Spring 1998)

AFFILIATIONS

- New York State Bar
- District of Columbia Bar
- American Bar Association, Section of Taxation
- International Fiscal Association
- Society of Trust and Estate Practitioners

LANGUAGES

English