非定居美国的外国公民的遗产税

Estate Taxation of a Non-Resident Alien

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- Regis Campfield's Notre Dame Tax and Estate Planning Institute;
- Lonnie McGee's Southern California Tax and Estate Planning Forum; and the
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He is also a co-author of the following three treatises:

- The Asset Protection Planning Guide: A State-of-the-Art Approach to Integrated Estate Planning, Commerce Clearing House (CCH) treatise, first edition;
- Asset Protection Strategies, American Bar Association (two chapters); and
- Asset Protection Strategies Volume II, American Bar Association published Apr. 2005 (MM responsible for 1/5 of the text).

Disclaimer

The law is constantly changing at an unprecedented pace. Also, each client's separate fact situation must be carefully examined before applying any principals of law. Furthermore, this outline is not intended to be a substitute for the practitioner's own research into this area of law and how the law applies to a client's specific situation. Therefore, the author takes no responsibility how the areas of law covered by this outline apply to the reader or the reader's clients. Finally, to ensure compliance with requirements imposed by the IRS Circular 230, we hereby inform you that any U. S. tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any matter addressed herein.

Procedures for Engagement

We would be more than happy to assist you with your request, however, let me first explain our procedures for engagement of our firm.

Our firm provides advice in estate planning, international taxation, business structures and transactions, and asset protection planning. *Seldom, if ever,* are there any "simple or quick questions in these fields. Almost all questions in these areas require a review of the relevant legal documents, organizational structure, past planning, as well as the client's objectives. Further, due to the liability issues involved combined with our time commitment, we do not answer technical questions, hypothetical questions, questions on outlines or articles unless we are engaged in writing. Our minimum engagement fee is $1,000. However, we do offer wholesale pricing for accountants and attorneys that engage us directly.

For more details regarding engaging our firm go to:
http://www.internationalcounselor.com then click on the "Accountants/Attorneys" Tab.
Please note that we do not accept international taxation of foreign retirement plan type of work. Should you have individual foreign retirement plan type of work, the following person was recommended to us:

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Table of Contents

Three Part Trilogy

I. Basics of International Estate Planning

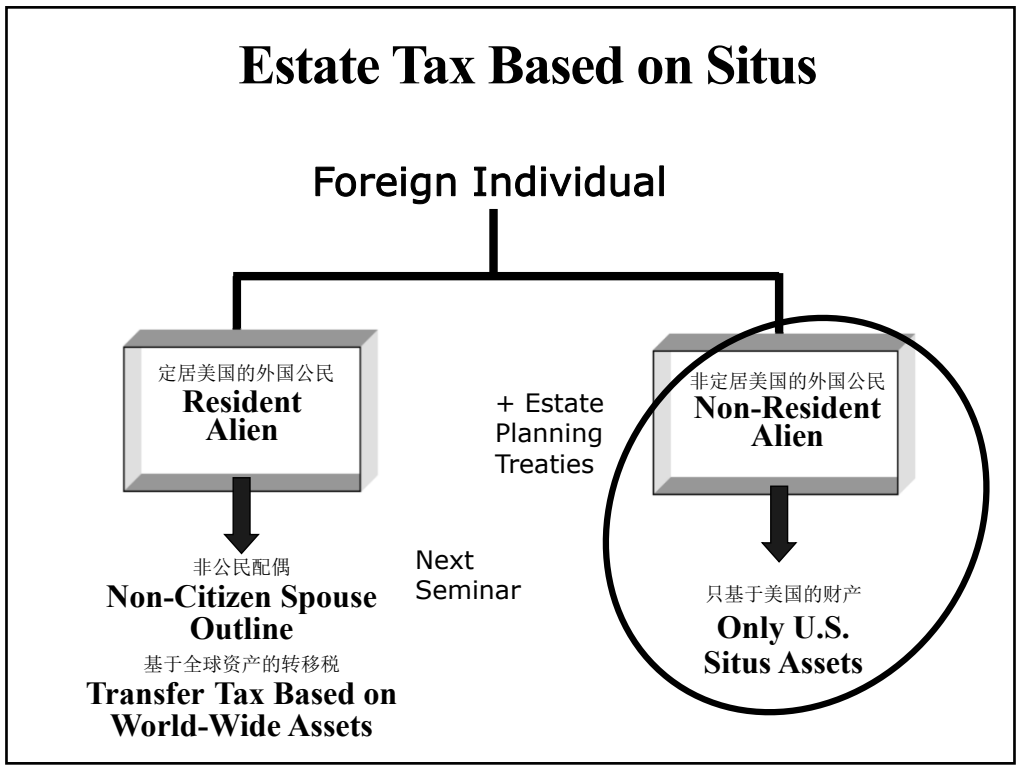
II. Noncitizen Spouse + U.S. Estate Tax Treaties

III. Advanced International Estate Planning With Trusts

This seminar is Part I of a three part seminar first broadcast by Steve Leimberg's LISI Services. The Basics of International Estate Planning discusses the traditional estate planning tools of gifting and the foreign corporation situs wrapper. For the foreign individual that has a lower value of assets in the U.S., these tools may meet the foreign person's individual needs.

The second seminar discusses two other key concepts: (1) the noncitizen spouse; and U.S. estate tax treaties. The noncitizen spouse gifting issues apply anytime that a citizen spouse of the U.S. makes a gift to his or her (1) resident spouse that is noncitizen or (2) spouse who is a foreign person. The second part of the seminar discusses the basics of estate planning treaties. The U.S. has estate 15 estate tax treaties with different nations. With seven of these nations, the U.S. also has gift tax treaties. Before moving to either the basic estate planning techniques, or as more often is the case, the advanced estate planning techniques with trusts, the planner needs to see if a treaty can solve the U.S. estate tax issue.

Finally, for the more wealthy clients, international or the use of a domestic trust should be considered.



A. Transfer Based on Situs

While a resident alien pays transfer tax based on his or her world-wide assets, a non-resident alien is subject to transfer tax only on U.S. situs assets. As noted in the Non-Citizen Spouse outline, a foreign person's classification for U.S. transfer tax purposes is based on the foreign person's domicile. Domicile is an intent test, based on all the facts and circumstances. A nonresident alien includes persons living outside of the United States as well as individuals that are living in the United States who are not domiciled in the US.

A. 基于财产所属地的转移税

定居美国的外国公民的财产转移税是基于他（她）的全球财产的，而非定居美国的外国公民的财产转移税是基于他（她）的美国财产的。在非公民配偶的章节中，我们提到了外国纳税人在美国转移税意义上的分类是根据该外国纳税人的法律居住地决定的。而法律居住地是基于所有的事实情况判断的，非定居美国的外国公民包括居住在美国之外的公民，还有住在美国但法律居住地不在美国的公民。

相同和不同之处

What's The Same or Different?

美国公民 U.S. Citizen	非定居美国的外国公民 Non-Resident Alien
1. 全球资产 **World-Wide Assets**	**1.** 美国资产 **U.S. Situs Assets**
2. 1158万美元免税额 **$11.58 Million Exemption**	**2.** 6万美元免税额 **$60,000 Exemption**
3. 1158万美元隔代转移税免税额 **$11.58 Million GSTT**	**3.** 1158万美元隔代转移税免税额 **$11.58 Million GSTT**
4. 可抵扣所有费用 **100% of Debts**	4. 只能抵扣美国资产占全球资产百分比的费用 **% Debt based on U.S. Assets**

B. Comparison of U.S. Citizen to a Non-Resident Alien

1. U.S. Situs Property

Under IRC § 2103 only property situated in the US is taxed in the non resident alien's estate, not worldwide assets. When referring to property "situated in the U.S.," the common term of "U.S. situs" assets is generally used.

2. Exemption Amounts

While a U.S. citizen and resident alien may have an applicable exclusion of $11.18 million (indexed), a non-resident alien is limited to a $60,000 applicable exclusion (no indexing). After the $60,000 amount is reached, the estate tax rate starts at 26 percent and goes up to 45 percent. For example, a US citizen or resident domiciled in the US with an estate of $500,000 will be allowed to pass the entire estate tax free; but a nonresident alien not domiciled in the US with an estate of similar value will pay $142,800 in estate taxes.

3. GSTT Amount

Ironically, a nonresident alien receives a $11.58 million generation skiping transfer tax exemption. Treas. Reg §. 26.2263-2(d).

4. U.S. Debts

Regarding U.S. situs assets that are included in a non-resident alien's estate, only a percentage of any debt (including funeral expenses and expenses of administration) is deductible against the U.S. estate. The percentage is computed by taking U.S. situs property and dividing by world-wide property.

B. 美国公民和非定居美国的外国公国公民的比较

1. 美国所属地的财产

在美国税法法典第 2103 章节下，非定居美国的外国公民的遗产中只有属于美国的财产需要缴税遗产税。对此通常使用的术语为“美国所属地”。

2. 遗产税免税额度

美国公民和定居美国的外国公民可以有 1118 万美元的遗产税免税额（每年根据消费者物价指数调整），而非定居美国的外国公民则可以有 6 万美元的遗产税免税额（不根据消费者物价指数调整）。当这 6 万美元的免税额达到之后，剩下的遗产需要按照 26%到 45%缴纳遗产税。举例来说，如果一个美国公民或者法律居住地在美国的居民有 500 万美元的遗产，那么所有的遗产都能够免于遗产税，而一个法律居住地不在美国的非定居美国的外国公民如果有相同的资产，那么他（她）将需要支付 14.28 万美元的遗产税。

3. 隔代转移税的免税额度

但有趣的是，非定居美国的外国公民也有 1158 万美元的隔代转移免税额。参见财政法规 §. 26.2263-2(d).

4. 美国费用支出

对于非定居美国的外国公民的美国遗产，只有一部分的费用（包括葬礼费用和管理费用）是可以抵扣税前遗产额的，这个比例是美国的财产占据所有财产的比例。

Percentage of World-Wide Debt

Allocated Debt or Expense = **U.S. real estate subject to Mtg** × **U.S. Assets / World-Wide Debt**

Recourse Debt

U.S. LLC Wrapper

Some planners propose

100% Single Member LLC

To net the asset against the debt

LLC

a. In General

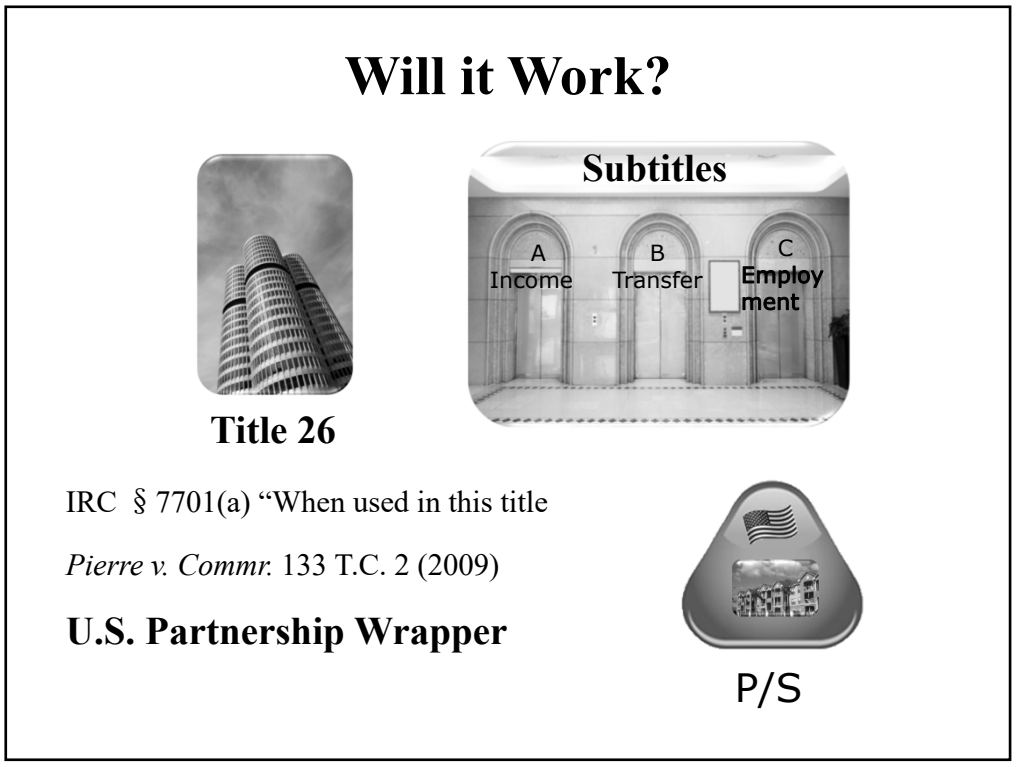
In general, IRC § 2106(a)(1) allows an allocated amount of debts and deductions listed under IRC § 2053 to be deducted from the foreign person's estate. IRC § 2053 lists funeral expenses, administrative expenses, claims against the estate, and a final fourth much trickier category. The fourth category, unpaid mortgages receives an allocation of debt, not the full amount, if the full value of the decedent's in the real estate is included in the estate. This means only a portion of the mortgage is offset against the U.S. person's estate tax, even though the entire value of the property was included in the estate.

Treasury Reg. § 20.2053-7 adds further complication to this issue. At first blush, it looks like the full value of the mortgage is offset against the U.S. property. However, the planner needs to read the entire short treasury regulation. At this point, most readers of the treasury regulation are uncertain of its meaning. Bad day's reading. Next the cases on point need to be consulted to determine how to interpret a one paragraph Treasury Regulation. *Estate of Johnstone v. Commr.,* 19 T.C. 44 (1952); *Estate of Fung,* 117 T.C. 247 (2001) *affd.* 58 Fed. Appx 328 (9th Cir. 2003).

These cases interpret the case to mean if the U.S. property was subject to a nonrecourse note, only the equity in the property is subject to U.S. estate tax. Conversely, if the mortgage was recourse to the decedent, only the allocated percentage is deductible from the estate. Please note the *Estate of Fung* regarding the difficulty in determining whether the loan was recourse or nonrecourse after the application of state law.

b. Single Member LLC

Some planners propose that a client create a single member LLC to hold the real estate. The theory is that now the 100% membership interest is now included in the estate net of the mortgage.



c. Does a Single Member LLC Work?

A single member is a disregarded entity, meaning that it is disregarded for almost all tax purposes. When defining entities IRC § 7701(a) states, when used in this *title,* then it gives the definition of many legal persons such as a partnership, corporation, fiduciary, and shareholder. So under the general rule of IRC § 7701(a) it appears that the definition provided under this code section would apply for all subtitles, including subtitle B for transfer taxes. Therefore, one might conclude that a disregarded entity is disregarded for all purposes, meaning the mortgage would not be netted in determining the nonresident's estate tax.

Conversely, the "disregarded entity" was created in the 1996 Check the Box regulations. It is not mentioned in the IRC. This resulted in the case of *Pierre v. Commr.,* 133 T.C. 2 (2009), where the taxpayer contributed property into an LLC. Days later she gifted the LLC interests. The Service argued that minority gifts should not apply as the gifts should be considered a percentage of the underlying assets. The Tax Court, in a divided opinion, sided with taxpayer treating the gifts as a gift of an interest in an entity, not the underlying assets.

The facts for a 100% LLC owned at the time of death for a nonresident are weaker. In *Pierre,* the gift created two members and partnership taxation. Here, the nonresident's estate still owns 100% of a disregarded entity. Further, *Pierre* was a divided opinion. So the planner may well wish to prefer using a structure with at least two members at the time of nonresident's death.

相同和不同之处

What's The Same or Different?

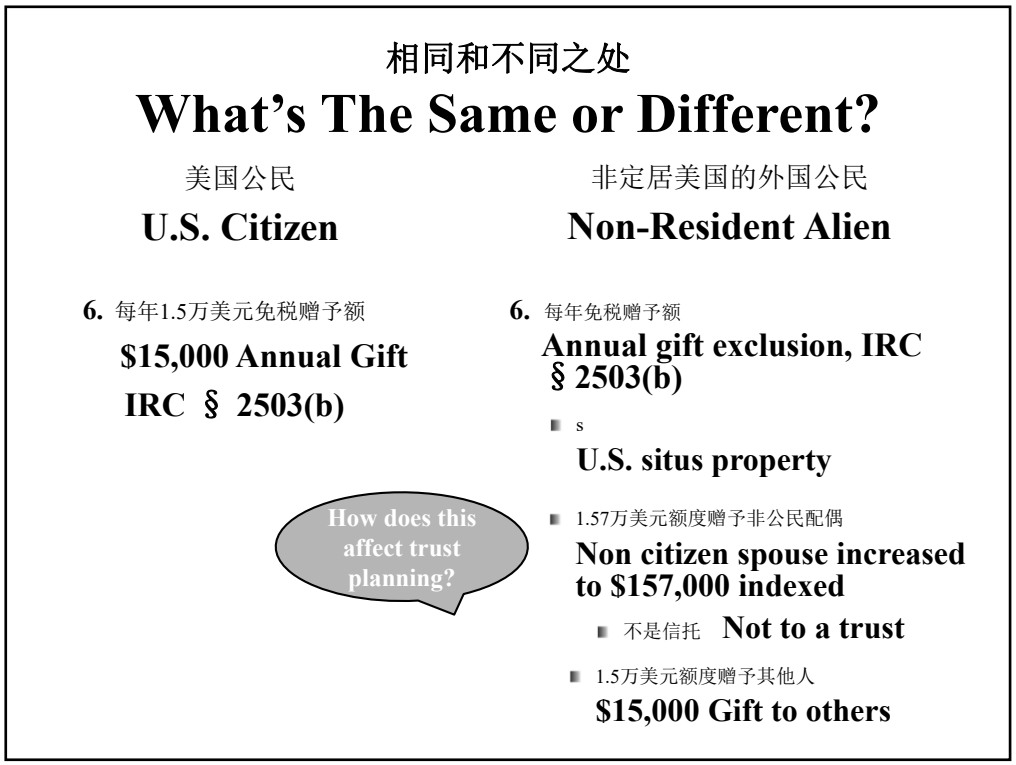
美国公民 **U.S. Citizen**	非定居美国的外国公民 **Non-Resident Alien**
5. 无限制抵扣赠予配偶的财产 **Unlimited Marital Deduction**	**5.** 不能抵扣赠予配偶的财产,但有“合格的国内信托（QDOT）” **No marital deduction, however - QDOT** ➢ Only delays to the second spouse's death ➢ Administrative Issues

5. Unlimited Marital Deduction

A U.S. Citizen receives an unlimited marital deduction for gifts to a citizen spouse. There is no unlimited marital deduction for non-citizen spouses. However, a non-citizen spouse may receive property in a Qualified Domestic QDOT. Unfortunately, this only delays the estate tax to the second spouse's death. In essence it operates similar to a marital trust (e.g. QTIP). Further, there are some administrative issues with a QDOT.

5. 无限制夫妻赠予抵扣

美国公民可以对配偶做任何数额的赠予从而减少自己的遗产价值，但非美国公民则不能够使用这样的无限制夫妻赠予抵扣。不过，非美国公民能够利用“合格的美国信托”来接受配偶的财产，从而将遗产税推延至下一个受益人过世的时候缴纳。关于这个“合格的美国信托”的征税方式会在之后讨论。



6. Annual Gift Amount

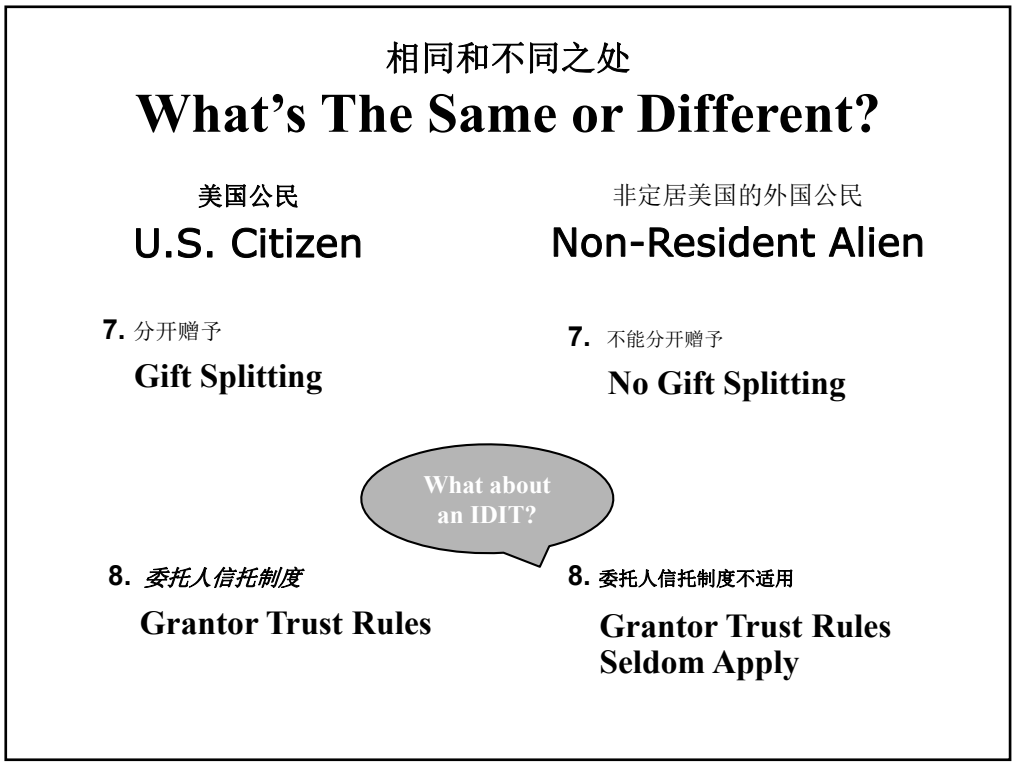
A U.S. citizen may gift $15,000 per person each year to whomever, the U.S. person chooses to do so. Generally, a person only gifts to members of his or her immediate family. A non-resident alien may also gift $15,000 of U.S. situs property per year to whomever they choose to do so. However, this annual amount is increased to $157,000 (indexed 2020) for gifts to a non-citizen spouse. IRC § 2523(i).

While the annual amount is increased to $157,000, only $15,000 may be made on behalf of a non-citizen spouse to an irrevocable trust. This is because a gift to a spouse must also qualify for the marital deduction. Treas. Reg. § 25.2523(1)-1(c). However, it is only the amount that is over the standard $15,000 annual 2503(b) exclusion (i.e. $152,000 - $15,0000 [indexed]= $137,000) that qualifies for the marital deduction. 136 Cong. Rec. H7147 (daily ed. Aug 3, 1990) (statement of Rep. Rostenkowski introducing H.R. 5454). To qualify for the marital deduction, a gift to a spouse cannot be to something known as a "non-deductible terminable interest." A gift to an irrevocable trust is almost always classified as a non-deductible terminable interest.

6. 每年免税赠予额

美国公民每年可以从自己的财产中免税赠予 1.5 万美元给任何人，但一般人们只赠予给直系亲属。非定居美国的外国公民每年也可以从自己的美国财产中免税赠予 1.5 万美元给任何人，如果是赠予给非美国公民配偶，那么可以达到 15.7 万美元（2020 年额度）。参见美国税法法典§ 2523(i).

尽管对于非美国公民配偶的这个赠予额增加到了 15.7 万美元，但其中只有 1.5 万美元的赠予额是可以代表该非美国公民的配偶转到不可撤销的信托的，这是因为赠予给配偶的礼物同时也必须符合夫妻间无限制赠予抵扣的要求。参见财政法规§ 25.2523(1)-1(c). 但这只是针对超出了 1.4 万美元的年度免税赠予额的部分。要符合夫妻间无限制赠予抵扣的要求，赠予给配偶的礼物不可以是“不可抵扣的可终止的权益”，例如赠予给“不可撤销的信托”的礼物就属于这样一种类型。



7. Gift Splitting

Only a citizen and resident alien may elect to gift split. IRC § 2513(a)(1). Therefore, this election is not available to a non-resident alien.

8. Grantor Trust Rules

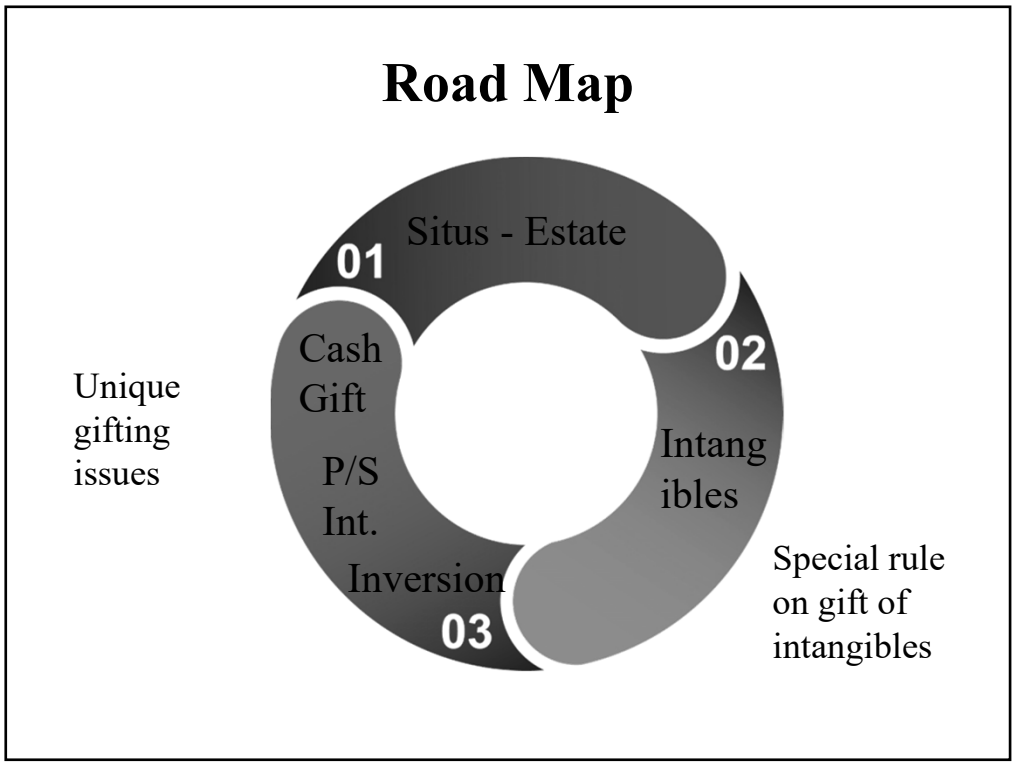
If a non-resident alien settles a trust, IRC § 672(f) prevents the trust from being classified as a grantor trust unless (1) the non-resident alien settlor may revoke the trust; or (2) all income and principal may only be paid to the non-resident alien and his or her spouse during their lives. For this reason, the use advanced estate planning tools such as the IDIT and GRAT are limited to (2).

7. 分开赠予

只有美国公民和定居美国的外国公民可以选择将赠予额分摊到夫妻两个人，从而利用每人每年的免税赠予额。参见美国税法法典§ 2513(a)(1). 但非定居美国的外国公民不能使用这个赠予选择。

8. 委托人信托制度

如果一个非定居美国的外国公民创建了一个信托，那么按照税法法典条例§ 672(f)，这个信托不属于委托人信托，除非（1）该创建人可以驳回信托；或者（2）所有的收入和本金都只能够在该创建人及其配偶的有生之年支付给他们。基于这个原因，有一些较高端的遗产规划方法，例如模糊授予信托和赠予人保留年金信托就不适用了。

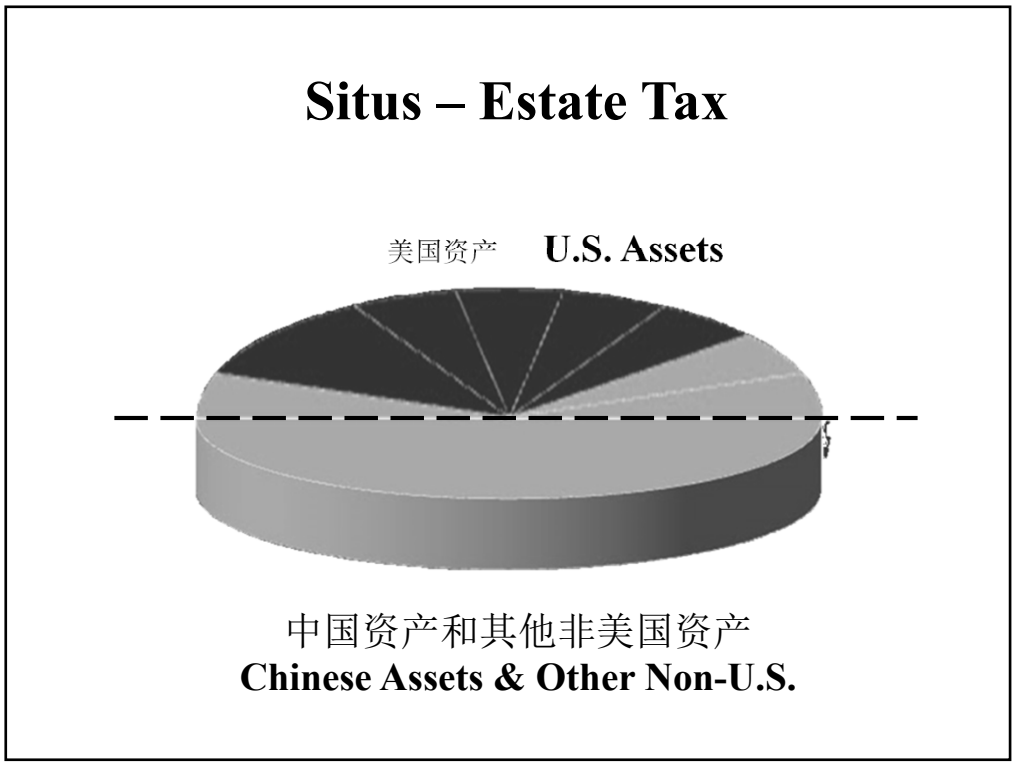


C. Basic Rules Road Map

A foreign person is subject to U.S. estate tax based on U.S. situs assets. Therefore, the analysis begins with defining U.S. situs assets. While some assets are located in the U.S., the IRC classifies them as non-U.S. situs or provides an exemption from estate tax.

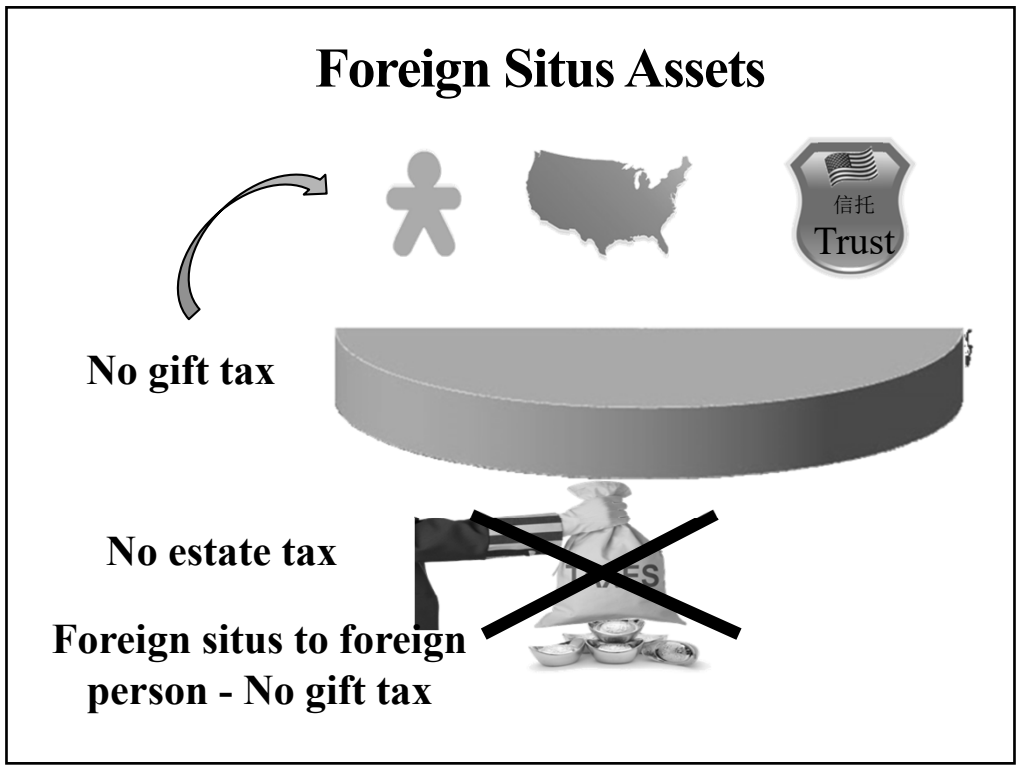
Second, a nonresident alien has a special gifting rule that allows she or he to gift intangibles without incurring any gift tax. There is no special intangible rule for U.S. citizens or residents.

This brings us to the third part of the basic international rules road map. What's an intangible? Is cash an intangible? How about a partnership interest? Further, how do the inversion rules apply to gifts of U.S. corporations or U.S. partnerships to a foreign corporation.



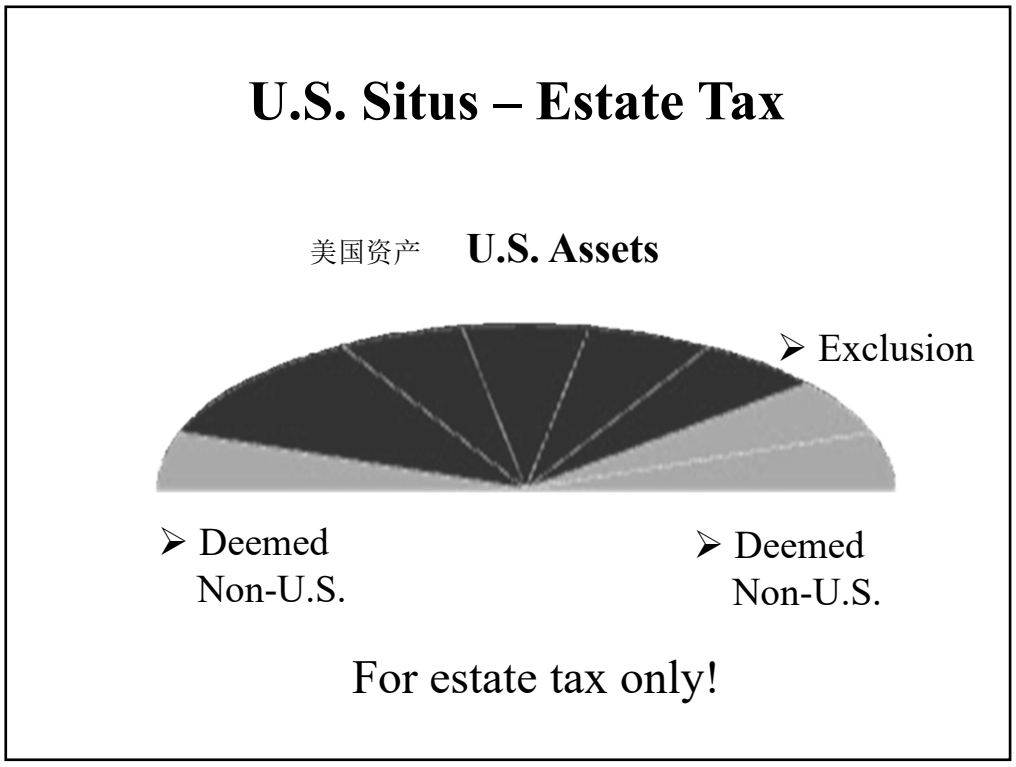
1. U.S. Situs and Foreign Assets

When planning for the foreign individual, the first step is to divide the client's assets into U.S. situs assets and foreign assets.



2. Foreign Situs Assets

Naturally, an foreign individual's foreign situs assets are not subject to U.S. estate tax. However, the more subtle point is that a gift of a foreign situs asset is not subject to U.S. estate tax. Naturally, this makes common sense if the gift is to someone outside the U.S. The more subtle point is that a gift of a foreign situs asset into the U.S. is not subject to any gift tax. A gift of foreign situs property may be made to an individual, or as we will discuss in the third part of this trilogy, Advanced International Planning With Trusts.



3. U.S. Situs – Estate Tax

The above graph details U.S. situs assets. The assets in red are included in a foreign individual's U.S. estate. However, certain U.S. assets are not included either because there is an exclusion or the asset is deemed to be non-U.S. situs. When the asset is deemed a non-U.S. situs (i.e. deemed to be foreign situs), this is for estate tax purposes only, not for gift tax purposes. This is further discussed when discussing whether cash is a tangible asset in this outline.

财产所属地

Situs of Property For Estate Tax

- 有形财产（美国来源）

Tangible (U.S. Source)

房地产

Real Estate

市场价格不减去贷款额

FMV not reduced by Loan

春天时光

Le Printempts 1873

法国画家皮埃尔-奥古斯特库特

Pierre Auguste Cot

纽约大都会艺术博物馆

Metropolitan Museum of Art, NY

D. Situs of Property

Since only property that is deemed to have a US situs is included in the non-resident alien's taxable estate, it is important to determine how property is classified for US situs purposes. The situs classification system for estate planning is similar to the source of income tests used for income tax purposes.

Conversely, a foreign individual has a special rule for gift tax purposes. A gift of a U.S. intangible asset is not subject to gift tax. For this reason, there are two major classification categories discussed below: tangible and intangible property.

1. Tangible Property (Real Estate and Personal)

Real estate and tangible personal property located in the US is taxable for estate and gift tax purposes. Real estate and tangible personal property outside of the US is not US situs property. Tangible personal property includes: furniture, art, collectibles, and cash.

U.S. real estate owned individually is U.S. Source property. Treas. Reg. § 20.2104-1(a)(1). Be careful to note however, the value of the real estate is not reduced by any mortgage it is subject to.

C. 财产所属地

对于非定居美国的外国公民的可征税遗产，只有美国所属地的部分会被归入，因此判断哪些财产属于美国所属地很重要。这个分类的制度体系和判断美国所得税的收入来源地是很相似的。对于赠予税，主要有两大财产类别：有形资产和无形资产。遗产税也有类似的分类。对于遗产税，有形资产和个别类型的无形资产属于美国所属地财产。

1. 有形资产（房地产和个人资产）

在美国的房地产和个人有形资产属于美国遗产税和赠予税的征税范围内。不在美国的房地产和个人有形资产不属于美国所属地财产。其中个人有形资产包括：家具、艺术品、收藏品和现金。

个人所有的美国房地产属于美国的财产，参见财政法规§ 20.2104-1(a)(1)。需要注意的是房产的价值不是减去贷款之后的价值。

财产所属地

Situs of Property – Estate Tax

a. 保险单 **Insurance Policies**

不属于美国财产

Situs outside U.S.
(IRC § 2105(a)

b. 年金 **Annuities**

– 发行公司所属地

Situs of the issuing company

2. Intangible Property

Intangible property located in the US is generally taxable for estate tax purposes only. The situs of intangible property depends upon the exact nature of the property.

a. Insurance Policies

Proceeds from a U.S. life Insurance policy owned by the decedent non-resident alien are not US situs property. IRC § 2105(a); Treas. Reg. § 20.2015-1(g). Conversely, if the decedent owns a U.S. policy on the life of another, it is subject to U.S. estate tax.

b. Annuities

Annuities regardless of the underlying investments are US situs property if issued by a US company.

2. 无形资产

位于美国的无形资产一般是来说只属于遗产税的征税范围，无形资产的所属地取决于资产的本质。

a. 保单

非定居美国的外国公民的寿险的保单不属于美国财产，无论是终身寿险还是万能寿险还是可变寿险保单。参见美国税法法典§ 2105(a)和财政法规 § 20.2015-1(g).

b. 年金

美国公司发行的年金都属于美国所属地财产，无论相关的投资是否是美国所属地财产。

财产所属地

Situs of Property

c. 股票 **Stock**

公司成立地点

Where the entity is incorporated (IRC § 2104(a))

d. 债务工具 **Debt Instruments**

投资组合利息免税

Portfolio Exclusion (IRC § 2105(b)(3))

c. Stock

Stock (equity) in a corporation organized in the United States is U.S. situs property. IRC § 2104(a); Treas. Reg. § 20.2104-1(a)(5).

d. Debt Instruments

Debt issued by U.S. persons or entities have a U.S. situs. Conversely, similar to the income taxation for a non-resident alien, debt instruments that are classified as portfolio interest are exempt for estate tax purposes. IRC § 2105(b)(3).

c. 股票

美国成立的公司的股票（公司权益）属于美国财产。参见美国税法法典条例 § 2104(a)和美国财政法规 § 20.2104-1(a)(5).

d. 债务工具

由美国个人或法律实体发行的债务属于美国财产。和非定居美国的外国公民的所得税制度很相似的是，被列为组合投资利息的债务工具免于遗产税。参见美国税法法典 § 2105(b)(3)。

财产所属地

Situs of Property

e. 共同基金 **Mutual Funds**

- 美国共同基金-所属地为美国（美国私信裁定 9748004）

  U.S. Mutual Fund (RIC) – U.S. Situs (PLR 9748004)

  - Generally, are RICS - Domestic
  - Exception – Unit Investment Trust
  - Direct ownership of a bond – portfolio exemption

- 外国共同基金-所属地为外国

  Foreign Mutual Fund (PFIC) – should be foreign situs

  - If it is classified as a corporation
  - Foreign business trust

e. Mutual Funds

U.S. mutual funds are generally organized as a regulated investment company. A regulated investment company must be a domestic corporation. IRC § 851(a). In PLR 97478004, the foreign person owned four mutual funds at time of death. Three of them were open ended management investment companies classified as RICs and one of them was an investment fund under IRC § 851(f). The PLR followed the corporate rule of place of incorporation. Since the RICs were U.S. corporations, the entire RIC was included in the foreign person's estate. Conversely, Treas. Reg, § 1.851-7(a), a unit investment trust shall not be treated as a tax person (as defined in § 7701(a)(1). A holder of an interest in such trust will be treated as directly owning the assets of such trust . . . Please note that IRC § 851 is an income tax code section. It is not an estate or gift section. So the drafter's reliance on this code section applying a look through rule to an investment fund may be placed.

A planning point. If a foreign person owns a bond directly, most of the time it will qualify for the portfolio exemption previously discussed. However, if the U.S. bonds are owned through a U.S. mutual fund, the corporation rule controls, and there is no portfolio exemption.

A foreign mutual fund that is classified as a foreign corporation for U.S. tax purposes should be foreign situs. Please note that many offshore mutual funds are formed as business trusts (similar to the Massachusetts business trust model). For offshore mutual funds formed as business trusts after the Check the Box Rules of 1996, most of these trusts will be classified as corporation for U.S. tax purposes.

财产所属地

Situs of Property

f. 知识产权 **Intellectual Property**

Neither filed in U.S. nor used in U.S.

g. 合伙企业 **Partnership**

- Wish we had corporate rule
- Is it an entity or an aggregate?

f. Copyrights, Patents, Trademarks

Treasury Reg., § 20.2105-1(e) states "intangible personal property the written evidence of which is not treated as being the property itself, if it is not issued by or enforceable against a resident of the U.S. **or** a domestic corporation **or** a governmental unit" is not situated in the U.S. This means place of use determines whether it is included in the nonresident alien's estate. The construction of the sentence has a bit of ambiguity. Does the double "or" without the any serial comma's mean issued by the U.S. government which is a place of filing rule. However, it looks like there is a second requirement to avoid U.S. taxation. The intangible personal property cannot also used in the U.S. The conservative reading would be that it cannot be filed in the U.S. or used in the U.S. Otherwise, it would be U.S. property.

g. Partnership or LLC Interests

One would hope that the place of formation rule would apply to a partnership for situs purposes, which is the case in classification of taxpayer which determines whether the person is foreign or U.S. primarily for international income tax rules. Unfortunately, for over a hundred years, neither the IRC or the regulations state the situs of a partnership interest. The question that has been raised is whether for foreign estate purposes, should the partnership be treated as an entity or in the aggregate. In the aggregate means that each partner owns a percentage of each of the underlying assets.

Entity or Look Through

- To underlying assets

- Why is this even an issue?
  - Domestic estate planning cases
  - Inconsistencies
    - Court cases
    - Service pronouncements

For this discussion, the term "aggregate" may be better defined as "looking through" to the underlying assets to determine the situs of the underlying assets.

One might simply assume that a partnership will be treated as an entity for the purpose of situs, because a partnership is treated as an entity for domestic estate planning purposes. While I would agree with this general statement, the issue needs to be further discussed as most authors agree that that there are inconsistencies between the court cases as well as inconsistencies between the Internal Revenue Service's pronouncements.

Look Through

- *Sanchez v. Bowers*
  70 F. 2d 715 (2nd Cir. 1934)
  - P/S terminated on death
  - Need to check foreign law
  - Dicta the P/S should be treated as an entity
- GCM 16164 (1936)
  French P/S owns part of a NY P/S

Entity

- *Blodgett v. Silverman*
  277 U.S. 1 (1948)
  - N.Y. P/S with N.Y. RE
  - Connecticut taxes intangibles on death
- GCM 18718 (1937)
  French P/S owns part of a NY P/S
  - Revoked decision in GCM 16164
  - Does not dissolved on death
- Rev. Rul. 55-701
  Place of business

The first case on point was written by Judge Learned had when he was on the Second Circuit. This case dealt with a Cuban Sociedad de gananciales. Cuban laws regarding this entity were applicable to property owned by spouses and the rights of the spouses were similar to a partnership.

Judge Learned Hand stated "in ascertaining whether an association claiming to be an entity shall be recognized as such, a court of the forum will look to the state which created it… So at first, it looks like the Second Circuit will hold that the marital partnership is an entity and possibly follow the corporate rule. However, it took the opposite approach and looked to the underlying assets. The Court held that since Cuban law required the liquidation of the marital partnership, a look through rule should apply. This is a 1934 case, and it was typical for partnership law to require liquidation on the death of a partner. However, this is no longer the rule for U.S. partnerships and LLCs. However, the real question is what does foreign law say regarding the partnership.

GCM 16164 (1936) held that a French decedent that owned a French partnership which in turn owned a New York partnership should include the NY partnership interest in his U.S. estate. Conversely, GCM 18718 (1937), revoked the previous year PLR, noting that the French partnership did not terminate on death.

Blodgett v. Silverman is not an international tax case. Rather, the issue is whether a NY Partnership that holds NY real estate may be taxed in Connecticut. Connecticut's estate tax stated that it could only tax Connecticut situs property and intangible property. If the New York real estate had been directly owned by the Connecticut decedent, it would not be subject to Connecticut estate tax. So the taxpayer argued that a look through rule should be applied. The U.S. Supreme Court disagreed upholding the entity theory and also stated the partnership interest was an intangible.

Revenue Ruling 55-701 uses a place of a "trade or business" to define the situs of a partnership interest. This revenue ruling specifically rejected the aggregate theory (i.e. a look through rule) thereby adopting the entity theory. However, it did not follow the corporate situs formation rule. Rather, it mentioned a principle used by some estate planning treaties and stated the "situs of a partnership interest is where its business is carried on." Please note that as this Revenue Ruling deals with the U.S. Britain estate tax treaty, many commentators note that it may well be limited to such a treaty that specifically mentions a place of business.

For a further analysis of these partnership situs issues, the author would recommend the following articles:

1. Cassell, Karlin, McCaffrey, and Streng, *U.S. Estate Planning For Nonresident Aliens Who Own Partnership Interests,* 1683 Tax Notes 1705 (June 16, 2003).
2. Howard J. Barnet Jr., *Estate Tax Situs of Partnership Interests,* 1093 Tax Notes 1101 (March 10, 2014).
3. Annette Glod, United States Estate and Gift Taxation of Nonresident Aliens: Troublesome Situs Issues, 51 Tax Law 109 (Fall, 1997).

现金

Cash

- Tangible v. Intangible Asset

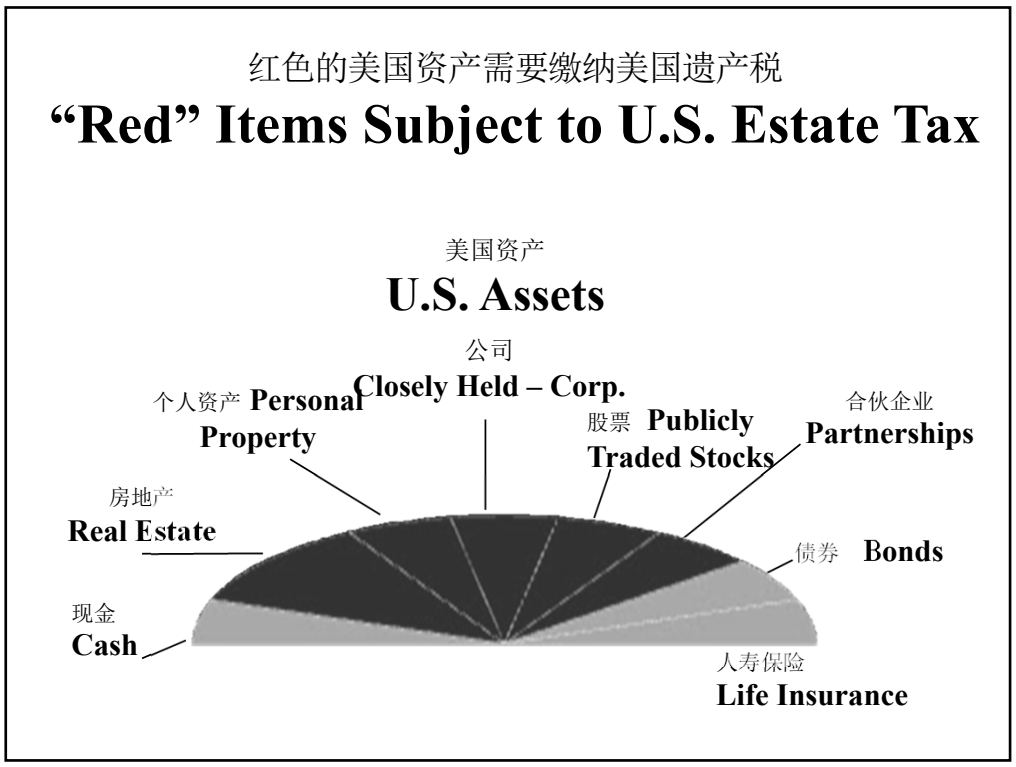
- If owned by a corporation, partnership, or disregarded entity it is valued as part of the entity
- If owned by a branch (not disregarded entity – included in estate
  - Rental property bank account
- If U.S. bank account – situs reclassification
  - What about a money market account?

3. Cash

When addressing this area, I find it easier to address some of the exceptions first, then the general rule.

If cash is held in a U.S. entity, it is valued as part of the entity, and the U.S. entity is subject to U.S. estate tax. This includes a disregarded entity (i.e. a single member LLC owned by a foreign person). If the foreign person created a U.S. branch (i.e. the foreign person has effectively connected income) then the bank account is part of the foreign person's estate. The most common example of this is a foreign person rents U.S. real estate and has a bank account for the real estate.

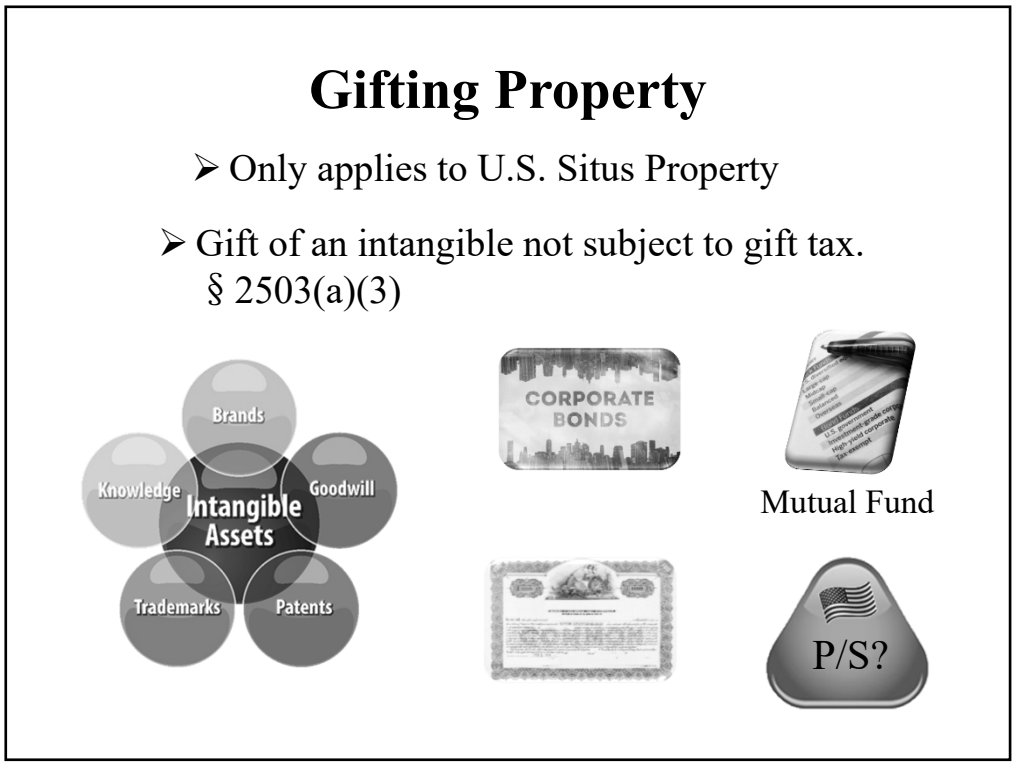
Now the general rule. If a foreign person opened a U.S. bank account, unrelated to a business, then the bank account is U.S. situs. However, for estate tax purposes (not gift tax) it is treated as non U.S. situs. IRC § 2105(b)(2); Rev. Rul. 82-193; Rev. Rul. 54-623. Conversely, a brokerage firm is not a bank. Therefore, a money market account possibly does not receive the exclusion. Zeydel and Chung, *Estate Planning For Noncitizens and Nonresident Aliens: What Were Those Rules Again?* 106 J. Tax'n 20 (January 2007) citing Rev. Rul. 69-596 (1969); *Estate of Ogarrio,* 40 TC 242 (1963), *aff'd* 337 F.2d 108.



4. U.S. Situs For U.S. Estate Tax

In summary, just because an asset is located in the U.S. does not mean that it is subject to U.S. estate tax. Cash has a bank deposit exemption. Bonds generally will not be a U.S. situs asset because of the portfolio interest exemption for estate planning. Also, life insurance on the life of a non-resident alien is sited outside of the U.S.

Conversely, the items in red (or in black on a printed outline) are the U.S. situs assets and subject to U.S. estate tax. U.S. situs assets would include U.S. real property, personal property located in the U.S., U.S. closely held stock, publicly traded U.S. stock, and U.S. partnership interests.



E. Gifting Intangible Property

The gifting rules for a foreign nonresident alien are not the same as such person's estate tax rules. A foreign individual has a special rule for gift tax purposes. A nonresident individual is not subject estate tax on a gift of intangibles. IRC § 2501(a)(3); Treas. Reg. § 25.2501-1(e)(i).

The next questions is what constitutes an intangible. Generally, when someone thinks of intangible assets they think of patents, trademarks, and copyrights. Yet, the definition of intangible assets is much broader than those intangibles that require a license. IRC § 197 adds goodwill, client lists, business processes, and trade brands to the list, and allows amortization over 15 years. Treasury Regulation § 25.2511-3(a)(2) adds to the list when it states:

> "Except as provided otherwise in subparagraphs (3) and (4) of this paragraph, intangible personal property constitutes within the United States if it consists of a property right issued by or enforceable against a resident of the United States or a domestic corporation (public or private), irrespective of where the written evidence of the property is physically located at the time of transfer."

Subparagraph (3) deals with shares of stock and states that shares of stock issued by a domestic corporation are U.S. situs and shares of stock issued by a foreign corporation are foreign situs. Therefore, gifts by a foreign person of U.S. stock were not subject to U.S. gift tax. *Also see, Rev. Rul. 56-438;* PLR 8342106; TAM 5511181600A.

Subparagraph (4) deals with debt instruments and also defines that debt instruments issued by U.S. persons are also U.S. situs property. Further, PLR 8210055 notes that the gift of Treasury Bills was a gift of an intangible, not subject to U.S. gift tax.

E. 财产所属地

对于非定居美国的外国公民的可征税遗产，只有美国所属地的部分会被归入，因此判断哪些财产属于美国所属地很重要。这个分类的制度体系和判断美国所得税的收入来源地是很相似的。对于赠予税，主要有两大财产类别：有形资产和无形资产。遗产税也有类似的分类。对于遗产税，有形资产和个别类型的无形资产属于美国所属地财产。

Gifting U.S. Bonds

- intangible personal property constitutes within the United States if it consists of a property right issued by or enforceable against a resident of the United States or a domestic corporation (public or private), irrespective of where the written evidence of the property is physically located at the time of transfer."
- PLR 821055 – Gift of Treasury Bills

1. Debt Instruments

Treasury Regulation § 25.2511-3(a)(4) deals with debt instruments and also defines that debt instruments issued by U.S. persons are also U.S. situs property. Further, PLR 8210055 notes that the gift of Treasury Bills was a gift of an intangible, not subject to U.S. gift tax.

Gifting of Mutal Fund

- PLR 9119049 – Transfer of an interest in a publicly held common trust
- Fund held municipal bonds and securities
- Probably limited to underlying investments

2. Mutual Funds

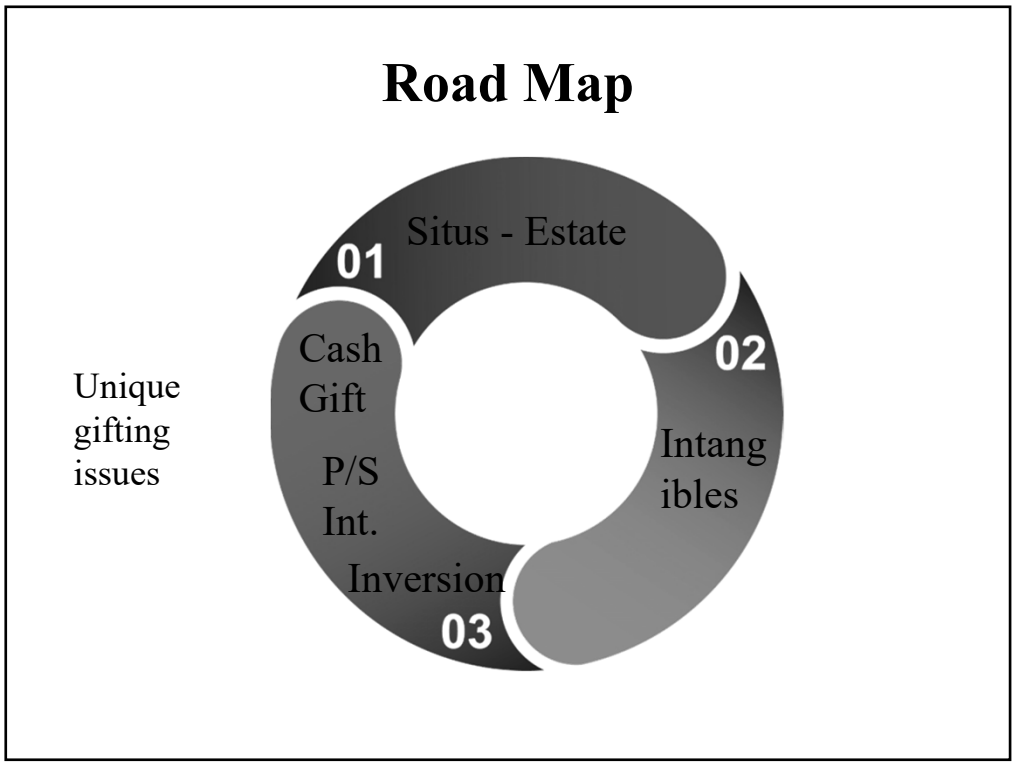
Mutual funds that hold bonds (debt instruments) and securities should qualify as a intangible personal property qualifying for the gift tax exemption of IRC § 2501(a). PLR 9119040, citing Rev. Rul. 55-163 that noted an investment in a "publicly held common trust" was a proprietary interest (i.e. intangible asset). Note mutual funds first came into existence in the late 1950's, so the term was not commonly used then. While the PLR states that a mutual fund interest is a proprietary interest meaning in its interpretation intangible property, the underlying assets were municipal bonds and securities that would qualify a gift of intangible property by themselves.

Gifting U.S. Corporate Stock

- Stock is an intangible
- Not subject to gift tax
- Rev. Rul. 56-438; PLR 8342106; TAM 5511181600A.

3. Corporate Stock

Stock is an intangible assets and the gift of U.S. stock. As an intangible asset, such a gift is not subject to U.S. gift tax. *Rev. Rul. 56-438;* PLR 8342106; TAM 5511181600A.



F. Unique Gifting Issues

Unique gifting issues that must be addressed are whether cash or a partnership interest are intangible assets. Also, whether the inversion rules apply when a U.S. corporation or a U.S. partnership are gifted to a foreign corporation or foreign partnership.

Cash Tangible or Intangible Asset

- Is it viewed as a wheel barrel of cash?

or

- Neurons floating over the air waves?
- As a tangible asset, gift from a U.S. bank account (situs) – subject to U.S. gift tax
- A gift from a foreign bank (not U.S. branch) – should not be subject to gift tax

1. Is Cash a Tangible or Intangible Asset

Does the IRC view cash a wheel barrel of cash or neurons floating over the air waves? In other words, if it is viewed as a wheel barrel of cash, it is a tangible asset and a gift of cash from a U.S. bank account (i.e. U.S. situs asset) would be taxable for gift tax purposes. Conversely, if it was an intangible asset, a gift of cash from a U.S. bank account would not be subject to U.S. gift tax. Unfortunately, the case law and PLRs are from older years which held that cash was a tangible asset. Therefore, a gift from a U.S. bank account is subject to U.S. gift tax. *Harris v. Commr.,* 178 F.2d 861 (2nd Cir. 1949); *Jorgensen v. U.S.,* 152 F. Supp. 73 (Ct. Cl. 1957); PLR 7737063. Also, see Treas. Reg. § 25.2511-3(b)(4)(iv) ("[c]urrency is not a debt obligation …", so it **cannot** be argued that a gift from a U.S. bank account would be nontaxable as a debt instrument.

This seems to conflict with a literal reading of IRC § 2105(b) that holds that such assets is deemed to be non U.S. situs asset. Apparently, the IRS and the courts draw a distinction between the estate tax provisions which are under IRC § 2000 and § 2100 for non-resident aliens and the gift provisions of IRC § 2500s. PLR 7737063 specifically mentions the exclusion for estate purposes under IRC § 2503(b), however concludes that cash in a U.S. bank account is a tangible asset, subject to gift tax. The same analysis was also reached in *Jorgensen* cited above in a 3-2 decision by the Court of Claims. The two dissenting judges took the position that the gift tax should be interpreted in light of the estate tax deeming the cash to be foreign situs.

Please note that sometimes a commentator confuses PLR 7737603 with PLR 7751056. With PLR 7751056, the question was the U.S. bank account owned by a nonresident alien subject to estate tax. The answer was simply "no" as for estate tax purposes only IRC § 2503(b) treat the U.S. bank account as non U.S. situs. PLR 7737603 deals with the gift tax rule.

Note a gift of cash from a foreign bank account to a U.S. individual or trust should not be subject to U.S. gift tax as it is a transfer of tangible personal property not situated in the U.S. PLR 200340015 citing Treas. Reg. § 25.2511-3(b)(1). Cassell, Karlin, McCaffrey, and Streng, *U.S. Estate Planning For Nonresident Aliens Who Own Partnership Interests,* 1683 Tax Notes 1705 (June 16, 2003) recommend that the transfers reflected on accounts of the donor and the done at the foreign office of the foreign bank would be the safest option.

Gifting U.S. Partnership Interest

- Is it an intangible?
- Some author imply that this depends on whether the entity or aggregate theory applies
- Annette Glod – "most courts and commentators"
- PLR 7737063 – as dictum
- Greater uncertainty than gifting U.S. corporate shares

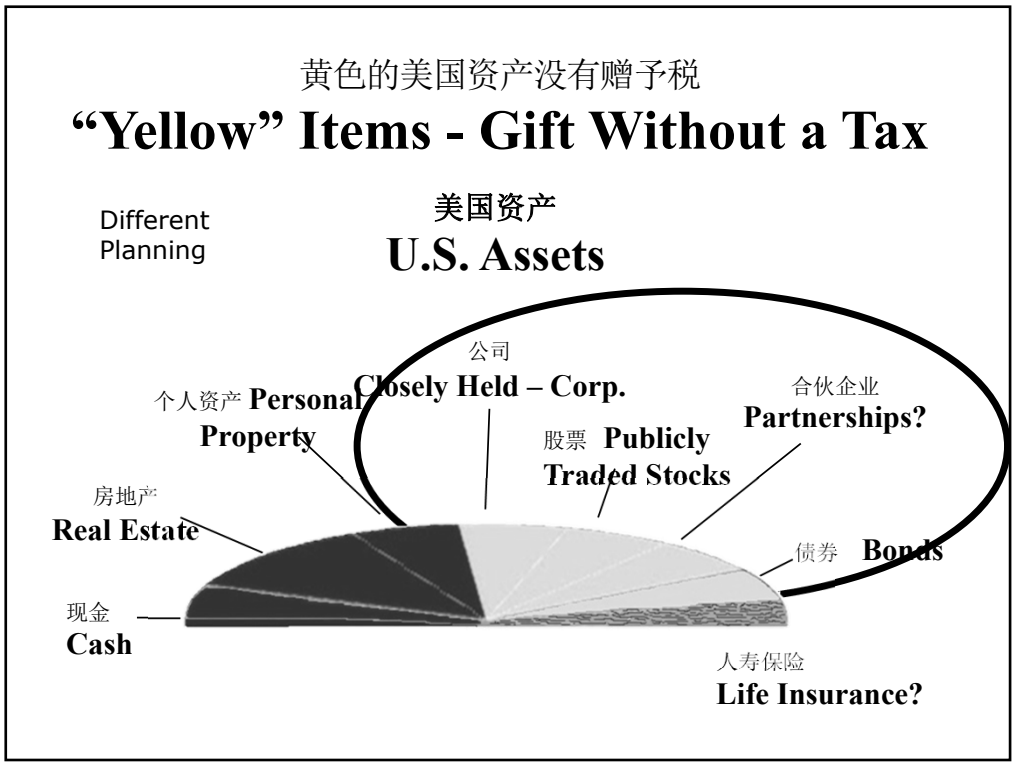
2. Partnership Interest

Some authors imply that whether a partnerships interest is an intangible asset may depends on whether the entity theory applies or the aggregate rule (both previously discussed in the situs rules apply). Remember "aggregate rule" means it is a look through rule, and the gift is a percentage of each of the underlying assets. I would lean in favor of applying the entity theory. Please note, that if a look through rule applies then the wrapper planning concept discussed in the following pages would not work.

Conversely, possible most detailed analysis on this issue is Annette Glod, United States Estate and Gift Taxation of Nonresident Aliens: Troublesome Situs Issues, 51 Tax Law 109 (Fall, 1997). At the bottom of page 6, she notes that "most courts and commentators" have take the position that a partnership interest is intangible personal property. See then cites:

Robert C. Lawrence III, International Tax and Estate Planning § 3.02(f) (3d ed. 1996) at 3-13. Stafford Smiley, *Dispositions of U.S. Partnership Interests by Nonresident Aliens*, 8 J. Partnership Tax'n 133, 142 (1991). She also mentions PLR 7737063 that as dictum mentions that a partnership interest is intangible property.

At this point, I would guess that the simple question is what does all of this mean? The Service view appears to be that the place of business controls the situs of a partnership interest. Therefore, if U.S. real e



3. Gifting Intangibles Without a Gift Tax

The above chart summarizes the gifting of intangible assets. It is clear that a nonresident alien may gift most types of U.S. debt instruments and U.S. stock without incurring a gift tax. Conversely, it appears that most planners view a partnership interest and considerer it an asset that a nonresident alien may gift without gift tax. However, this is not certain. Cash in a U.S. bank account is considered a tangible asset, and may not be gifted free from U.S. gift tax.

Finally, life insurance is uncertain. Under the general principles that the life insurance contract represents a right to payment, life insurance should be classified as an intangible. If it is classified as an intangible for gift tax purposes, it should then be exempt from gift tax. Unfortunately, I could find no authority on the issue for gift tax purposes.

Almost all authorities note that the proceeds of U.S. life insurance on the life of the nonresident alien are not a U.S. source asset. IRC § 2105(a). Also, if the decedent owns a U.S. policy on the life of another, it is subject to U.S. estate tax.

Basic Nonresident Alien Estate Planning

- Qualified Domestic Trust - QDOT
- Situs "Entity Wrapper" Planning
- Intangible Gifting Planning

Intermediate – Estate Tax Treaties

Advanced – Foreign and U.S. Trusts

G. Basic Nonresident Alien Estate Planning

Basic estate planning tools for a nonresident alien typically include a qualified domestic relations trust (QDOT); changing the situs of U.S. assets to foreign situs, and gifting intangibles. However, before using the basic techniques, the planner should first consult to see if there are more favorable provisions under an estate tax treaty. Currently, the U.S. has 15 estate tax treaties. Finally, for many nonresident aliens the better structure will be using either a foreign trust or a U.S. trust to hold the assets.

合格的美国信托

QDOT

- 非定居美国的外国公民还可以利用合格的美国信托

A non-resident alien may also utilize a QDOT

- 然而，财产仍然要被归入在世配偶的遗产

However, the property is still included in the surviving spouse's estate

-

Bunch of requirements discussed in next seminar

1. QDOT - Deferral of Tax to the Death of the Surviving Spouse

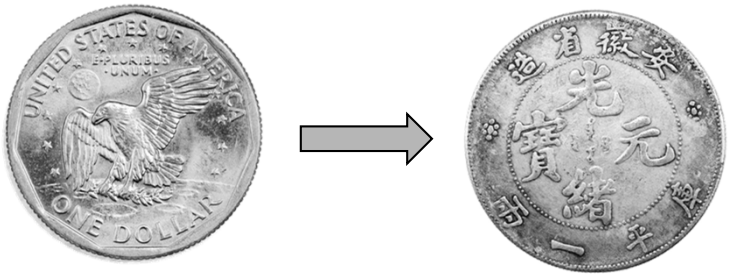
Similar to a non-citizen spouse, a non-resident alien may also utilize a QDOT. However, it should be noted that the U.S. sourced property will still be included in the surviving spouse's estate. In this respect, a QDOT only defers tax until the death of the surviving spouse.

1. 合格的美国信托-将遗产税延迟到配偶过世之时

和非美国公民的配偶制度相似的是，非定居美国的外国公民也可以利用“合格的美国信托”来做遗产规划。但是需要注意的是，美国所属地的财产仍然会被归入配偶的遗产，因此，这种合格的美国信托本质上只是将遗产税推迟到了配偶过世的时候缴纳。

利用外国法律实体改变财产的美国所属地

Changing Situs With a Foreign Entity

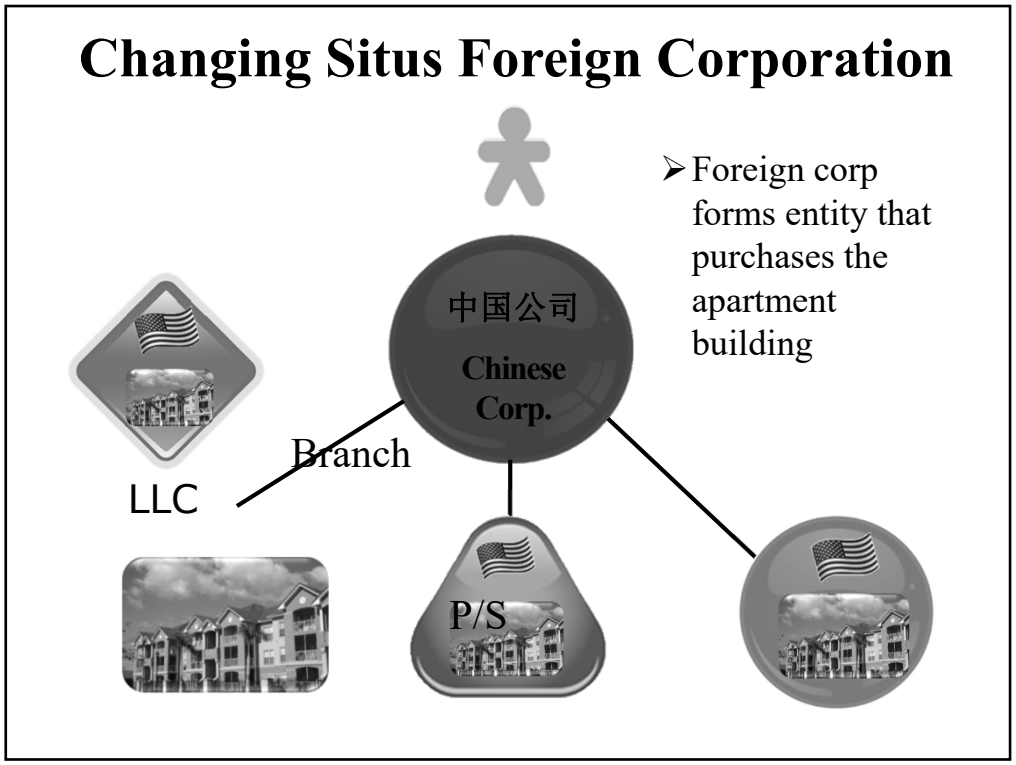


2. Changing the Situs With a Foreign Entity

The first method of estate planning was merely gifting intangibles to a spouse or child. The second method of estate planning involves changing the situs from U.S. situs to foreign situs by using a foreign entity. Some may refer to such a process as placing a foreign "wrapper" (analogy to a candy wrapper) over the U.S. property.

2. 利用外国实体改变外国财产所属地

第一个遗产规划的方法是将无形资产赠予给配偶或子女，第二个方法是利用外国法律实体将美国资产转变成外国资产。这种方法有时被称为美国财产的"外国包装"。



a. Changing the Situs With a Foreign Corporation

Assume a foreign corporation directly purchases an apartment building (including through a U.S. LLC), purchases a partnership interest that owns an apartment building, or forms a U.S. corporation that purchases a foreign corporation. The first question is when the foreign person passes away, does a corporation die? Of course corporations don't die.

The second questions is whether there is a look through rule to the underlying assets of the foreign corporation for U.S. estate tax purposes? In almost all cases, there is not a look through rule. The exception is when the foreign corporation simply disregards all of the rules of being a separate entity. *Henry Fillman v. U.S.,* 355 F.2d 632 (Ct. Cl. 1966).

The third question is what is the situs of the foreign corporation? It is foreign source, therefore, it is not included in the nonresident alien's estate. However, before the reader thinks that he or she has found the holy grail, the downside of such planning needs to be discussed. First, the three structures to the left will created branch income tax computations on Form 1120F. After the client's U.S. CPA asks for all the information needed to complete these computations and sends them the bill for their services, you may get a call from the nonresident alien client or the CPA complaining about the structure. When the U.S. real estate is owned by a U.S. corporation, the branch profits tax does not apply. However, who would advise a U.S. client to own real estate through a C corporation. Also, isn't a foreign corporation also subject to a double tax?

对于房地产也是一个好方法吗？

Is this a Good Idea for Real Estate?

好处：对美国的房产不需要缴纳美国的遗产税

Advantage: U.S. real estate not subject to U.S. estate tax

坏处：

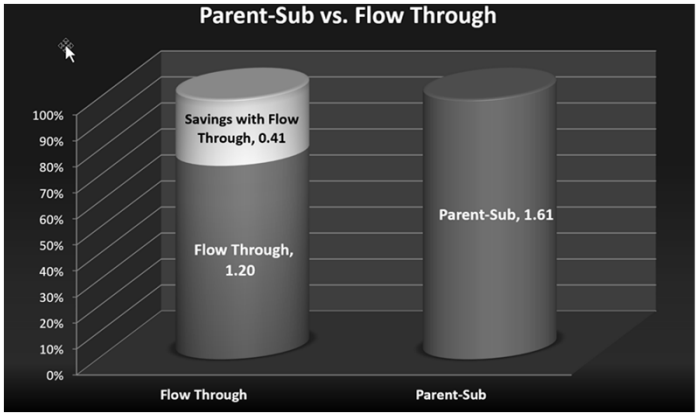
Disadvantage: double tax of a C corporation

Dividend withholding tax

i. Estate Tax v. Income Tax

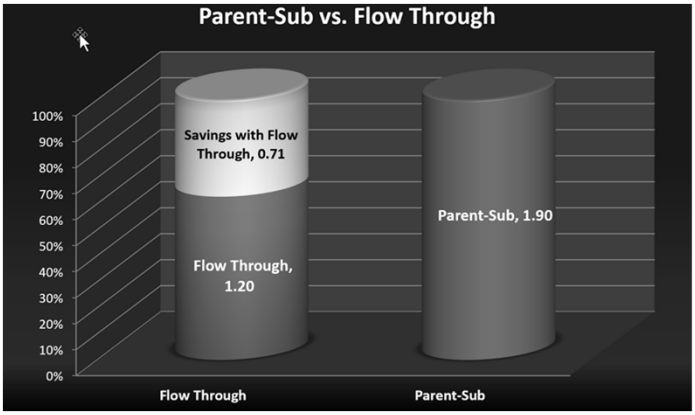
Whether it is one foreign corporation directly owning the real estate or a parent subsidiary relationship, after taking into account the indirect foreign tax credits by the foreign nation, by the time the money is in the nonresident alien's pocket, at best the nonresident alien is subject to three taxes. First, there is the tax on the operating income in the foreign country. Second, there is a dividends withholding tax (or branch profits tax) when the corporation pays a dividend or the branch profits tax, and the dividend tax when received by the individual nonresident alien.

- $ 1 Million Real Estate
- 5% increase operating income
- Over 10 years
- 10% Cap Rate
- 21% Corporate Rate

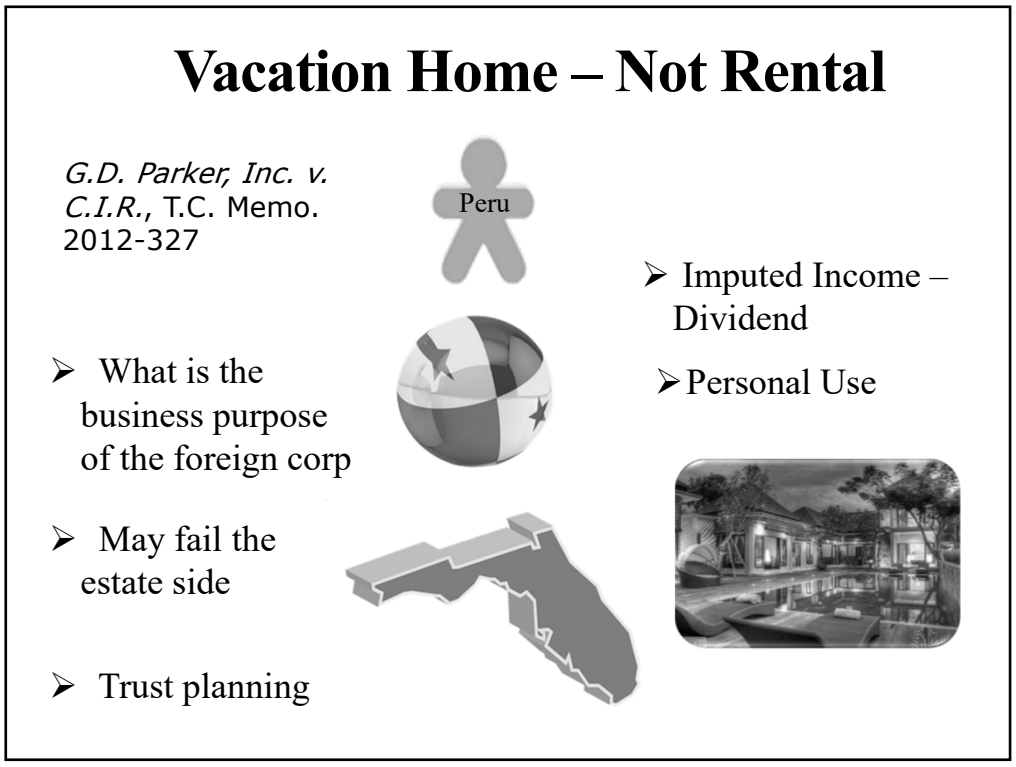


The above graph shows an increase in $410,000 if the building is sold ten years after purchase based on a 5% increase in operating income. The difference between this graph and the next is that the next graph assumes the U.S. corporate tax rate returns to 35%.

- $ 1 Million Real Estate
- 5% increase operating income
- Over 10 years
- 10% Cap Rate
- 35% Corporate Rate



This graph assumes the U.S. corporate tax rate increases to 35%. In this graph, the savings of flow through taxation is greater, it is $710,000.



ii. When Probably Not to Use a Foreign Corp to Change Situs

With the previous examples, the estate tax savings of using a foreign corporation needs to be compared to the income tax detriment of a double (really, triple tax) of a C corporation structure. However, there is at least one situation where the use of a foreign corporation should probably not be used to hold U.S. real estate – a vacation home that is not a rental property.

In *G.D. Parker, Inc. v. C.I.R.,* T.C. memo 2012-327 a citizen of Peru formed a Panama corporation that owned a Florida corporation that then owned a 23 bedroom vacation home in Florida. In holding that a dividend should be imputed to the individual, the Tax Court noted that "a dividend need not be declared or even intended by a corporation," citing *Noble v. Commr.,* 368 F.2d 439 (9th Cir. 1966). Next the Tax Court stated, "When a shareholder is permitted to use corporate property for personal purposes, the fair rental value is included in his or her income as a constructive dividend. *Commr. v. Riss,* 374 F.2d 161 (8th Cir. 1967); *Melvin v. Commr.,* 88 T.C. 63 (1987); *Falsetti v. Commr.,* 85 T.C. 332 (1985).

In addition to the imputed income tax issue, there is a question whether or not the estate tax issue will work. For example, what is the business purpose of the foreign corporation? Most likely the primary business purpose, and possibly the only business purpose is to get out U.S. estate tax on tangible real estate. That brings up alter ego type issues that were at the essence of the *Fillman* case previously cited.

利用外国合伙企业来改变资产的国籍

Foreign Partnership to Change Situs

中国公司是中国资产，因为在中国注册成立

Chinese corporation is a Chinese asset because it is incorporated in China

中国合伙企业的国籍判定方法不同

Unfortunately, a Chinese partnership does not have the same rule

营业所在地决定了是否为美国资产

Place of the Partnership's Business determines whether U.S.?

b. Foreign Partnership Wrapper to Change Situs

As previously discussed, situs of a foreign corporation is based where the corporation was incorporated. A foreign partnership does not follow the same rule as a foreign corporation. The Service's position appears to be that situs for a foreign partnership is based on where the partnership conducts business. Rev. Rul. 55-701. The revenue ruling indicates that a "look through" rule is not applied when determining the situs of a foreign partnership. In this regard, situs is an entity test.

b. 利用外国合伙企业来改变财产所属地

之前已提过，外国合伙企业的所属地和外国公司所属地的判断制度不同，不是根据成立地点决定的，而是根据合伙企业经营业务所在地决定。参见美国税收裁定55-701.税收裁定规定了在判断外国合伙企业所属地的时候，“透视准则”（即根据合伙企业资产判断）不适用，因此该所属地判断是一个合伙企业层面的测试。

只有一处美国房产时的问题

Single U.S. Rental Won't Work

该合伙企业的营业所在地为美国

Place of the Partnership's Business is U.S.

唯一的美国出租房产

One U.S. rental

i. Underlying Assets Are Only U.S. Situs Real Estate

At first glance, one might wish to take the position that if management of the business is conducted from abroad, the situs of the foreign partnership is outside the U.S. However, what happens if management is abroad, but all the underlying assets of the foreign partnership are U.S. real estate interests? If this is the case, the stronger argument appears to be that, the business of the partnership is actually conducted in the U.S.

i. 相关的资产只有美国的房地产的情况

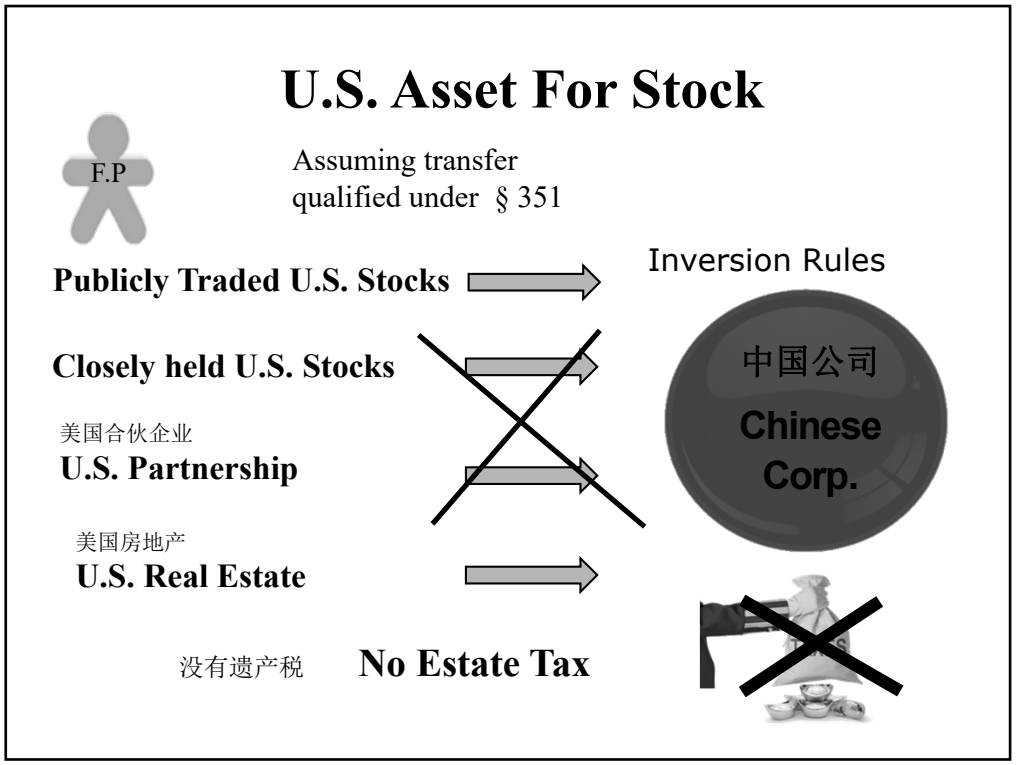
当一个外国合伙企业的经营管理是在国外时，人们的第一判断是这是一个外国合伙企业。但是当外国合伙企业的经营管理在国外，但资产只有美国的房地产的时候，它将被判定为是在美国经营业务，因此将变成一个美国合伙企业，即美国财产。

ii. Master Foreign Partnership

On the other hand, if the underlying assets of the foreign partnership contain assets from different jurisdictions, the foreign partnership may be sometimes referred to as a "master foreign partnership." If more than one-half of the assets of the master foreign partnership represent assets that are outside the U.S., one may consider taking the position that the situs of the partnership is outside the U.S. If situs of the partnership is outside the U.S., the estate tax would be completely avoided. Furthermore, unlike the "foreign corporation wrapper" around U.S. real estate, the master foreign partnership would not result in a triple tax – just one flow through. Please note that this type of planning depends on a "primary business" situs interpretation by the courts. Presently, there is only Rev. Rul. 55-701 that state "place of business," not primary place of business.

ii. 外国合伙企业

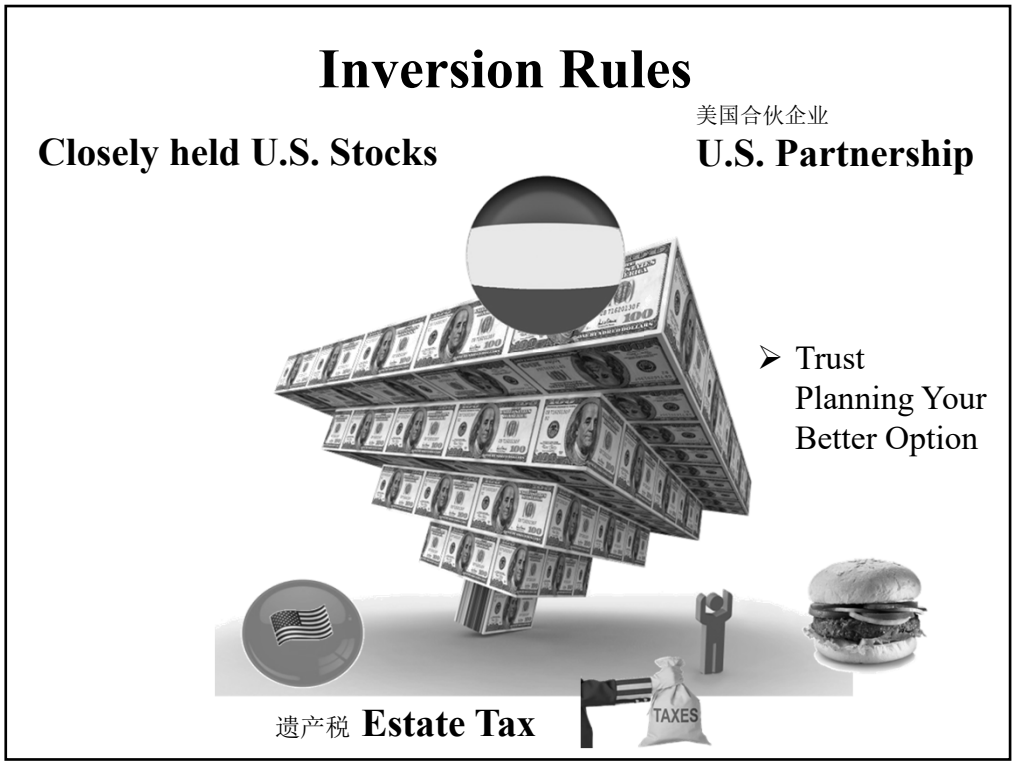
另一方面，如果外国合伙企业含有属于其他管辖地区的资产，那么这样的外国合伙企业有时被称为"业主外国合伙企业"。如果合伙企业中有超过一般的资产都是外国资产，那么纳税人可以将该合伙企业界定为外国合伙企业。如果合伙企业的所属地为外国，那么在遗产税上它是完全免税的。另外，和利用外国公司改变美国房产所属地的结果不同的是，业主外国合伙企业的资本收益不会被转变成普通收益缴税。



c. Previously Owned U.S. Asset Transferred to Foreign Corp. for Stock

A foreign person may transfer publicly traded stock and U.S. real estate to a foreign corporation in exchange for its stock. This should change the situs of the U.S. assets. However, if a foreign person transfers closely held U.S. stock or a U.S. partnership to a foreign corporation, this may well result in U.S. taxation. This is because in most cases, the inversion rules may well apply to the foreign corporation.

The above transfers of publicly traded stock and U.S. real estate assume that the transfer qualifies under IRC § 351. Please note that transfers to foreign partnerships are much more complicated due the Treas. Regs. The under IRC § 721(c).



As noted, in the committee reports, the inversion rules were first passed in 1996 to prevent U.S. companies parent corporation from inverting and become nothing more than a subsidiary of a tax efficient parent company formed in a nation like the Netherlands. In other words an "inversion" is a corporate expatriation. The intent of IRC § 7874 was to prevent U.S. multi-national companies from creating such a structure and escaping U.S. world-wide taxation. In essence what this statute says is that if a U.S. entity transfers its assets to a foreign parent, but retains the U.S. subsidiary, the foreign parent will be deemed to be a U.S. company still subject to world-wide taxation. The exception through 2004 to this rule was if a large foreign company acquired a small U.S. foreign, then the inversion rules would not apply. This was the case when Burger King expatriated from the U.S. Unfortunately, while the intent was to stop large multi-nationals, it traps many company nonresident alien transfers of a U.S. corporation or U.S. partnership interests to a foreign corporation.

For a detailed discussion of this issue *see When Intended Estate Planning Results in an Accidental Inversion.* Robert H. Moore and Michael J. Burno, Journal of International Taxation, June 2016.

在过世前赠予资产

Direct Gift of Asset Before Death

Most U.S. debt; most U.S. mutual funds

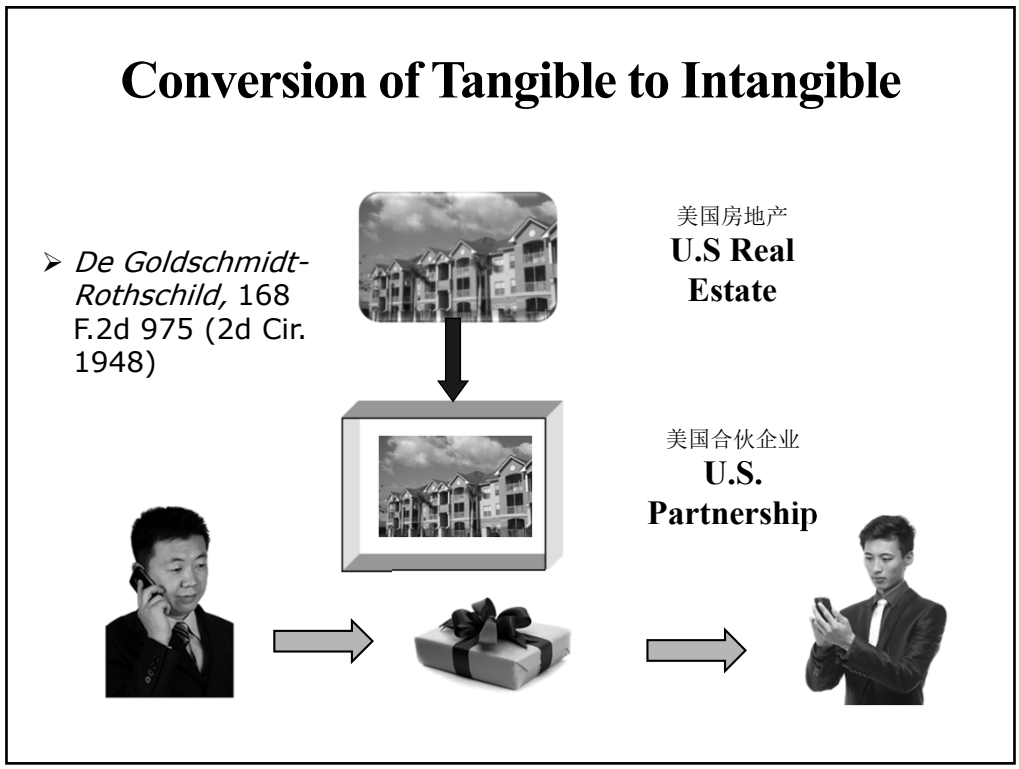
美国股票 **U.S. Stocks**

- **Publicly Trade or**
- **Closely Held**

美国合伙企业 **U.S. Partnership**

3. Direct Gift of Certain U.S. Intangibles

As previously noted a nonresident alien may make a direct gift of certain U.S. property such as corporate bonds, Treasury notes, most mutual funds, publicly traded or closely held stock, a probably partnership interests.



4. Conversion of a Tangible Asset to an Intangible

Real estate is a tangible asset. However, a partnership interest or a membership interest is an intangible asset. Intangible assets may be gifted without incurring a gift tax. Therefore, if real estate is transferred into either a partnership or limited liability company, has the interest that will be transferred been converted into an intangible asset? Most likely, this is what will occur. Timing becomes critical with this type of plan. If real estate is transferred to an FLP and immediately gifted to the non-resident alien's children, the Service may challenge the transaction under the substance over the form doctrine. *See De Goldschmidt-Rothschild,* 168 F.2d 975 (2d Cir. 1948) where less than a year holding period for two trust resulted in a substance over form loss for the taxpayer. Judge Learned Hand delivered the opinion for the Second Circuit.

H. 将有形资产转变为无形资产

房地产是有形资产，但是合伙企业权益或股东权益是无形资产。无形资产可以被免税地相互赠予。因此，如果将房地产转到一个合伙企业或者一个有限责任公司里，那么这能够将房地产权益转变成无形资产吗？大部分情况下，答案是肯定的。但是规划的时间点是很关键的。如果房地产转到了一个外国有限合伙企业里，然后合伙企业权益马上被赠予给该外国公民的子女，那么美国税务局很可能会不同意这种处理方式，进一步追述按照这个交易的本质而不是它的形式来处理。

Next Two in the Trilogy

II. **Noncitizen Spouse including the QDOT Estate Tax Treaties**

III. **Using Foreign and/or Offshore Trusts**