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Key Issue 2B: Filing Requirements for Nonresident Noncitizens.

Except as provided by treaty, the estate of a nonresident alien is taxed on the transfer of property situated or deemed situated within the U.S. (While tax rates are the same as for U.S. citizens and residents, the allowable deductions and credits are different.) Form 706-NA [United States Estate (and Generation-Skipping Transfer) Tax Return, Estate of nonresident not a citizen of the United States] must be filed for the estate of every nonresident who is not a U.S. citizen and whose gross estate, valued at the date of death, exceeds the filing threshold [IRC Sec. 6018(a)(2)]. (The filing threshold is explained later in this key issue.) Form 706-NA and instructions are available on the IRS website at **www.irs.gov/app/picklist/list/formsInstructions.html**.

A nonresident is one who, at the time of his death, was not domiciled in the U.S. [Reg. 20.0-1(b)]. For this purpose, the U.S. includes the 50 states and District of Columbia. A person's domicile is the place where the person lives, even for a brief period of time, if there is no present intention of leaving. Thus, domestic habitation and an intention to remain indefinitely are prerequisites for establishing residency. A person who is a resident of any U.S. possession and is a U.S. citizen only because of birth, residence, or citizenship in a possession, is considered a nonresident alien for estate tax purposes and Form 706-NA is the appropriate form to file (IRC Sec. 2209).

Observation: A decedent may be a U.S. resident for income tax purposes but a nonresident for estate tax purposes. For estate tax purposes, residence in the U.S. without an intention to remain indefinitely is not considered domiciled in the U.S. For example, a refugee who immigrated to this country during World War II with the intention of returning to his domicile when conditions permitted was a nonresident for estate tax purposes (*Estate of Jan Willem Nienhuys*).

Additionally, a tax is imposed on the recipient of property transferred from a covered expatriate who expatriates after June 18, 2008. See discussion later in this key issue about transfers by covered expatriates.

The following should be attached to Form 706-NA:

1. If the decedent died testate, a certified copy of the decedent's will.

2. Explanation if a certified copy of the will is not available.

3. Copy of the death certificate.

4. Copies of U.S. gift tax returns filed by the decedent.

5. English translations for any documents written in other languages.

Preparation Pointer: Executors must now attach documentation of their status (e.g., certified copy of the will or court order naming the executor). A statement by the executor is not sufficient.

Filing Threshold

A nonresident decedent's estate is required to file an estate tax return if the value of the gross estate exceeds $60,000. However, if the decedent made lifetime gifts, the $60,000 filing threshold includes the decedent's adjusted taxable gifts made after December 31, 1976, and the total amount of the decedent's specific lifetime exemption allowed for gifts made after September 8, 1976. (See Key Issue 26C for a discussion of the specific lifetime exemption.) Therefore, if the gross estate (valued at death) plus lifetime gifts and specific lifetime exemption allowed exceed $60,000, Form 706-NA must be filed. In addition, an estate may be required to file an estate tax return to allocate a portion of the decedent's generation-skipping transfer (GST) tax exemption ($5 million for 2011). (See Key Issue 29D for additional discussion of allocating the GST tax exemption.)

Note: The election to transfer unused applicable exclusion amounts to a surviving spouse is not available for nonresident, noncitizen decedents. Thus, a return is not required unless the $60,000 filing threshold is met or the return is filed to allocate GST tax exemption. See Key Issue 1E for a discussion of transferring the unused applicable exclusion amounts to a surviving spouse.

For Deaths in 2010 Executors of estates created in 2010 can elect the modified carryover basis rules instead of filing Form 706-NA under the estate tax rules. See Key Issue 2F for a discussion of the modified carryover basis rules.

Adjusted Taxable Gifts. While the estate tax and the gift tax are separate taxes, they are part of a unified transfer tax system whereby a uniform rate structure applies to cumulative lifetime and testamentary transfers. Thus, when determining whether the decedent is required to file an estate tax return, the $60,000 filing threshold includes the amount of adjusted taxable gifts. Adjusted taxable gifts are the total of the decedent's taxable gifts made after December 31, 1976, reduced by the amount of gifts included in the decedent's gross estate (i.e., gifts of life insurance within three years of death and other gifts included on Schedule G) [IRC Sec. 2001(b)(1)]. (See Key Issue 1C for a discussion of adjusted taxable gifts.)

Situs of Property

To determine whether the gross estate of a nonresident who is not a citizen is situated within the U.S., the situs of the decedent's property is decided in accordance with the principles of IRC Secs. 2104 and 2105 [Reg. 20.6018-1(b)(1)]. Under these principles, tangible personal property is considered to be situated in the country where it is located [Regs. 20.2104-1(a)(2) and 20.2105-1(a)(2)]. However, the situs of intangible property is dependent on the specific type of the intangible.

Property Situated in the U.S. Unless a treaty provides otherwise, property is considered to be located in the U.S. if it is [Reg. 20.2104-1(a)]:

1. Real property located in the U.S.

2. Tangible personal property located in the U.S. (This includes clothing, jewelry, automobiles, furniture, and currency. Works of art brought into the U.S. solely for public exhibition are not included.)

3. A debt obligation of a citizen or resident of the U.S., a domestic partnership or corporation, a domestic estate or trust, the U.S., a state or a political subdivision of a state, or the District of Columbia.

4. Stock of corporations organized in or under U.S. law.

Preparation Pointer: The instructions for Form 706-NA require attachments for five years of balance sheets, operating results, and dividend history on closely held or inactive corporate stock. In addition, attach English translations for any documents in other languages.

However, the personal effects of a nonresident noncitizen who dies while in transit through the U.S. are not considered located in the U.S. Neither is merchandise that happens to be in transit through the U.S. when a nonresident noncitizen owner dies.

Property that the decedent transferred before death, but that is includable in the gross estate, is considered to be located in the U.S. if it is so located either at the time of the transfer or at the time of the decedent's death [Reg. 20.2104-1(b)]. These transfers include transfers with retained life estates, transfers taking effect at death, and revocable transfers. (See Chapter 9 for additional discussion of lifetime transfers.)

Observation: The situs of partnership interests for estate tax purposes is not specifically addressed in the Code or the regulations. However, if a nonresident alien has an interest in a U.S. partnership that owns U.S. property or is engaged in a U.S. trade or business, this interest should be reported on the Form 706-NA (in the authors' opinion). Other partnership interests should be evaluated based on the applicable facts and circumstances and any other available authority.

If the decedent was the beneficiary of a trust that holds U.S. assets (or held U.S. assets when formed), the interest is included for U.S. estate tax purposes even if the trust is a foreign trust.

Property Not Situated in the U.S. Notwithstanding the above rules, property of a nonresident noncitizen decedent is not considered located in the U.S. if it is (Reg. 20.2105-1):

1. Real property located outside the U.S.

2. Tangible personal property located outside the U.S. (including artwork on exhibition or on loan to a nonprofit public gallery or museum in the U.S.).

3. A deposit with a U.S. bank or a U.S. banking branch of a foreign corporation if the deposit was not effectively connected with conducting a trade or business within the U.S.

4. A deposit or withdrawable account with a savings and loan association chartered and supervised under federal or state law, or an amount held by an insurance company under an agreement to pay interest on the account. (The deposit must not be effectively connected with conducting a trade or business within the U.S.)

5. A deposit with a foreign branch of a U.S. bank (if the deposit is not effectively connected with conducting a trade or business within the U.S.).

6. Debt obligations issued after July 18, 1984, if the interest (had it been received at the time of death) on them would be eligible for exemption from income tax under IRC Sec. 871(h)(1).

7. A debt obligation of a domestic corporation if any interest the decedent would have received at the time of death would have been treated for income tax purposes as income from sources outside the U.S. because less than 20% of the domestic corporation's gross income from all sources was from sources within the U.S. for the three-year period (or applicable part) ending with the close of the tax year of the corporation immediately preceding the decedent's death.

8. Stock issued by a corporation that is not organized in or under U.S. law, even if the certificate is physically located in the U.S.

9. An amount receivable as insurance on the decedent's life.

10. For decedents dying before January 1, 2012, stock in a regulated investment company (RIC) in the proportion that the assets held by the RIC are debt obligations, deposits, or other property that would be treated as situated outside the U.S. if they were directly held by the decedent [IRC Sec. 2105(d)].

Estate Tax Treaties

The U.S. has entered into death tax conventions with a number of foreign countries to avoid double taxation. These conventions make credits available to **estates** of U.S. citizens and residents for death taxes paid to the foreign countries. (See Chapter 19 for a discussion of the foreign death tax credit.) In addition, they provide rules for determining the situs of property. In some cases, the rules under the **treaty** differ from those previously discussed. In these instances, the **treaty** provisions are used to determine the property includable in the **estates** of nonresident noncitizen decedents who come within the scope of the conventions.

The following is a list of the countries with which death tax **treaties** are in force:

Australia	Finland	Ireland	Norway
Austria	France	**Italy**	South Africa
Canada	Germany	Japan	Switzerland
Denmark	Greece	Netherlands	United Kingdom

Preparation Pointer: If the **estate** claims an **estate** tax position based on an **estate** tax **treaty** with another country,

an explanation of the **treaty** based position should be attached to the **estate** tax return (Reg. 301.6114-1).

Gross Estate Limited to U.S. Property

The gross **estate** of a nonresident alien is determined the same way as that of a citizen or resident. Report the U.S. assets on Form 706-NA, Schedule B, line 1. Report the non-U.S. assets on Schedule B, line 2. This information is needed to properly allocate certain expenses reported on Schedule B, line 5. However, the value of the gross estate for Form 706-NA tax calculation purposes is only that part of the gross estate that is situated within the U.S. at the time of death (IRC Sec. 2103 and Reg. 20.2103-1).

The gross estate of a nonresident, noncitizen is not grossed up for gift tax paid within three years of death. The gift tax paid is not a transfer of property deemed situated in the U.S. at the time of payment and is not required to be added back to the gross **estate** (CCA 201020009).

Note: If a taxpayer or practitioner encounters a situation in which the actions of a **treaty** country, the United States, or both, will result in taxation that is contrary to the provisions of a **treaty**, the taxpayer (or practitioner) may request assistance from the U.S. competent authority as outlined in Rev. Proc. 2006-54.

Available Exclusions, Deductions, and Credits

The instructions for Form 706-NA explain how to claim several exclusions, deductions, or credits that may be available to the decedent's estate. These include—

• *Qualified Conservation Easement Exclusion (Schedule A).* Under IRC Sec. 2031(c), estates may make an irrevocable election to exclude the lesser of (1) the applicable percentage of the value of land (after certain reductions) subject to a qualified conservation easement or (2) $500,000. Attach Schedule U of Form 706. If the deduction is claimed under a treaty, attach a computation of the deduction (and specify the treaty).

Preparation Pointer: The decedent's interest in the land should be included on Schedule A and then exclude the value of the land subject to the easement on Schedule A. The authors recommend this be on two separate lines. The election must be made on a timely filed, including extensions, Form 706-NA.

• *Charitable Deduction (Schedule B, line 6).* Unless a treaty allows otherwise, this deduction is available only if the transfer was to a U.S. charity or for U.S. charitable purposes as described in the Form 706 instructions. Attach Schedule O of Form 706. If the deduction is claimed under a **treaty**, attach a computation of the deduction (and specify the **treaty**).

• *Funeral and Administration Expenses, Debts and Liens (Schedule B, line 4.)* The following items can be deducted (whether or not they were incurred or paid in the U.S.): funeral expenses, administration expenses, claims against the **estate**, mortgages (if full amount of mortgaged property is included in the gross **estate**), other liens, and nonreimbursed casualty or theft losses incurred during the **estate** administration. Note that only the part of the debt or mortgage that was contracted in good faith and for full value can be deducted. Also, the tax related to income received after death and property taxes accrued after death are not deductible.

Preparation Pointer: An itemized schedule should be attached to support this deduction. For each item, specify

the nature and amount of expense or claim and give the creditor's name. A full description of all deductions as well as identifying any particular property to which the deduction relates should be provided.

Observation: Generally, the total funeral and administration expenses amount on Schedule B, line 4, is limited to the entire gross estate amount on Schedule B, line 3.

• *Marital Deduction (Schedule B, line 6).* Unless a treaty allows otherwise, this deduction is available only if the surviving spouse is a U.S. citizen or if the property passes to a qualified domestic trust (QDOT), and an election is made on Schedule M of Form 706. Attach Schedule M of Form 706 and attach a computation of the deduction.

• *State Death Tax Deduction (Schedule B, line 7).* A deduction is allowed for death taxes (estate, inheritance, legacy, or succession taxes) paid to any state or the District of Columbia related to property listed in Schedule A. The amount of the deduction is calculated as:

$$\frac{\text{Total value of assets in the gross estate subject to state death taxes}}{\text{Gross estate located in the U.S. (line 1 of Schedule B)}} \times \text{Total state death taxes paid}$$

Preparation Pointer: A certificate, signed by an appropriate official of the taxing state, should be filed. The certificate should include: total tax charged, any discount allowed, any penalties and interest imposed, the tax actually paid, and the date(s) of payment. If available when Form 706-NA is filed, attach the certificate to the return. If not available, file as soon as it is available.

Observation: The IRS must be notified within 30 days of any state taxes refund. Notification should be mailed to: Department of the Treasury, Internal Revenue Service, Cincinnati, OH 45999.

• *Unified Credit (Part II, line 7).* A credit is allowed for the smaller of the amount shown on line 6 of Part II or the maximum unified credit, which generally is $13,000. If the unified credit is affected by a **treaty**, the **estate** must follow rules in IRC Sec. 2102(b)(3)(A). The Form 706-NA instructions lists the following **treaties** to which this applies: Australia, Canada, Finland, France, Germany, Greece, **Italy**, Japan, Norway, and Switzerland.

Observation: Any credit previously allowed to reduce gift tax will reduce the **estate** tax credit dollar for dollar.

• *Other Credits (Part II, line 9).* A credit for federal gift taxes may be allowed under IRC Secs. 2012 and 2102. Attach the computation of the credit. In addition, a Canadian marital credit may be allowed if all applicable elections are made. This nonrefundable marital credit is generally limited to the lesser of (1) the unified credit allowed to the estate before the reduction for any gift tax unified credit, or (2) the amount of estate tax that the U.S. would otherwise impose on the transfer of qualifying property to the surviving spouse. Attach the computation of the credit, and write "Canadian marital credit" to the left of the line 9 entry.

Preparation Pointer: Practitioners should refer to the Canadian income tax treaty protocol for details on computing the Canadian marital credit.

• *Generation-skipping Transfer Tax (Part II, line 13).* If the answer to Part III, question 11 is yes, attach Schedules R and/or R-1 from Form 706. However, only include transfers of interests in property that are a part of the U.S. gross estate (i.e., those included on Schedule A).

The executor or administrator filing the return must attach the appropriate schedule from Form 706 for these exclusions, deductions, and credits.

Executor Filing Responsibility

The decedent's executor or administrator is responsible for filing the estate tax return (Reg. 20.6018-2). If there is more than one executor, the return is filed jointly by all. If no executor or administrator is appointed, qualified, or acting as the decedent's executor in the U.S., every person in actual or constructive possession of the decedent's assets is deemed to be an executor and is required to file a return. People with actual or constructive possession of the decedent's assets can include the decedent's agents and representatives; safe deposit box companies, warehouse companies, and other custodians of the decedent's property; persons holding securities as collateral; and the decedent's debtors (Reg. 20.2203-1).

If the executor is unable to file a complete return, he or she is required to file a return that provides all available information, including the name of every person holding legal or beneficial title in the property (Reg. 20.6018-2).

See Key Issue 22G for a discussion of the executor's responsibility for paying the tax.

For Deaths in 2010 The IRS will send out letters if multiple Forms 706-NA or 8939 (Allocation of Increase In Basis for Property Acquired From a Decedent) are filed by more than one executor. If a restated form is not filed within 90 days of the IRS letter, the IRS will determine whether an election has been made to apply the modified carryover basis rules (Notice 2011-66). See Key issue 2F for information on filing Form 8939.

Due Date

Unless an extension of time to file is requested, the estate tax return for a nonresident normally must be filed within nine months after the date of the death [IRC Sec. 6075(a)].

The actual due date is nine months after the date of death (i.e., if the date of death is June 25, the due date is March 25). If there is no numerically corresponding day in the ninth month, the due date is the last day of the ninth month. For example, if the decedent died on May 31, the estate tax return would be due on the last day of February (i.e., February 28 or 29) since there are not 31 days in February. If the due date falls on a Saturday, Sunday, or a legal holiday, the due date is the next business day (Reg. 20.6075-1). (See Key Issue 2C for a discussion of extending the time for filing the estate tax return.)

See Key Issue 35A for a discussion of the penalty for failing to timely file the return.

Filing Location

Form 706-NA is filed with the Department of the Treasury, Internal Revenue Service, Cincinnati, OH 45999. If the return is mailed, the authors recommend that it be sent by registered or certified mail, with a return receipt requested or by a private delivery company designated by the IRS. (See Key Issue 2A for a discussion of private delivery services.)

Citizens and Residents Who Relinquish Their Citizenship or Residency

A tax is imposed on the recipient of property received from a covered expatriate who expatriates after June 16, 2008 (IRC Sec. 2801). *Covered expatriates* are defined as certain U.S. citizens and green card holders who have—

1. a net worth of at least $2 million on the date of expatriation;

2. an average annual net income tax for the five tax years prior to expatriation greater than $147,000 (for 2011, adjusted for inflation; $151,000 for 2012); or

3. failed to certify under penalties of perjury that he or she has complied with all U.S. tax obligations for the preceding five years and provided evidence of compliance as required by the Secretary of the Treasury.

If a U.S. citizen or resident receives property, directly or indirectly, by gift, devise, bequest, or inheritance from a *covered expatriate* (a "covered gift or bequest") after the date of expatriation, the recipient must pay a tax equal to the value of the covered gift or bequest multiplied by the highest estate or gift tax rate in effect on the date of the transfer. The value of the covered gift or bequest is reduced by the annual gift tax exclusion in effect in the year of transfer and the amount of tax is reduced by any estate tax paid to a foreign country. However, the tax is not reduced by the gift or estate tax applicable credit amount. The following covered items are exempt:

1. A gift by a *covered expatriate* shown on a timely filed gift tax return.

2. A bequest by a *covered expatriate* shown on a timely filed estate tax return.

3. A gift or bequest that would be eligible for an estate or gift tax charitable or marital deduction if the transferor was a U.S. citizen.

Note: The due date for reporting the transfer, filing the return, and paying the tax will be provided in future IRS guidance (IRS Ann. 2009-57). Practitioners should watch for further developments.

Preparation Pointer: The IRS is developing a new form (Form 708) for reporting these gifts and bequests. At the time of this publication, the form had not yet been released. Form 708 will be posted at **www.irs.gov/app/picklist/list/formsInstructions.html** when released.

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