Trust & Estate Planning

NEWS

Use of Foreign Trusts in the UK

and further trends from the Trust & Estate Planning sector

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Editorial

Dear Reader

As the Global Chairperson of the Trust & Estate Planning Practice Group, I am very delighted to introduce you to the Spring issue of our FYI Newsletter and I hope you are healthy and safe.

With regard to the newsletter, we have collected a significant number of contributions coming from each part of the world. In fact, you will find articles related to North and South American, African, Australian and European trust and estate planning matters. I suggest you contact each author directly, in order to receive further information on their specific topics.

Especially during this period of great concern and uncertainty, I would like to personally thank each of the authors for taking part and for sharing with us the latest updates and developments in their respective countries.

With the wish that this health emergency will be over soon, I would be honored if you will join us at one of our future Trust & Estate Planning Practice Group meetings. They represent excellent and unique occasions for us to meet with one another, and to exchange ideas and professional experiences in a very inspiring and worldwide context.

If you wish to be part of the Trust & Estate Planning Practice Group or if you would like to receive additional information, please do not hesitate to contact me at stefano.loconte@studioloconte.it.

I do hope you will enjoy reading this Spring FYI Newsletter and I am very much looking forward to seeing and hearing from you very soon.

Kind regards

Prof Stefano Loconte
Global Chairperson of the Trust & Estate Planning Practice Group

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Use of Foreign Trusts in the UK

By Maxine Higgins and Emma Florentin-Lee

Trusts have a long history in the UK as a means for individuals to protect, control, and manage the use of assets and ultimately how these assets are passed on to the next generation. They have offered tax advantages, although over the years these have been eroded for UK-domiciled trusts. There is still a significant tax advantage for non-UK domiciliaries to transfer their non-UK assets to a non-UK resident trust. This article solely concerns the protection afforded from UK inheritance tax (IHT) but there can also be income tax and capital gains tax mitigation.

Domicile for UK IHT

IHT (currently at 40%) is chargeable on UK-domiciled individuals, and some UK-domiciled trusts, on their worldwide assets. For a non-domiciled individual, broadly, any assets held outside the UK are not included in the individual's UK estate and are referred to as excluded property, while assets held in the UK may still be subject to IHT.

On formation of a trust, the trust is considered to be domiciled in the same jurisdiction as where the person creating the trust (the settlor) is domiciled.

An individual may be domiciled in the UK either under general law or deemed domicile rules.

Domiciled under General Law

Domicile is a legal concept not specifically defined. It is not the same as residency. It is generally understood as the place which a person considers to be their permanent home. Under UK general law, an individual has one of three types of domicile:

1. Domicile of origin – Everyone acquires a domicile of origin at birth, usually their father's. The domicile of origin takes precedent until it is superseded by a domicile of dependency or choice.

2. Domicile of dependence – In certain circumstances the domicile may change with that of the person on whom they are dependent. This generally only applies to children under 16, and those lacking mental capacity.

3. Domicile of choice – A domicile of choice is acquired when an

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GGI member firm
Citroen Wells Chartered Accountants
Auditing and Accounting, Tax, Advisory, Corporate Finance, Fiduciary and Estate Planning
London, UK
T: +44 20 7304 2000
W: www.citroenwells.co.uk
Maxine Higgins
E: maxine.higgins@citroenwells.co.uk
Emma Florentin-Lee
E: emma.florentin-Lee@citroenwells.co.uk

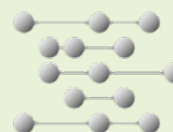
Maxine Higgins

Emma Florentin-Lee

Citroen Wells' partners include specialists with years of practical knowledge assisting their international clients, including the financial problems facing property investors, dealers, and developers. They offer a range of high-quality accounting, tax, financial, and business services.

Maxine Higgins is a long-standing Partner at Citroen Wells experienced in dealing with personal taxation, family offices, trusts and estates, and inheritance tax planning.

Emma Florentin-Lee is a Partner at Citroen Wells dealing with a wide range of clients' tax and accounting needs. She recently passed her Chartered Tax Advisor exams and won two awards for her performance in the Inheritance Tax, Estates and Trusts paper. She is increasingly involved with this area of the firm. Currently, Emma is on maternity leave.



individual takes up residence in a new country and intends to reside there, permanently or indefinitely.

Deemed Domicile

An individual not domiciled in the UK under general law is deemed UK domiciled for IHT purposes if any of points 1 to 3 apply:

1. Domiciled in the UK under general law at any point in the last three years.

2. Both a) UK resident for at least 15 out of the last 20 tax years, and b) for at least one out of the last four tax years.

3. Formerly domiciled resident, defined as someone who satisfies all of the below:
   a. Was born in the UK;
   b. Has a UK domicile of origin;
   c. Is resident in the UK in the year in question;
   d. Was resident in the UK in one or both of the two prior years.

Excluded Property Trusts

IHT does not apply to "excluded property" which, as explained above, is broadly non-UK assets belonging to a non-UK domiciled individual or trust.

If a non-UK domiciled individual places (or "settles") assets into a trust this would be a non-domiciled trust. It will then protect the non-UK assets of the trust from IHT regardless of what happens to the settlor's domicile or residence after this point (with the exception of any tax year in which the settlor is deemed domiciled as a formerly domiciled resident).

This is particularly useful if an individual is about to become deemed domiciled. In this situation they could set up an excluded property trust prior to becoming deemed domiciled and thus protect all foreign assets within the trust from IHT.

UK assets can be protected by holding through a non-UK company owned by the trust as it is directly held assets which must be non-UK situs. However, foreign assets deriving their value from UK residential property remain within the scope of IHT.

It is essential that that no further assets should be settled into the trust by the settlor once UK domiciled or deemed domiciled as this may jeopardise its excluded property status.

Running a Business as a Sole Proprietor? You Should Have an Estate Plan

By C. Andreea Muth and Nozomi (Zoe) Smith

When a business is owned by an individual where there is no legal distinction between the individual and the business, it is called a sole proprietorship. The owner owns the assets, takes on the liabilities, and makes profits – all in their personal capacity.

You need to understand how your business can impact your estate. What do you want done with the business when you pass away? A consulting business is not likely to have much value without its consultant. But a physical or online store can carry on after you die, if there is someone willing and able to step into your shoes. If not, it makes sense to sell the business.

Once you have a plan, make sure it is laid out in your Will. You can appoint someone you trust as an executor and give them instructions on what you want done with your business. In Ontario, if you die without a Will, no one is legally authorised to act on your behalf and deal with your business unless someone applies to the court to be appointed as "Estate Trustee Without a Will".

Business Assets and Liabilities

You are personally responsible for leases, bank accounts, supplies, sales contracts, etc. Parties with whom you

have contracts, including website platforms, will need to be notified that you have passed away. Any profits from your business after you have passed away will form part of your estate.

With a Will, you can decide who makes decisions about your business contracts, and how to distribute your business profits and assets after your death.

Business Assets and Liabilities

If you collect and remit Harmonised Sales Tax (HST), someone will need to close your HST account and file your final HST return. Someone will also need to file your final personal income tax return, close your business number, and close any other Canada Revenue Agency business accounts once all returns are filed.

An estate plan, which can be as simple as creating a Will, is critical to give your loved ones the starting point and make sure your affairs are taken care of after you die.

You can read the full article here.

GGI member firm
Pallett Valo LLP
Law Firm Services
Mississauga (ON), Canada
T: +1 905 273 33 00
W: www.pallettvalo.com
C. Andreea Muth
E: amuth@pallettvalo.com
Nozomi (Zoe) Smith
E: zsmith@pallettvalo.com

Pallett Valo LLP is one of Ontario's Top 10 Regional Law Firms. The firm practices in the areas of business law, commercial litigation, commercial real estate, construction, insolvency and corporate restructuring, employment and labour, and wills, estates, and trusts.

C. Andreea Muth

Nozomi (Zoe) Smith

Andreea Muth is a member of the Business Law Practice. Andreea has a general corporate/commercial law practice, representing start-ups and mature business owners. She also has a developing expertise in trust and estate planning for business owners.

Zoe Smith is a member of the Wills, Estates and Trusts Practice. Zoe has a broad practice, providing estate-planning advice to business owners, professionals, families of children with disabilities, and individuals with foreign assets or beneficiaries and complex family relationships.

Taxation of Distribution from "Opaque" Foreign Trusts Set Up in Blacklist Countries

By Angela Cordasco

In Italy, as a general rule, income generated by "transparent" trusts (trusts with appointed beneficiaries) is attributed to the beneficiaries regardless of its distribution for tax purposes and trust beneficiaries are taxed directly on their share of the trust's income.

Whereas income generated by "opaque" trusts (with no identified beneficiaries) is not subject to tax in the hands of the Italian residents who received said income.

However, a tax decree issued in October 2019 (D.L. no. 124/2019) has changed the tax treatment of income generated by opaque, foreign blacklist trusts received by Italian residents. In particular, while distributions made out of capital will generally continue to be considered non-taxable, any distributions out of income generated by a foreign blacklist trust, even if it is considered as opaque will be taxed in the hands of the Italian residents who receive said income.

According to the Italian tax law, a country (other than EU member states and EEA countries which grant an effective information exchange) is considered blacklist if the nominal tax rate is lower than 50% of the nominal tax rate applicable in Italy, which is equal to 24% (for corporations).

Other important news is related to capital distributions. Generally speaking, capital distributions are not taxable in the hands of the Italian tax residents who receive said capital. However, the abovementioned tax decree establishes that, when it is not possible to determine whether the distribution is made out of income or out of capital, the whole amount is deemed income distribution and it is taxed on the beneficiaries.

Therefore, according to the current tax law, distributions of income from trusts established in blacklist countries will be subject to tax in the hands of the Italian tax residents who receive said income, disregarding the qualification of the trust as opaque or transparent. In addition, if it is not possible to establish whether the distribution is made out of income or out of capital, the whole amount will be considered as income.

GGI member firm
Loconte & Partners,
Studio legale e tributario
Advisory, Auditing & Accounting, Corporate Finance, Fiduciary & Estate Planning, Law Firm Services, Tax
Bari, Italy
T: +39 024 5476 250
W: www.loconteandpartners.it
Angela Cordasco
E: angela.cordasco@studioloconte.it

Loconte & Partners is a law firm specialising in tax and legal consultancy that assists its Italian and international clients, helping them to preserve and grow their wealth.

Angela Cordasco is an Italian lawyer. After graduating in Law, she completed two postgraduate master's degrees focused on Tax Law and on Wealth Management and Asset Protection. She has noteworthy experience in tax law matters and cross-border individual taxation. Angela joined Loconte & Partners in 2014, where she deals mainly with private clients for asset protection and wealth-management services.

Angela Cordasco

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Australian Capital Gains Now Subject to Tax

By Tony Nunes and Jane Harris

Non-residents are generally subject to tax in Australia on any Australian-sourced income. However, in order to encourage investment in Australia, foreign residents are only taxable on capital gains from "taxable Australian property" ("TAP"). In broad terms, TAP is mainly direct or indirect interests in real property situated in Australia. A foreign resident can generally disregard a capital gain or capital loss from a CGT event if the event happens in relation to a CGT asset that is not TAP.

Investing in Australian assets via a discretionary trust is very common, due to the significant tax advantages.

The Australian Taxation Office has released draft Tax Determination 2019/D6, in which the Commissioner has taken the view that a capital gain attributed to a foreign beneficiary of a discretionary trust cannot be disregarded by the non-resident beneficiary. The ATO's reasoning is that a capital gain by a trust is a CGT event for the trustee, rather than an event that happens to the beneficiary.

The Commissioner's view results in a foreign resident being taxed on any capital gain received through a trust. That same non-resident would not have been taxed if they had invested directly in a non-TAP asset.

The views expressed are a change from the way that most practitioners have treated non-TAP capital gains distributed to non-resident beneficiaries of discretionary trusts. It raises significant issues for non-residents investing in Australia and is something that requires existing investors to urgently review their current Australian investment portfolio.

GGI member firm
Kelly+Partners Chartered Accountants
Advisory, Auditing and Accounting, Corporate Finance, Tax, Fiduciary and Estate Planning
Sydney, Australia
T: +61 2 9933 8866
W: www.kellypartners.com.au
Tony Nunes
E: tony.nunes@kellypartners.com.au
Jane Harris
E: jane.harris@kellypartners.com.au

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Tony Nunes

Jane Harris

Tony Nunes has over 22 years' experience in providing tax advice. He has extensive experience in advising clients on issues affecting cross-border transactions, acquisitions and restructures, and in all aspects of structuring the ownership and financing of corporations and their operations.

Jane Harris has over 10 years of experience assisting clients with taxation matters. Jane provides clients with structuring and tax legal advice. Jane frequently advises on the opportunities and risks of operating personal and business affairs through a variety of structures, including trusts.

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Tax Implications of Beneficiaries of Foreign Trusts Moving to Germany

By Oliver Biernat

Germany is beautiful and there are many good reasons to move here. Tax advantages are usually not among them and before packing your suitcases you should take a minute or two and consider the tax implications that may have. This is especially true if you own a company abroad where there is no German equivalent (e.g., LLC) or if you are the beneficiary of a foreign trust. The problem is that German tax authorities are very suspicious if you own something they cannot easily understand or

rate and there are no clear rules how this is handed tax-wise. Let us take the example of an Australian who is a beneficiary of an Australian trust and moved to Germany. Trusts do not exist in German law. Therefore, one needs to decide how to handle a trust tax-wise in Germany. The result is shocking as I will show you.

Depending on the rules in the trust deed, one has to decide how to classify the trust according to German civil and tax law. Assuming our foreign trust comes closest to a German family foundation, Sec. 15 AStG (Foreign Tax Act) says that,

> "assets and income of a family foundation which has a business address and registered office outside Germany are attributed to the founder, if he is subject to unlimited tax liability in Germany, otherwise to the persons subject to unlimited tax liability in Germany who are entitled to draw or are entitled to claim, according to their share."

That means that there is no doubt about it that all running profits of the trust as well as capital gains when the trust is terminated, are taxable according to Sec. 15 AStG in Germany, if the beneficiary has a residence in Germany. However, it is doubtful if there is double taxation. German tax authorities usually want to raise a) gift tax on donations made by a foreign trust to their German beneficiaries **and** b) income tax on investment income on all benefits the German resident receives from a foreign trust, **on top** of the tax already raised by Sec. 15 AStG. It is expected that the German federal fiscal court will decide on that and until then a lot of uncertainty remains.

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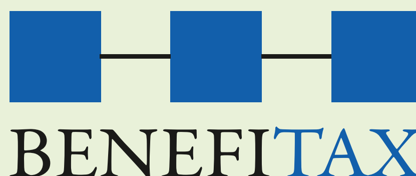
Benefitax GmbH
Steuerberatungsgesellschaft
Wirtschaftsprüfungsgesellschaft
Advisory, Auditing and Accounting, Corporate Finance, Fiduciary and Estate Planning, Tax
Frankfurt am Main, Germany
T: +49 69 256 227 60
W: www.benefitax.de
Oliver Biernat
E: o.biernat@benefitax.de

Benefitax GmbH is a tax consultancy and public auditing company located in Frankfurt, which is widely recognised as the financial centre of Germany. Benefitax predominantly serves German entities of foreign multinational groups, mid-sized German companies with cross-border activities, and wealthy private individuals.

Oliver Biernat is Founder and Managing Partner of Benefitax. He is a German chartered accountant, certified tax advisor, and specialist advisor for international taxation, with more than 20 years of experience. Since 2008, he has chaired GGI's International Taxation Practice Group (ITPG), increasing its size to more than 570 experts from 90 countries in the process.

Oliver Biernat



Mediating Probate, Trust, and Fiduciary Disputes

By Patricia L. Davidson

Probate, trust, and fiduciary litigation is usually contentious. Will contests, breach of fiduciary duty claims, objections to accounts, etc. are often fraught with simmering, often irrational, emotions. Litigation can dissipate family assets and perpetuate conflict, often across multiple generations. Because these disputes involve more than money, "family feuds" are well suited to mediation.

Mediators facilitate compromise. They try to problem-solve collaboratively and set expectations about the potential outcome of a trial. Trials are about winners and losers; mediation can help parties find creative resolutions.

Mediators assist parties to work through both economic and psychological issues, such as trustee-beneficiary power imbalances and sibling rivalries. Mediation provides a forum where parties can vent to an impartial person. Ultimately, parties must focus on the legal issues.

Lawyers should work with the mediator to help clients understand the benefits of a negotiated resolution and the uncertainty and expense of litigation. Mediators often engage with just the lawyers to discuss issues, narrow the disputes and vet potential settlement terms. But when lawyers emphasise advocacy over collaboration, lawyers can impede settlement. Lawyers should not channel clients' emotions but should maintain objectivity and stress to their clients that a negotiated settlement provides control over the outcome of a legal controversy.

Mediators – and lawyers – can help parties understand that in family feuds, trials seldom bring vindication. Fact finders are rarely outraged and may not relate to parties sparring over wealth. Judges are often more concerned with the intent of someone who has died than the wants of the litigants.

In advance of the any mediation, lawyers should share the old adage that the mark of a good compromise is when no one is happy, and the old joke that if you have a perfect case you only have an 80% chance of winning. And of course, no one has a perfect case.

GGI member firm
Mirick, O'Connell, DeMallie & Lougee, LLP
Law Firm Services
Worcester (MA), USA
T: +1 508 860 1540
W: www.mirickoconnell.com
Patricia L. Davidson
E: pdavidson@mirickoconnell.com

Patricia L. Davidson

Mirick O'Connell is a full-service business law firm with offices in Worcester, Westborough, and Boston, Massachusetts, USA. Excellence in work. Excellence in client service. Excellence in value.

Patricia L. Davidson is a Partner in the Probate, Trust and Fiduciary Litigation Group and the Business and General Litigation Group. Her practice focuses on helping families resolve issues involving wills, trusts, and real estate, as well as disputes involving family and closely held businesses.

Update on South Africa's Consideration of a Wealth Tax Regime

By Simphiwe Mili

In 2015, the Davis Tax Committee was tasked to investigate the relevance of estate duty in the South African ("SA") tax regime. The committee's first interim report proposed abolishing estate duty and replacing it with a wealth tax. In 2018, the Davis Tax Committee was tasked with investigating the feasibility of a wealth tax in South Africa and this included investigating whether the wealth tax would perform better relative to estate duty. The debate between the proponents and the opponents of this tax has gained much momentum since 2018 and a specifically interesting debate is how this tax affects inheritance.

The 2019 Inequality Trends Report, published by the University of Cape Town and SALDRU, reported that the wealth Gini coefficient is 0.94 in SA. Furthermore, the top 10% of the country possess 90% of the country's wealth. The rise and high concentration of income and wealth at the upper end of the distribution have reinforced the call for the need to preserve or increase taxation on inheritance. International organisations such as the International Monetary Fund (2013) have recommended reinforcing property-related taxes (such as estate duty) and decreasing current taxes on earned income. Family succession and inheritance incentives have been proven to play a role in the accumulation of high capital and corporate assets. Given that estate duty is factored into tax planning, this can elicit tax avoidance or the relocation of residents, since estate duty is not levied in a number of OECD countries, while net wealth taxes have been eliminated in most countries (Förster et al. 2014).

The fact that the wealth tax also poses a great risk for tax avoidance and migration by wealthy taxpayers has been one of the major arguments for the opponents of the wealth tax in South Africa. However, when determining the burden of estate duty, it becomes less relevant to account for economic decisions made during years when the person was economically active because estate duty is only imposed after death. Therefore, most practitioners, tax experts and economists (Boadway et al. 2010; Kopzuk 2013) tend to advocate for estate duty over wealth taxation.

The burden on beneficiaries, especially on those acquiring a large inheritance in which they played no part in acquiring, is considered small, lending support to the idea of taxing inheritance. This is motivated by the premise that inheritance taxation accounts for meritocratic ideas while striving to equalise opportunities between members of individual generations (Piketty & Saez 2012).

In 2016, the Davis Tax Committee ruled against abolishing estate duty and the discussion for the wealth tax is still ongoing.

GGI member firm
Nolands
Advisory, Auditing and Accounting,
Fiduciary and Estate Planning, Tax
More than 10 offices throughout Africa
T: +27 21 658 6600
W: www.nolands.co.za
Simphiwe Mili
E: simphiwem@nolandstax.co.za

Simphiwe Mili

Nolands is an international auditing firm located in eleven offices in all major centres in Africa. Nolands employs almost 200 people and focuses on providing the best possible solutions for its clients. The company prides itself on being "not ordinary" and on its ability to integrate services and respond rapidly to clients' needs.

Simphiwe Mili is a Tax Consultant at Nolands. Simphiwe holds a BCom (Hons) degree in Tax from the University of Cape Town and is currently completing her master's in South African Income Tax at the University of Cape Town.

Cross-Border Estate Planning and Succession

By Prof Sergio Guerrero Rosas

Cross-border business can get very complex and Mexico is no exception. Mexico is a great location to buy real estate for business; it is a cheaper option in terms of labour costs and a perfect location for business with the US as well as Central and South America. Some just enjoy Mexico for its beauty and buy real estate in search of warmer weather for a vacation property. This acquisition can come from a purchase or succession – either way property ownership in Mexico comes with expenses, risks, and taxes from local and federal laws.

When talking about succession it is necessary to have the death certificate and, if applicable, the will. This is defined if it is a testamentary or non-testamentary succession. An inheritance immediately causes the property-acquisition tax, which is a minimum tax ranging from 0.5% to 3% on the cadastral value of the property. In the specific case that it is not an inheritance, but a donation or legacy in life, the payment of the property-acquisition tax is also contemplated. ISR payment is not made, only in cases where hereditary succession is in a straight line.

The next step is to check the status of the property and make sure that the estate does not have debts in the payment of property, water, and other services, and, in the case of mortgages, that the property has been liquidated. When this is done, the executor can be appointed, and the beneficiaries can either claim ownership of the property or begin the process of selling it.

In Mexico's case, major business opportunities come from our northern border; having an economic giant as a neighbour like the United States is great for business but many foreigners do not understand the expenses, risks, and tax implications of property ownership or doing business within the US. In the US, there are several types of will: simple, joint, and fiduciary. As a general rule, the widowed spouse has the right to receive a percentage of the inheritance, although there is no obligation to leave an inheritance to children or other relatives, such as siblings or parents. The inheritance tax, known in the US as estate tax, is paid on the estate of the deceased and before proceeding to deliver each part to the heirs. At the state level, only some states have estate tax. In addition, some states such as Iowa, Kentucky, Maryland, Nebraska, New York, and Pennsylvania have inheritance taxes that apply on the amount each heir receives, after the inheritance has already been delivered.

GGI member firm
Guerrero y Santana, S.C.
Advisory, Auditing & Accounting, Corporate Finance, Law Firm Services, Tax
Tijuana, Baja California, Mexico
T: +52 333 120 05 38
W: www.guerrerosantana.com.mx
Prof Sergio Guerrero Rosas
E: sguerrero@guerrerosantana.com.mx

Prof Sergio Guerrero Rosas

Guerrero y Santana S.C. provides its clients with a wide range of tax, legal, and consulting services. The firm makes comprehensive evaluations of its clients' businesses and draws on the expertise of its professionals to offer the best solution available.

Prof Sergio Guerrero Rosas, Managing Director at Guerrero y Santana, has over 25 years' experience advising companies from SMEs to multinationals, as well as individuals, on tax and estate planning. He is also the Latin American Regional Vice Chairperson of GGI's International Taxation Practice Group (ITPG) and Global Vice Chairperson of the Trust & Estate Planning Practice Group.

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TAX, AUDIT & CONSULTING

US Estate Tax Planning for Non-Citizen Spouses after the SECURE Act of 2019

By Ladidas Lumpkins

The SECURE Act, enacted in December 2019, changed the Required Minimum Distribution (RMD) guidelines for IRAs. Most beneficiaries must now take full distribution of an IRA within 10 years of the owner's death. Beneficiaries who can still "stretch" RMDs over their own lifetime are disabled individuals and the spouse of the deceased.

That includes non-US-citizen surviving spouses. That's the good news for non-US-citizen spouses. Now the bad: A US person may be subject to estate tax of up to 40% of the fair market value of their worldwide assets that are unsheltered by the estate tax exemption (currently USD 11.58 million per individual, and USD 23.16 million for a couple).

Unlike US-citizen spouses, transfers to non-US-citizen spouses do not qualify for the "unlimited marital deduction" that reduces the decedent's taxable estate and defers both federal and gift tax on transfers of property between spouses, including IRAs. That is, unless that property is held in a Qualified Domestic Trust, or QDOT.

The central purpose of a QDOT is to defer federal estate tax when a US citizen dies and leaves substantial assets to a non-US-citizen spouse. A QDOT, which can hold all assets of an estate, can be established under a decedent's will, as well as after his or her death by the surviving spouse if certain statutorily prescribed conditions are met. Additionally, at least one of the QDOT's trustees must be a US citizen and/or a domestic US corporation, and the terms of the QDOT must provide that the surviving spouse is entitled to all trust income during his or her lifetime.

So, for surviving non-US-citizen spouses, a QDOT defers the estate tax. The income distributed to the surviving spouse, including RMDs from IRAs, is taxed at a top personal income tax rate of 37%. One final caveat:

Distributions of QDOT **principal,** unless for hardship, are subject to estate tax. This can occur if the RMDs that flow from the QDOT to the surviving spouse exceed IRA income.

GGI member firm
Prager Metis International LLC
Advisory, Auditing & Accounting, Corporate Finance, Fiduciary & Estate Planning, Tax
15 offices throughout the USA
T: +1 212 643 0099
W: www.pragermetis.com
Ladidas Lumpkins
E: llumpkins@pragermetis.com

Ladidas Lumpkins

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Ladidas Lumpkins is a Partner in the Trusts & Estates Department of Prager Metis. She provides strategic tax planning, compliance, and consulting to high-net-worth families and their closely held businesses. She specialises in the US taxation of individuals and trusts in multi-national family groups.

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Use of Hybrid Canadian Partnerships in Canadian Estate Planning

By Greg Gartner and Jeanne Posey

US estate tax arises on the death of an individual and is applied at graduated rates to the fair-market value of the individual's taxable estate. The same rates for estate tax apply regardless of whether the individual is a US citizen, US resident, or non-resident of the US. The main difference is that for non-residents, only the value of the US-situs assets is included in calculating the taxable estate.

Ownership of US-situs assets can be through several different forms including personal holdings, a corporate structure, a trust, or a partnership. A key advantage to the use of a partnership is the ability to elect and designate the partnership as a corporation for US tax purposes through the use of a "check-the-box" election. It should be noted, a partnership only exists where partners carry on business in common with a view to profit and the partnership must be a non-US partnership. If the sole use of a partnership is the ownership of personal-use property in the US (not a business) this may limit planning opportunities. However, a partnership, which in addition to owning US real estate owns an investment portfolio, may be viewed as carrying on business to an extent sufficient to permit a partnership to exist.

In terms of estate tax planning, use of the "check-the-box" election is a prudent approach to tax planning as it allows the partnership to be treated as a foreign corporation for US income and transfer-tax purposes while retaining its partnership status (as would be the case in Canada). Where a partnership is treated as a corporation for US purposes, the non-resident individual would be considered to own shares in a non-US corporation at the time of death.

Provided the partnership is not treated as a sham or a nominee, the interest in the foreign partnership would be treated as foreign-situs property, and likely not subject to US estate tax. Further, such election would make the gain from the disposition of any US real property on death subject to US corporate tax which is currently at a rate of 21%.

GGI member firm
Moodys Gartner Tax Law LLP
Fiduciary and Estate Planning, Law Firm Services, Tax
Calgary, Edmonton, Canada
T: +1 780 784 2501
W: www.moodysgartner.com
Greg Gartner
E: ggartner@moodystax.com
Jeanne Posey
E: jposey@moodystax.com

Moodys Gartner Tax Law LLP has one single focus: tax. They provide tax advisory and planning for individuals with personal and business interests on either side of the Canada-US border, no matter where they live in the world.

Greg Gartner

Jeanne Posey

Greg Gartner, CA, MBA, LLB, QC, is Moodys' Director, Canadian Tax Law. Equipped with nearly 30 years of experience, Greg specialises in purchases and sales of businesses, corporate reorganisations, cross-border Canada/US tax issues, and international taxation.

Jeanne Posey, LLB, LLM, began her career as a mortgage broker in British Columbia, and now assists clients with matters related to international tax planning, Revenue Canada, tax-driven corporate reorganisations, and estate and succession planning.

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Benefits of Investing in Uruguay

By Natalia Silva Isasmendi

Uruguay is part of the most important commercial axis in South America, which includes Brasilia, Río de Janeiro, Sao Paulo, Santiago de Chile, Montevideo, and Buenos Aires. The axis has the largest urban concentration with 400 million people and 68% of Latin America's GDP.

Foreign Direct Investment

The country offers **political, economic, judicial, and institutional stability,** guaranteeing security for foreign investments. National and foreign investors receive the same treatment.

Moreover, there is no limit for foreign capital endowment in companies and no restrictions regarding their activities. This has positioned Uruguay as one of the countries with the most investment flows in relative terms within the region.

Uruguay has **no restrictions on capital inflows or outflows.** It also has free-exchange market and no issues with opening accounts on several currencies or remittances to foreign countries. Nevertheless, it is the country in Latin America that presents the lowest level of risk in terms of asset laundering and terrorism financing, according to international rankings.

The country has several fiscal incentives to promote investment, which are legally backed by investment promotion laws. These regulations are available for both national and foreign investors, and ever since their entry into force they have been widely used by foreign companies settled in Uruguay. According to official data, **44% of the investment amount in the 2009–2018 period was made by foreign companies.** In 2018 it was around 30%.

Uruguay receives investments in the **infrastructure area,** in **services** (tourism, logistics, communications), in **agricultural activity, software industry, meat processing industry, and forestry industry,** among others.

GGI member firm
Carle & Andrioli Contadores Públicos
Advisory, Auditing and Accounting, Corporate Finance, Tax
Montevideo, Uruguay
T: +598 24019911
W: www.carle-andrioli.com.uy
Natalia Silva Isasmendi
E: nataliasilva@carle-andrioli.com.uy

Natalia Silva Isasmendi

Carle & Andrioli Contadores Públicos was established in 1991 and became an independent member of GGI in 2001. It offers consulting, audit, tax, and accounting advisory services. The firm currently has 40 employees and provides services to companies in the industrial, agricultural, commerce, and services sectors. Since 2010, all services provided are certified according to the ISO 9001:2015 norms by UNIT and the Spanish Association for Standardisation and Certification (AENOR).

Natalia Silva Isasmendi is a Managing Partner of consulting, accounting, and tax advice at Carle & Andrioli. She is a Public Accountant with a degree from Universidad de la República, Uruguay. She also holds an Advanced Management Programme Diploma from the ESADE Barcelona-Universidad ORT. Natalia is a lecturer at Universidad ORT.

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Contacts

GGI | Geneva Group International AG
Schaffhauserstrasse 550
8052 Zurich, Switzerland
T: +41 44 256 18 18
E: info@ggi.com
W: www.ggi.com
W: www.ggiforum.com

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Responsible Editor in charge of Trust & Estate Planning Contents:
Prof Stefano Loconte
Global Chairperson of the GGI
Trust & Estate Planning Practice Group
E: stefano.loconte@studioloconte.it

GGI member firm
Loconte & Partners, Studio legale e tributario
Corso della Carboneria 15
70123 Bari
Italy
E: +39 080 572 2880
W: www.loconteandpartners.it

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