

# A Treasure Trove of Planning Tips for Foreign Assets

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# Overview

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- Trusts and Their Potential Traps
- Wills and Disability Planning
- US Tax Reporting
- Foreign Estate and Inheritance Taxes and Treaties
- Post-Death Planning



# Intro: Valuable Nuggets

A little knowledge about international planning can pay handsomely

- Always ask about citizenship and residency
- Inquire about international assets
- Be cautious with trusts in international plans
- Be mindful that valid US documents may be ineffective in foreign jurisdictions
- Be cautious with foreign business entities and trust-like arrangements
- Anticipate potential tax and reporting issues with international assets

# Taking Title to Foreign Property



# Title to Foreign Property – Personal Ownership

Form of Title	US Treatment	Foreign Treatment
Individual	Individual	Some jurisdictions restrict individual ownership by foreign individuals
Joint tenancy; tenancy by entireties	Passes automatically to surviving owner at death	Unavailable in some foreign jurisdictions; may not avoid probate administration
Community Property	Spousal interests vary depending on the jurisdiction	Spousal interests vary depending on the jurisdiction
Life Estate	Life estate	Unavailable in many foreign jurisdictions
Usufruct	Taxed as a life estate, or, in rare cases, as a trust	Property rights are somewhat different than a US life estate

# Title to Foreign Property – US Vehicles

Form of Title	US Treatment	Foreign Treatment
Domestic Trust	Legal title is held by trustee; property is taxed to grantor, beneficiaries, or the trust, depending on the nature of the trust	Titling in a trust may be impossible; likely to be disregarded, taxed in a punitive manner, or both
US LLC	Check-the-box rules apply	May be impossible to hold non-US property in a US LLC; US LLC may be opaque or flow-through, depending on applicable law
US Partnership	Flow-through taxation	A partnership holding foreign assets may be a foreign entity; typically flow-through taxation but other tax results may be possible



# Title to Foreign Property – Non-US Vehicles

Form of Title	US Treatment	Foreign Treatment
Fideicomiso	Varies; depends on terms; disregarded, voting trust/shareholder agreement, corporation eligible to check the box	Generally disregarded for tax purposes
Stiftung or foundation	Generally taxed as a trust but may be a check-the-box entity	Generally a flow-through entity
Société Civile Immobilière (SCI)	Generally a check-the-box entity for US tax purposes	Generally a flow-through entity
Any foreign entity	Any foreign entity may be taxed as a trust if it is used for trust-like purposes	Foreign tax treatment may not correspond to US tax treatment

# Non-US Entities: Checking the Box

- Certain foreign business entities with US taxpayer owners may check the box to elect tax classification
- Use Form 8832 to make the check-the-box election
- Per se corporations are ineligible – Form 8832 provides a list
- Default rules are different for foreign entities; greater risk of C corporation taxation if no election
- Timing of elections and changes in elections is important for foreign entities used to block US estate tax



# Trusts and Their Potential Traps





# Trusts Under Worldwide Legal Systems

- Common Law
  - Trusts recognized but may be subject to heavy taxes
  - Some governments maintain trust registries
- Civil Law
  - Trusts may not be recognized
  - Trusts may be taxed and reported as if they were abusive tax shelters
  - Trusts may be subject to forced heirship rules
- Religious Legal Systems
  - Trusts may not be recognized
  - Trusts may be subject to forced heirship rules

# Foreign Jurisdiction Over Trusts

- Trust property located in a non-US jurisdiction
- Trust beneficiary residing in a non-US jurisdiction, including a contingent beneficiary
- Trust grantor or trustee residing in a non-US jurisdiction
- Trust beneficiary, grantor, or trustee subject to worldwide taxation by a non-US jurisdiction (for example due to domicile at death)



# Consequences of Trust Nonrecognition

- Benefits
  - Nonrecognition may result in treatment of the trust as a disregarded entity in the foreign jurisdiction. This may be favorable or convenient
- Detriments
  - Multiple individuals may be taxed as the owner of all trust property
  - Discretionary pot trust beneficiaries may be taxed on all property
  - Disconnect between US taxpayer and foreign taxpayer may cause double taxation with no treaty relief

# Foreign Taxation and Reporting of Trusts

- Trusts may be taxed at higher rates than individuals or entities
- Trust income and property may be taxed to multiple individuals in different jurisdictions
- Treaties may not provide relief if taxpayers in different jurisdictions are not identical
- Trust principal may be subject to periodic taxation or to wealth tax
- Trust information may be reportable to a government registry
- Information reporting may be due to a foreign taxing authority

# Wills and Disability Planning





# Probate Avoidance Internationally

- Probate avoidance may be unnecessary in foreign jurisdictions
- Foreign estate planning may look very different from US planning, including elements such as
  - Contracts for transfers at death
  - Handwritten wills
  - Mandatory dispositions due to forced heirship
- Even if the plan is to avoid probate, always prepare one or more wills to address the possibility of probate property in every relevant jurisdiction

# Limitations on Recognition of US Wills

- Formalities of execution and registration
  - Executing documents internationally
  - Hague Convention on Testamentary Disposition
  - Washington Convention on the Form of an International Will
  - Foreign will registry systems
- Forced heirship may limit freedom of disposition
- Choice of law may or may not be available
  - EU Succession Regulation

# Coordinating US and Foreign Wills

	One Will	Multiple Wills (situs wills)
Pros	<ul style="list-style-type: none"><li>• Simplicity (if a US will can dispose of foreign property)</li><li>• Potential cost savings at drafting phase (if the local jurisdiction does not require significant modification)</li></ul>	<ul style="list-style-type: none"><li>• Reduced risk of invalidity or of missing administrative clauses in will instruments</li><li>• Simultaneous probate administration</li><li>• Reduced risk of translation problems</li><li>• Probate assets are limited to the applicable jurisdiction, potentially limiting costs and complexity in each probate administration</li></ul>
Cons	<ul style="list-style-type: none"><li>• Probate administration may need to be initiated in one jurisdiction first due to one original document</li><li>• May be impractical depending on the foreign jurisdiction's requirements, such as a local executor</li></ul>	<ul style="list-style-type: none"><li>• Risk of accidental revocation</li><li>• Risk of conflicting terms in separate documents, particularly tax allocation</li></ul>



# Drafting Considerations for Situs Wills

- Scope: avoid overlap; ensure coverage of all worldwide assets
- Revocation: prevent accidental revocation by requiring specific reference to a provision
- Definitions: confirm that relevant terms will be defined consistently in each jurisdiction
- Fiduciaries: a local fiduciary may be required
- Beneficiaries: consider dispositions across all jurisdictions to ensure the overall plan is consistent with the client's wishes
- Choice of Law: include a choice of law provision in each will
- Tax Apportionment: carefully coordinate the tax apportionment in each jurisdiction and consider the assets available for payment

# Disability Planning Internationally

- Consider disability planning for healthcare and for property for US clients with a foreign presence or foreign assets
- Domestic healthcare powers of attorney and domestic financial powers of attorney are unlikely to be effective internationally
- Confer with foreign counsel regarding foreign healthcare powers of attorney and foreign financial powers of attorney
- If the client will have more than one healthcare or financial power of attorney, draft to avoid inadvertent revocation and clearly define the scope of each power to avoid gaps or overlap
- With domestic financial powers of appointment, be aware of FBAR reporting obligations of an agent for a principal with foreign accounts or assets

# US Tax Reporting





# US Tax Reporting for Domestic Trusts with Foreign Assets

- Domestic trusts are taxed on their worldwide assets
- Categories of foreign assets with heightened US tax and reporting include
  - Passive Foreign Investment Companies (PFICs)
  - Controlled Foreign Corporations (CFCs)
- US information reporting may apply to foreign assets, even if they generate no income
- Administration of assets outside the US can fail the court test's safe harbor rule, causing a risk of taxation as a foreign trust

# Identifying PFICs

- Includes foreign mutual funds, foreign money market accounts, holding companies that are not CFCs, and other common investments
- Tax Code definition under IRC § 1297: foreign corporation meeting either the income test or the asset test
  - Income test: 75% or more of the corporation's gross income for its taxable year is passive income
  - Asset test: at least 50% of the average percentage of assets held by the foreign corporation during the taxable year are assets that produce income or that are held for the production of passive income

# PFIC Taxation

- Default Rule:
  - Ordinary income tax rates, not capital gains rates
  - Sales of long-term PFICs result in “excess distributions” tax, similar to the throwback tax on a foreign trust
- Qualified Electing Fund:
  - A QEF election allows a PFIC shareholder to pay tax based on the character of the PFIC’s income instead of ordinary tax rates
  - The QEF election requires significant reporting from the PFIC to the shareholder
- Mark-to-Market:
  - Election only available for PFICs that are “marketable stock”
  - Shareholder pays tax on the annual increase in value of the PFIC; losses are allowed up to the net amount of gain previously included in income



# Transfers of PFIC Shares

- PFIC shares owned directly or indirectly by a trust are treated as owned proportionately by the trust's beneficiaries under IRC § 1298(a)(3)
- Transfer of PFIC shares from a US person to a non-US person can cause taxation as a deemed disposition of a PFIC interest under IRC § 1291(f)
- A timely QEF election can provide relief in some cases
- Certain holding structures may provide relief in some cases

# Identifying CFCs

- A foreign corporation if one or more “US shareholders” own more than 50% of the company’s combined total value or voting power, under IRC § 957
- A “US shareholder” is a US person who owns, directly, indirectly, or constructively, 10% of the stock of a CFC either by vote or by value
  - A US person refers to the definition under IRC § 7701, including all US citizens, residents, domestic companies, and domestic trusts and estates
  - Attribution rules apply

# CFC Taxation: Shares Owned by US Persons

- Direct ownership: shares held in a taxpayer's name
- Indirect ownership:
  - Proportionate ownership of shares held in a foreign entity, trust, or estate
  - Indirectly owned shares are treated the same as directly owned shares
- Constructive ownership:
  - Attribution rules deem a US person to constructively own shares of a foreign corporation that are owned by a US family member (spouse, parents, children, and grandchildren) or a US corporation, partnership, estate or trust
  - Constructively owned shares apply to determine whether or not a foreign corporation is a CFC, but not to determine the amount of tax includible in a shareholder's income
- OBBBA largely eliminated the “downward attribution” rule that caused many US-owned foreign corporations to be classified as CFCs



# CFC Taxation: Default Rules

- US owners are taxed on their proportionate share of certain income (generally passive income), regardless of whether or not the income is distributed
- Taxed at ordinary income rates
- PFICs that are also CFCs are taxed as CFCs

# CFC Taxation: GILTI

- Since 2018, US owners of CFCs may also pay tax on non-Subpart F income under the Global Intangible Low Taxed Income regime (“GILTI”), which was rebranded under OBBBA to Net CFC Tested Income (NCTI)
- US federal income tax on active income (and other non-subpart F income) inclusion of  $\geq 10\%$  US shareholders of CFCs
- Post 2025 under OBBBA 12.6% (21% federal corporate income tax rate – 30% NCTI deduction); prior to OBBBA, was 10.5% (i.e., 21% US federal corporate income tax rate – 50% GILTI deduction)
- One of the key components of GILTI was the qualified business asset investment (QBAI) exclusion, which was designed to provide a “routine return” of 10% on tangible assets, so that only income above this return—presumed to be from intangibles—was subject to GILTI. The OBBBA eliminated the QBAI exclusion
- GILTI can generate timing issues if foreign taxes are paid in a different year than GILTI inclusion; credits may be lost and cannot be carried forward or back; CFCs with non-calendar year end can cause timing mismatches
- Non-corporate US owners of CFCs do not qualify for many deductions and credits related to GILTI tax; US corporations may qualify for deemed foreign tax credits, subject to a 90% limitation (was 80% pre OBBBA)
- If all of the CFC’s income is Subpart F income, there is no GILTI tax

# Foreign derived deduction eligible income (FDDEI)

- Offers a lower effective US income tax rate (via deduction) on non-US source IP or tangible property transactions income
- Under the OBBBA, the rate is 13.9986% (i.e., 21% US federal corporate income tax rate – 33.34% FDDEI deduction); pre-2026, the rate was 13.125% but was supposed to increase to 16.406%



# US Information Reporting

Asset	Form	Penalties (civil nonwillful)
Any foreign account with more than \$10,000 (include escrow accounts held by foreign counsel)	FinCEN Form 114, the Foreign Bank Account Report (FBAR)	\$10,000/yr, assessed after examination
50% or more interest in a foreign partnership (10% if US control)	Form 8865, maybe Schedules K-2 and K-3	\$10,000/yr, increasing after notice from IRS
Officer, director, or 10% or more shareholder of a foreign corporation	Form 5471	\$10,000/yr; 10% reduction of foreign tax credits
Domestic US corporation or US trade or business, if 25% or more foreign-owned	Form 5472 (filed by corporation)	\$25,000/yr
Foreign disregarded entity	Form 8858	\$10,000/yr, increasing after notice from IRS
Any asset reportable on a form other than the FBAR; foreign account in excess of a certain amount	Form 8938 (filed by individuals, domestic trusts and certain beneficiaries, <u>not</u> estates)	\$10,000/yr
Shares in a Passive Foreign Investment Company (PFIC)	Form 8621	No penalty
Interest in or distribution from a foreign trust or estate; gifts from non-US persons	Form 3520; Form 3520-A	35% of reportable property; 5% of reportable property; 25% of total gift

# Foreign Taxes and Treaties



# Types of Foreign Taxes

- Income tax is based on the taxpayer's residence or the situs of the assets in most jurisdictions worldwide
- Inheritance tax may apply instead of estate tax. Inheritance tax applies to a beneficiary who resides in a certain jurisdiction, or to recipients of tangible property located in a certain jurisdiction
- Residents of certain foreign jurisdictions are subject to a wealth tax on worldwide assets, which may include trust property
- Acquisition tax may apply upon the purchase of property, particularly real property, typically some proportion of the value of the property at the time of purchase
- Gift tax or transfer tax may apply to the gratuitous transfer of property located in a certain jurisdiction

# US Gift and Estate Tax Treaties

- Gift and estate tax treaties may help to avoid double taxation on transfers worldwide, but the savings clause provides that the taxpayer will always pay the higher of the two taxes
- Treaties reduce tax generally by giving one country priority to tax the transferred property; the other country applies a tax credit to prevent double taxation
- Situs-type treaties generally allocate primary taxing jurisdiction to the treaty country in which property is situated
- Domicile-type treaties generally allocate primary taxing jurisdiction to the treaty country in which the taxpayer is domiciled

# Special Treaty Benefits

- US-UK estate tax treaty: gives UK citizens and domiciliaries the benefit of the US lifetime estate tax exemption amount
- US-Germany estate tax treaty: exempts US securities from US estate tax
- US-Canada income tax treaty: gives Canadian citizens and domiciliaries a portion of the US lifetime estate tax exemption amount and provides a marital credit as an alternative to the marital deduction



# Post-Death Planning



# Valuations

- On a US estate tax or gift tax return, foreign assets must be valued in USD according to standard US valuation processes, which may not otherwise be appropriate for the foreign assets
- Identification of a qualified appraiser may be difficult, depending on the jurisdiction
- All appraisals and supporting documentation must be translated into English for attachment to the US estate tax or gift tax return

# Disclaimer Planning

- Consider coordinated disclaimers in multiple jurisdictions
- Note that the timing and other requirements for a disclaimer may vary by jurisdiction
- Disclaimers may not be available or may not have the same consequences in every jurisdiction

# Post-Death Marital Deductions

- Coordinate marital deductions in all relevant jurisdictions to avoid double taxation due to timing issues
- It may be impractical to fund a QDOT or other marital trust with foreign assets, due to trust nonrecognition or punitive trust taxation in the foreign jurisdiction

# Probate Considerations

- Secure local counsel early in the process
- Some jurisdictions do not appoint a fiduciary to administer a probate estate. Instead, transfers of title are authenticated by notaries or other government agents





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Michelle Graham, a Shareholder of Greenberg Traurig, focuses her practice on estate planning and tax planning strategies for domestic and international clients. She advises U.S. and non-U.S. individuals on tax planning matters, including strategies to minimize global taxation and IRS compliance regarding foreign reporting.

Michelle works with non-U.S. individuals investing in the United States and U.S. individuals residing abroad on their U.S. tax filings and global estate planning. Her cross-border experience spans Latin America, Asia, Europe, Australia, Canada, and the Middle East. She also assists migrating clients, including corporate executives moving between states or internationally, and those retiring or acquiring second homes in California.

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Ruth is a Fellow of the American College of Trust and Estate Counsel (ACTEC) and an Academician of the International Academy of Estate and Trust Law. Ruth has served in leadership roles with the Massachusetts Bar Association, the Society of Trust and Estate Practitioners, New England (STEP New England), and the Boston Estate Planning Council (BEPC).

A frequent author and speaker, Ruth has presented at national and international events sponsored by ACTEC, STEP, the National Academy of Elder Law Attorneys (NAELA), and other organizations. Their publications address topics such as foreign asset reporting, international tax compliance, and cross-border estate planning strategies.

Ruth has received the Boston Estate Planning Council President's Award (2021) and the Arthur Stavisky Award from the Massachusetts Chapter of NAELA (2023) for advocacy in elder law and dedication to the needs of seniors.

Since 2015, Ruth has served as a lecturer in Boston University School of Law's Graduate Tax Program, teaching estate planning and international information reporting and withholding.



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Suzanne is a frequent speaker, the recipient of the Chicago Estate Planning Council Austin Fleming Distinguished Service Award, a fellow of the American College of Trust and Estate Counsel where she was the past chair of the International Estate Planning Committee and past Co-chair of the International Membership Committee, and is a Co-chair of the FATF Task Force, an Academician of the International Academy of Estate and Trust Law, and a member of the Society of Trust and Estate Professionals (STEP). Suzanne is an adjunct professor in the Northwestern Pritzker School of Law LLM in Taxation Program, where she teaches international estate planning and is a lecturer at the Instituto Tecnológico Autónomo de México and University of San Diego International Tax Program.

Suzanne is active in the civic community, serving on philanthropic boards, concentrating on access to educational excellence and access to healthcare. She serves on the Board and Executive Committee of Kids Hope USA and Chicago Scholars Foundation and the Board of American Mission Hospital (Bahrain), and is a Trustee emeritus and member of the catalyst of investors of Hope College.

Suzanne's greatest joy is her family – her husband, daughters, sons-in-law, grandson, and golden retriever. She enjoys spending time outdoors, including hiking, swimming, skiing, and snowshoeing.