

International Estate Planning and South Dakota Trusts



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- Notre Dame Tax and Estate Planning Institute;
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- 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 (responsible for 1/5 of the text).

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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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Inbound Estate & Trust Planning

Inbound



1. Know Your Customer
2. Foreign Person Owns U.S. Assets
3. Foreign Person Creates a South Dakota Trust with U.S. Beneficiaries

This outline discusses some of the legal and tax aspects of a foreign person (non-resident alien) forming a U.S. trust. As the foreign person is coming into the U.S., this is referred to as an inbound transaction. First, this outline will discuss some of the Know Your Customer issues from a legal perspective. Second, some of the basics of international estate planning for an inbound structure will be discussed. Finally, this outline discusses some of the tax issues of a foreign person creating a South Dakota Trust with U.S. beneficiaries. Please note, this outline does not deal with either a non-citizen spouse (married to a U.S. citizen) or a resident alien.

Know Your Customer

- ABA Risk Based Approach
- Country Risk
- Client Risk
- Service Risk



A. Know Your Customer

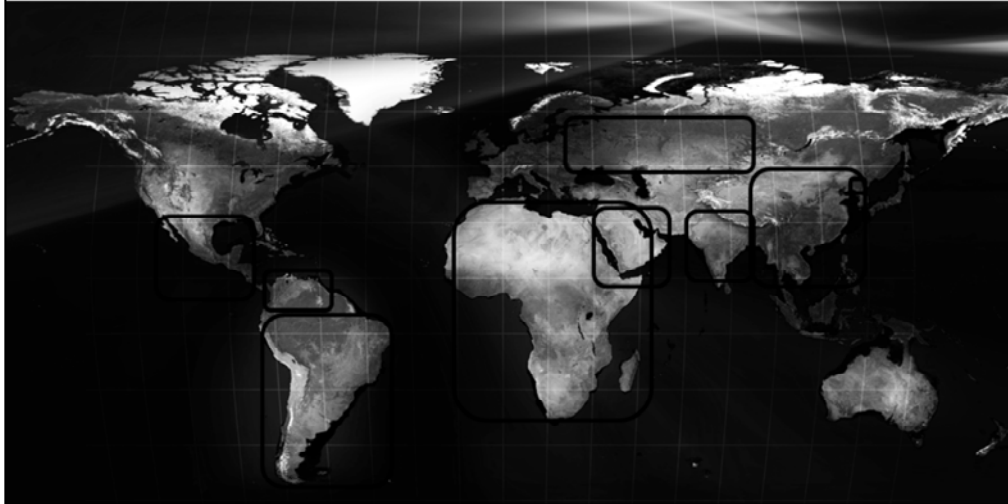
Knowing your customer (“KYC”) becomes one of the key and most difficult issues to work through. Many times attorneys will attempt to represent an international client, knowing little, if anything, regarding their background.

The ABA, IBA and CCBE in conjunction with FATF developed a voluntary risk based approach guidance for lawyers known as the Risk-Based Approach Guidance for Legal Professionals. The risk based approach (RBA) divides risks into three categories: (1) country/geographic Risk; (2) client risk; and (3) service risk.



Country Risk

- Sanctions, embargos, no money laundering laws, corruption



1. Country Based Risk

Countries with geographic risks are those countries subject to sanctions or embargos, anti-money laundering laws, having significant levels of corruption or other criminal activity. Other than the general statement of the issues in the above sentence, the Risk Based Approach does not specifically identify any areas or countries of concern. Rather, it requires an attorney to do more due diligence if a potential client is either a (1) country risk; (2) client risk; or (3) service risk.

From his experience, the author has identified several areas where he would have greater levels of concern. Naturally, the mid-east is a problem as well as North Korea. Second, it is hard to follow through with due diligence on Russian, India, and currently Venezuelan clients. Third, Mexico, South America, Africa, may present some unique issues. Finally, while China has become a modern industrial power, there are still a few cultural issues that an advisor needs to be aware of. Some that will be discussed later in this outline.

Client Risk

➤ Politically exposed persons



➤ Unregulated charity



➤ \$100 M from Africa

2. Client Risk

Client risk is generally referred to as politically exposed persons. While not specifically listed in the Risk-Based Approach, strong inferences are made to governmental officials of various nations. Other client risk is entities that make it difficult to identify its beneficial owner and Charities not regulated by a government. Also, clients with no address or cash basis businesses also have a client based risk.

One attorney that I have cocounseled with called to ask me whether he should take 2 potential clients that were ministers in a certain African nation. He stated that each would fund the trust with approximately \$30 million initially, and over the next couple of years it would increase to \$100 million for each trust. The potential clients then offered to fly the cocounsel out to their nation to meet him.

When asked regarding the source of their wealth, the two replied that it was from oil revenues. One need only remember Harry Truman's quote, "You can't get rich in politics unless you're a crook." Further, there were concerns that if we assisted this client, we could be in violation of the foreign corrupt practices act (15 U.S.C. §§ 78dd-1, et seq. ("FCPA")) as well as any other laws that would make assisting a dishonest person a criminal act. Therefore, cocounsel declined the engagement. A few years later in December of 2015, an article in a major U.S. magazine quoted the new president of this African nation as finding evidence of massive oil corruption where oil funds were diverted to governmental officials.

As a second example, I was contacted by a potential cocounsel regarding helping a certain governmental official's daughter find a bank for \$10 million. Apparently, the daughter had had \$15 million invested in a U.S. bank for over six years. With the recent FACTA, the U.S. bank had asked the official's daughter to prove the source of the \$15 million. The daughter could prove \$5 million. The U.S. bank informed the official's daughter that she would need to move the other \$10 million to another bank. I turned down the proposed engagement based on the simple thought, "If a major U.S. bank with all of their resources and a very wealthy foreign official could not prove the source, what chance would I have of proving that the funds were from a legitimate source?"

b. Source of Wealth

One of the biggest KYC questions is the source of wealth. If a foreign client has tax returns for several years, this greatly helps document the source of funds. Naturally, a background check would be nice, except in non-European countries this simply may not exist.

Client Risk

➤ Source of Funds



- Income Tax Returns
- Background Check

One of the biggest KYC questions is the source of the wealth. If a foreign client has tax returns for several years, this greatly helps document the source of the wealth. Naturally, a background check would be nice, except in non-European countries this simply may not exist.

Other Advisors

- 物以类聚 wùyǐlèijù
- Attorney or Trust Company
 - Untested Jurisdictions – Belize; Panama
 - Self Proclaimed Expert
 - Self-published book(s)
 - No mainstream articles
 - Claims of celebrity clients



c. Other Advisors

Another possible way to help vet a client is either the American or Chinese similar saying, “Birds of a Feather, Flock Together.” When deciding to do business with an attorney or a trust company, the practitioner may wish to also look at the following three factors:

- a. Does the attorney or trust company primarily recommend untested jurisdictions to form a trust or an entity. While Belize and Panama are both rising offshore jurisdictions, at this point in time, many of their laws are untested. Many years ago, as to trust law when Cook Islands and Nevis were new to the offshore world, the same concern was made. However, over time, case history has proven the validity of these jurisdictions laws. The same applies to Lichtenstein and its civil foundation – it has many years to be tested. However, the Belize and Panama do not have such a history.
- b. When marketing legal services, there are generally two categories that attorneys fall into: One group sells the sizzle without having a steak to back it up; the other group sells the steak.

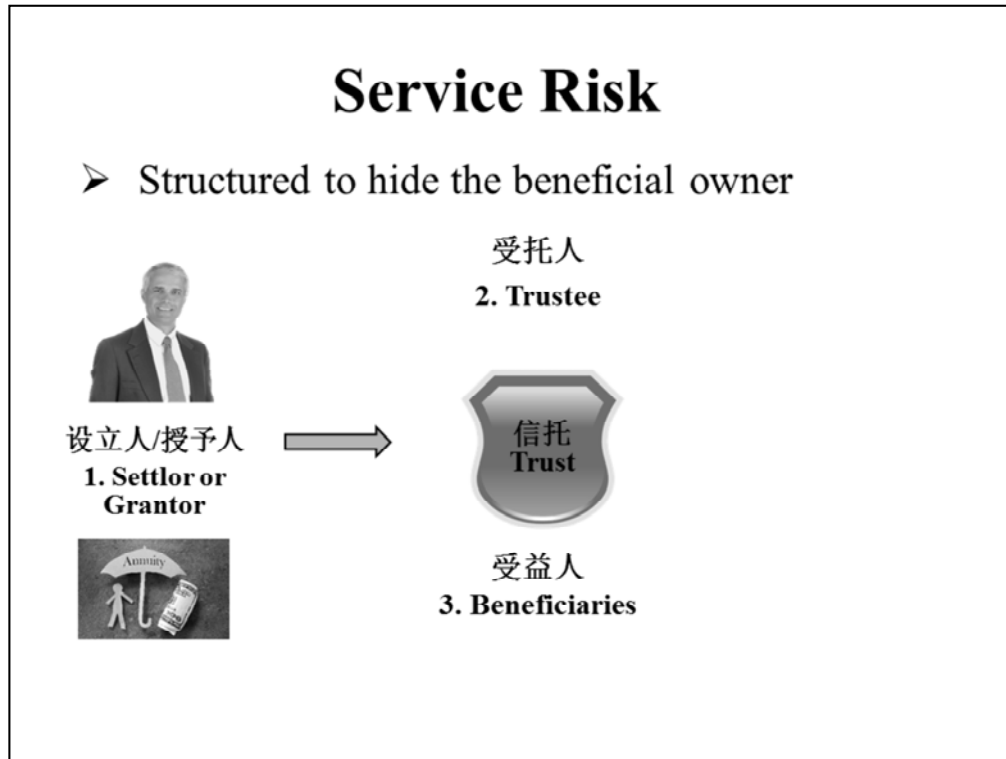
Those that rely most exclusively on selling the sizzle will have self-published technical materials that have not been vetted by the legal community. I remember my speaking coach stating, “If you want everyone to think you are an expert in a subject, merely hold up a copy of the book you published.” He then went to explain that the self-publication costs generally were not too expensive.

Another characteristic will be that these person’s articles or podcasts were never published in any main stream technical journal or source. Rather, they generally were written or filmed as podcasts for such person’s own website.

Finally, the third trait of a promoter relying on the sizzle will be to brag about their celebrity clients (not mentioning any names) as well as the number of clients that they have created offshore trusts. In one case, I came across a Florida attorney who worked for a large national law firm, and he claimed that he had created more Cook Island trusts than the entire number of registered trusts in the Cook Islands. Further, when I mentioned this person’s name to a few of the well-known offshore trust attorneys, no one had ever heard of him.

Service Risk

- Structured to hide the beneficial owner



3. Service Risk

Service related risks involve using the lawyer's trust account to transfer funds, designing structures to improperly conceal ownership from competent authorities, client offers to pay an extraordinary premium.

One area that I see particularly with offshore advisors is that they many times design offshore structures to purposefully conceal the beneficial ownership. For example, a recent one that I saw, a US attorney proposed that the client have an annuity be one of the settlors to the structure as well as the beneficiary. Annuities can always be an investment of the trust. However, Why would an annuity be a settlor? Who owns the annuity? Who controls the annuity? Other than to intentionally hide the beneficial ownership of the structure, I can't see any purpose to the annuity being a settlor of the trust.

Service Risk

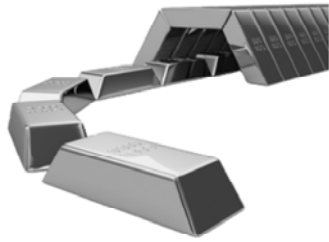
- Attorney Trust Account
 - Close real estate deal
- Client offers to pay an extraordinary premium
- Client needs the trust immediately



The normal rule is never let your client run money through your attorney trust account other than to pay for your services and fees. A notable exception is with real estate attorneys, who frequently buy real estate for a client anonymously. With foreign buyers of real estate, this becomes a possible issue as frequently they do not research the source of the funds or the client's background.

A third area under service risk identified by the Risk-Based Approach was the receipt of an extraordinary premium for the service being rendered. From an international estate planning perspective, seldom will you see a client offer any premium for services. Rather, the more concerning issue is the client need the trust immediately. When you make further inquiries regarding the client's situation, you find out that there is a present creditor.

The Road to Money Laundering



1. Corruption
2. Tax Evasion
3. Theft – Improper Title
4. Fraudulent Conveyance

4. The Road to Money Laundering

While there are many roads that lead to money laundering, the primary ones in international estate planning are (a) corruption; (b) tax evasion; (c) theft; and (d) fraud.

a. Corruption

Corruption is generally the issue with governmental employees diverting governmental funds for their own personal use. In this respect, a money claim may also be brought for theft discussed below. Further, assisting such a dishonest person may trigger provisions of the foreign corrupt practices act. 15 U.S.C. §§ 78dd-1, et. seq.

b. Tax Evasion

Many practitioners are surprised to find out that money laundering is a specified money laundering act. In the mid 1990's the Internal Revenue Service made a major attack on offshore tax schemes. Most of these structures ended up being classified as criminal fraud by the early 2000's. In the early 1990's was not a specified money laundering activity. However, today it is.

c. Theft – Improper Title

Most practitioners view theft as someone used traditional forms of theft such as burglary or robbery. However, there is a more subtle element of theft – transferring improper title.

For example, Sheikh Fahad was the oil minister to the Shah of Iran before it fell, and the claim was made that he had illegally obtained the property transferred to a Bahamian APT from the Iranian citizens. Therefore, the Bahamian Court would not allow the Bahamian APT statute to shield his assets from creditors. *Grupo Torras v. Fahad*, 1994 No.72/1 OFLR 443 (Bahamas Supreme Ct 1994).

A recent Delaware DAPT case, *In re Daniel Kloiber Dynasty Trust u/a/d Dec. 20, 2002*, 2014 WL 3924309 (Del. Chan. unpublished (Aug. 6, 2014)), the court alluded that one of the legal theories that the plaintiff could bring against the Delaware APT was that the transferor did not have valid legal title. *Kloiber* involves the transfer of marital assets to a third-party irrevocable trust. However, the trust invoked the asset protection benefits and detriments of Delaware's qualified disposition statute.

The trust was designed as a beneficiary defective irrevocable trust. On December 20, 2002, the Dan's father settled a Delaware irrevocable discretionary trust (dynasty trust) with \$15,000. The beneficiaries of the dynasty trust are Dan, Dan's spouse (defined in general as the person he's currently married to) and Dan's descendants. In early 2003, Dan sold 99.45 percent of his shares in Exstream Software, Inc. (Exstream) to the dynasty trust for an unsecured promissory note with a face amount of \$6 million. Four years later, Exstream was sold in two transactions for approximately \$340 million. In 2011, Dan's spouse filed for divorce. The question raised by the Delaware court was that Dan may not have proper legal title.

As analogy, the Delaware court made what it called an "extreme and unrealistic hypothetical," when it stated that if Dan took a Kentucky neighbor's artwork without permission and delivered it to the dynasty trust, then Dan would have no power to transfer the artwork to the trust. The unrealistic hypothetical is very similar to the facts of *Fahad*. However, more relevant is that the Delaware court's analogy was being used to question whether Dan had the capacity to transfer marital property to the trust under Kentucky law. If he didn't, similar to Sheikh Fahad, none of the APT law needs to be consulted. The transfer would have been void from inception, and Beth could recover the transferred property.

The issue of transferring marital property to an irrevocable trust is not unique to U.S. clients. Many foreign clients will seek to use a trust for the same purpose. Further, transferring property without proper legal title, may also be deemed a fraudulent conveyance.

Fraudulent Conveyance

- 2 Year Statute
- Notice by Recording
- An Exception to Statute of Limitations
 - Improper title may be a fraudulent conveyance
- Piggyback offense



d. Fraudulent Conveyance

The fourth method to lead to a money laundering claim is through a fraudulent conveyance. Some DAPT practitioners may think that their short statute of limitations will solve all of these issues. For example, a few states' DAPT statutes provide for a two-year or less statute of limitations as well as giving notice by recording. However, it is the U.S. federal government or other foreign government that brings a money laundering claim, and they may well choose the laws of another state to bring the fraudulent conveyance action. Further, in Bankruptcy, the fraudulent conveyance period is increased to 10 years, regardless of state law. Further, as previously discussed, transferring property without valid legal title may be classified as a fraudulent conveyance.

Finally, a fraudulent conveyance is not fraud. Therefore, it is not a specified money laundering act. Rather, it is something referred to as a "piggy back" offense.



Mail, Wire & Bank Fraud



18 USC Section 1341 Prohibits:

- **Use of Mail for Scheme to Defraud**
- **Use of Wires for Scheme to Defraud**
- **Only Two Simple Elements to Prove:**
 - ✓ **A Scheme to Defraud**
 - ✓ **Use of Mail or Wires to Execute Scheme**
- **Each Mailing is Separate Violation**

Federal law (18 USC 1341) governs the use of the mails and prohibits the use of the mails for the purposes of executing or attempting to execute a scheme to defraud. The same prohibition is applied to interstate and international communications by wire, radio or television and is known as “Wire Fraud”. The elements of mail and wire fraud are quite simple and require proof of (i) a scheme to defraud and (ii) use of the mails or wires for the purpose of executing the scheme. Intent is considered an element of the offense and can be shown by circumstantial evidence. See for example *United States. v. Jones*, 797 F.2d 184, 187 (4th Cir. 1986).

The defendant does not have to personally deposit an item in the mail or to personally make use of the wirelines themselves in order to be convicted of this crime, it is sufficient to show that that it was reasonably foreseeable that the scheme envisioned the use of the mail or wires or that the defendant’s actions would result in the use of the mails or wires, See *Pereira v. United States*, 347 U.S. 1, 74 S.Ct. 358 (1954).

Vicarious liability exists for all co-scheming participants if the scheme involved the use of the mail and each mailing is a separate offense. An attorney advising a client on asset protection matters could be named as a participant in mail, wire or bank fraud and found liable under the vicarious liability provisions as a co-schemer without having wired or mailed anything if the attorney’s actions are deemed to have been part of the overall scheme to transfer certain assets to the offshore trusts when the attorney knew that the transfers to the more protective entity were being made to hinder, delay or defraud a creditor.

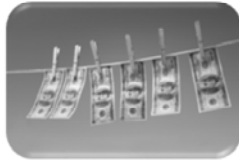
Since every method of funding an offshore entity requires the use of the mail or wires, this is an area that has to be carefully explored before the attorney elects to proceed with creditor protected planning if existing creditors exist or the client will become insolvent after the completion of the transfers.

Bank fraud (18 USC 1344) is essentially the same as mail and wire fraud and requires proof of the same elements (e.g. defendant knowingly executed or attempted to execute a scheme to defraud or to obtain property by reason of false or fraudulent pretenses, representations or promises; defendant acted with intent to defraud; and the financial institution was insured by the FDIC. See *United States v. Brandon*, 17 F.3d 409,424 (1st Cir.1994)), including the scheme to defraud or deceive others in order to obtain something of value such as money. To support a bank fraud conviction the bank does not have to actually suffer any financial losses, the prosecution only needs to prove that the bank was put at risk. *United States v. Young*, 952 F.2d 1252, 1257 (10th Cir. 1991).

Once again the asset protection planning attorney needs to know his client, the facts surrounding the client's desire to pursue asset protection techniques and exercise caution knowing that the failure of the client to pay bank loans or perhaps a deemed insecure clause in a commercial note may cause the bank to perceive that it may be put at potential risk by the scheme between the attorney and client to prepare and fund a creditor protected entity denying a bank access to collateral or funds to repay outstanding indebtedness.

The breadth of the application of these provisions is illustrated by *U.S. v. Bronston*, 658 F.2d 920 (2d Cir. 1981), wherein an attorney was convicted of mail fraud when the attorney violated his duty of loyalty to a former client. In a civil matter, the court determined the attorney's conduct to be fraudulent. Since two letters were mailed by the attorney in the course of violating his duty of loyalty, his conduct was brought within the application of the mail fraud statute.

The last two pages are based on Robert Gillen's Ethical and Criminal Outline and have been reprinted with permission.



Money Laundering

- **Knowingly (willful blindness) involved in any transaction where the source of the funds is from a specified unlawful activity**
- **Criminal U.S.C. §1957**
 - up to \$500,000 or twice the value of funds involved in the transaction
 - up to 20 years
- **Civil Offense § 1956(b) - \$10k per trans.**
 - reckless or negligent

e. Money Laundering

Money laundering is a counter intuitive crime as it does not depend on being involved in the crime. Rather, anyone, regardless of whether they participated in the specified criminal activity, is involved in a transaction that affects the disposition of the proceeds of the “specified unlawful activity.”

There are two possible criminal offenses provided under U.S.C. § 1956(a)(1) and § 1957. U.S.C. § 1956(a)(1) states an unlawful activity includes a transaction that is involved with the proceeds of an unlawful activity:

1. with the intent to promote the specified unlawful activity;
2. with the intent to evade the payment of federal income taxes;
3. knowing the transaction is designed in whole or in part to conceal the nature, source, ownership, or control of the proceeds received from the specified unlawful activity; and
4. with the intent to avoid federal or state transaction reporting.

U.S.C. § 1957 expands the above situations to include engaging in a “monetary transaction” involving criminally derived proceeds in excess of \$10,000, (including the provisions of legal services), when such proceeds are derived for a specified unlawful activity.

Both U.S.C. § 1956(a)(1) and § 1957 each may each impose a criminal fine up to \$250,000 or twice the value of the funds involved in the transaction as well as up to a 20 year penalty. The criminal offenses require knowledge or reckless disregard of the facts. U.S.C. § 1956 is a civil fine of up to \$10,000 per transaction. As a civil penalty, the advisor need only be reckless or negligent in their involvement in the transaction.

Quick Way to Bankrupt Yourself



Initial Consultation For Free

1. Cultural differences
2. Getting the Facts
3. Structure

B. Quick Way to Bankrupt Yourself

With domestic transactions and planning, many attorneys offer the first hour or initial consultation for free. When this policy is extended to international estate planning clients, this may be one of the quickest ways that such attorney can bankrupt his or her firm. This is because there are many cultural difference in how citizens of certain nations do business, how much these clients disclose to their advisors; and designing the structure appropriate for the client.

Different Culture From Europe

a. Chinese

- i. Negotiations
- ii. Only pay if you can help them
- iii. Trust Law



b. India

- i. Requesting Bids

1. Different Culture From Europe

When dealing with the Asian, Arabic, African, and South American Cultures, there are differences in how and what these cultures consider proper business etiquette. Using China as an example, many western clients misinterpret the Chinese when they nod their head “yes” in the beginning of the negotiations. To the Chinese this means that I heard and understood what you were saying, not that any terms had been agreed upon. Therefore, three to five days later, the Western client is surprised when the Chinese party brings up items that the western client that were agreed upon days earlier.

A second difference is that Chinese clients generally want to only engage an attorney if the attorney can solve their problem. In other words, generally the Chinese client wants you to analyze their issue and design the plan without being paid for your services. As a side note, if I had cancer, I would like to employ a doctor and pay a doctor only if he or she could absolutely cure me. However, the doctor has no idea what type of cancer I have, whether it is curable, and whether he or she can help me until I hire the doctor, and they conduct multiple tests. Providing international estate planning services has little difference than the doctor analogy.

First, just getting the elementary facts will take a couple of hours. Second, whether the design may be completed in the first meeting will depend on the complexity of the issues presented. Third, there are due diligence requirements before an advisor may proceed. Finally, there is the drafting of the documents and implementation of the plan. Quoting a fee prior to knowing the complexity, design, and due diligence directly conflicts with the Chinese idea of only paying if you can help them.

Due to its English ties, Hong Kong has had trust law for some time. However, mainland China is a civil law jurisdiction and has very little trust law. With most mainland Chinese clients, their first question is “What is a trust?”

India is also a country where it is common to repetitively ask for quotes. Changing the facts to the international sale of goods, we represented a client where the Indian company would ask for a quote that would take about six to eight hours to prepare. The Indian company would indicate that they wanted to place a very large order. After five quotes which kept changing the specifications, and reducing the quantity desired, the Indian company had not ordered anything. It then offered to enter into a partnership relationship with my client. The terms of the partnership appeared to make little business sense as the intellectual property rights would be transferred to the partnership. Prior to this Indian Company asking for quotes, our client had similar experiences with another Indian Company. I advised the client to charge the Indian Company for the time to prepare any future quotes. At that time, the Indian Company ended requesting any future quotes. A year later, the owner at a trade show, the owner spoke with several other competitors, and the Indian Company had attempted to conduct business in the exact same manner. Never did the Indian Company place any order with any of these companies.

Far Less Than Half of the Facts



- a. Enforcing a Debt example
- b. International Structure
- c. Unreported Income



2. Far Less Than Half of the Facts

Foreign clients in general tend to be much more private regarding their financial affairs. For example, with Swiss private banks, the receptionist will purposefully not mention customers in the waiting area by name. As most of their customers are very important figures, they do not want the other customers to know the names of who is in the waiting room.

Another example is when a Chinese attorney called me to see if we could help him collect a debt of a Chinese person in the U.S. As we are exclusively a transaction firm, we do not provide any debt collection services. Anyway, I decided to look for the person on the internet to see if there was some possibility of referring the person. When I found the person on the internet, this person was one of 25 most wanted of China's fugitives. At this point, I declined to provide any referrals to another attorney or private detective.

A third example was when I worked for an accounting firm as their international director. The firm had an audit and tax client with international operations in over 15 nations. The firm had been preparing the U.S. tax returns, providing U.S. tax advice, and preparing the audit for over seven years. Unfortunately, the Chinese client was very private regarding his affairs and had never disclosed how the international structure was connected to the U.S. firm. It took me over six months before the Chinese client developed enough trust to disclose the structure to me. At such time, we determined that it was an open face Dutch sandwich structure. Unfortunately, the structure was 20 years out of date, and now working opposite the desires of the client. In other words, no sophisticated U.S. advisor had looked at the structure in over 20 years.

As a final example, when working on a merger or acquisition with a U.S. company buying or investing in a Chinese business is almost always there will be unreported Chinese income. When meeting with one Chinese wine company seeking investment capital, one of my first questions was “how much was the unreported income?” I did not ask if there was unreported, I asked “how much was unreported?” As I explained to the Chinese company’s owner and chief financial officer, the unreported income was reducing the profits, which meant that it was harder to attract either debt or equity investment. Therefore, should someone wish to invest or loan money to the Chinese company, they would need to get this issue resolved. Further, this issue creates a negative impression to most Western investors.

Cannot Quote Without Determining the Structure



- a. Legal between \$20,000 to \$100,000
- b. Average \$30,000
- c. Trustee fees



3. Cannot Quote Without Determining the Structure

Many foreign clients will call up and say, I would like a “trust,” what does it cost. The client does not realize that forming a trust is very similar to buying a car with one key exception. For example, a new car may cost as low as \$15,000 or for many luxury cars it could be close to \$100,000 depending on the make, model, and options desired. This is where the trust analogy to a car falls apart. With a car, both the low cost and high cost car will get you from point A to B. With a trust not properly designed and implemented, it simply fails. In this respect, if a client wants a low cost trust to work like a high cost trust, it simply will not work, and the attorney will need to advise the client to seek services elsewhere. For this reason, we typically give a large range as the initial cost to draft a trust for an international client.

In addition to the drafting fees are the trust fees. Trustees typically charge either on a fee basis or based on the assets invested.

Qualifying Clients



1. Internet Clients
2. Cost/Benefit
3. Current Creditors
4. No Free Consulting



4. Qualifying Your Prospect

Sometimes a referral comes from a client looking at your internet site. In this case, I would suggest that this prospect has little, if any chance, of becoming a client. Generally, this group has no contacts in the legal area and are unfamiliar with sophisticated business clients.

Referrals from an advisor tend to fall into the excellent, good or the mediocre category. If the colleague has previously had a good business relationship with the client, knows how to present your services, and has advised the client in advance that you charge for your time, this is almost always an excellent referral. Conversely, if the advisor has had no relationship with the prospect and out of the blue asked the prospect if he knew of anyone, this tends to be a poor referral. In this case, the potential client has not even been advised that you charge for your time.

This gets to the point that I would strongly suggest that you do not give any free consultation to international estate planning clients. In this regard, I would suggest that you screen the prospects with a quick e-mail or a quick phone call. Myself, I find having my receptionist ask for an e-mail address to be the most efficient. This is because I find that if a prospective client refuses to leave an e-mail address, they almost always are looking for free advice.

Anatomy of an Engagement Letter

1. Initial Consultation

a. \$ 1,000

i. Retainer

ii. Initial Engagement



b. Typically 1 ½ to 2 hrs

i. Requesting Bids

b. Cannot quote an exact price

With my first e-mail, I will send something similar to the following:

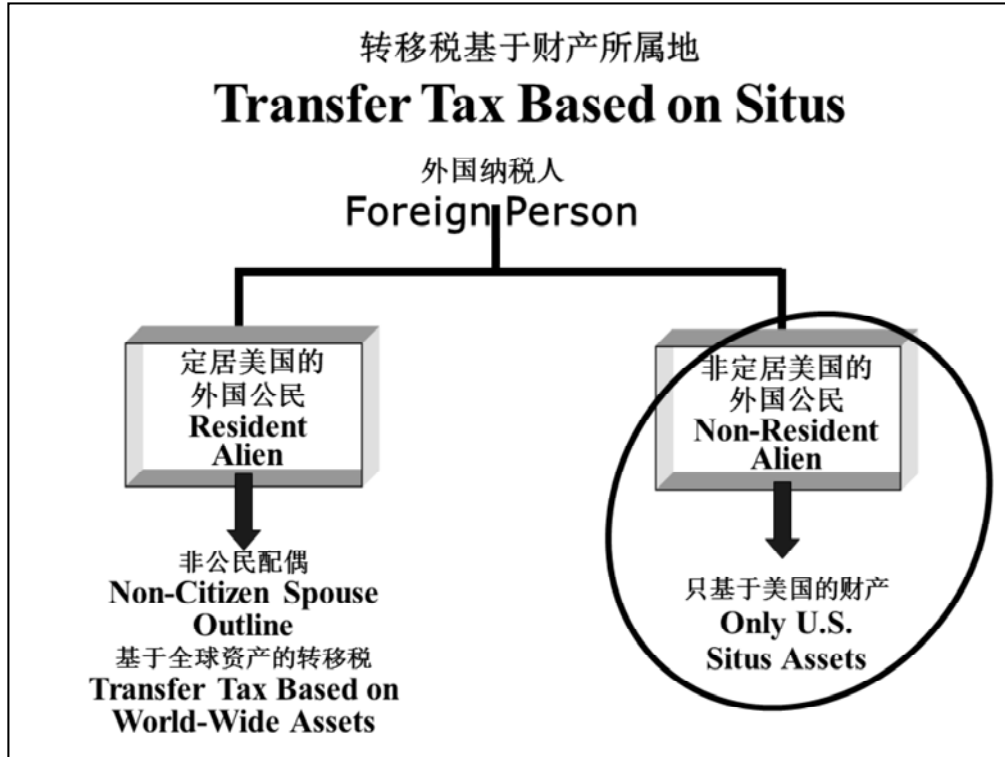
“We are happy to help you with your international estate planning needs. In order to better assist you, could you please tell me more about your situation so that we can make sure that we are a match for the services that you are looking for. Please note that these structures typically run on the low side \$20,000 to some very sophisticated ones as high as \$100,000, with the average around \$30,000. Therefore, we have generally found that a client generally will need a net worth of at least \$5 million for such a structure to be cost/beneficial.”

After learning a bit more about the services requested, the second e-mail would be something similar to the following:

“Yes, this is an area we have a significant area of expertise. We would be happy to assist you in designing and implementing your international estate planning strategy. We would be more than happy to set up a phone call with you to discuss the preliminary design. My billing rate is \$555 an hour, and the initial phone call lasts approximately an hour and ½. Therefore, we charge a retainer to begin of \$750. Should you decide to proceed with a structure that we propose, we then offset the \$750 against the cost of the entire project. Please let me know if you would like to set up a phone call to discuss the initial design of the structure, and I will forward you the retainer agreement and credit card authorization.”

If you are looking to cocounsel with a firm with international estate planning expertise, you may wish to reply with an email similar to the following:

“Yes, this is an area we have a significant area of expertise. We would be happy to assist you in designing and implementing your international estate planning strategy. We would be more than happy to set up a phone call with you to discuss the preliminary design. My billing rate is \$555 an hour, and the initial phone call lasts approximately an hour and ½. Therefore, we charge a retainer to begin of \$750. Should you decide to proceed with a structure that we propose, we then offset the \$750 against the cost of the entire project. Please let me know if you would like to set up a phone call to discuss the initial design of the structure, and I will forward you the retainer agreement and credit card authorization.”



C. 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.

C. 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

1. 全球资产
World Wide Assets
2. 545万美元免税额
\$5.45 Million Exemption Amount
3. 545万美元隔代转移税免税额
\$5.45 Million GSTT
4. 可抵扣所有费用
100% of Debts

非定居美国的外国公民
Non-Resident Alien

1. 美国资产
U.S. Situs Assets
2. 6万美元免税额
\$60,000 Exemption Amount
3. 545万美元隔代转移税免税额
\$5.45 Million GSTT
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

D. 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 \$5.25 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 \$5.25 million generation skippint 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.

D. 美国公民和非定居美国的外国公民的比较

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 525 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 50 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 525 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。

相同和不同之处

What's The Same or Different?

美国公民
U.S. Citizen

5. 无限制抵扣赠予配偶的财产

Unlimited Marital Deduction

6. 每年1.4万美元免税赠予额

\$14,000 Annual Gift

IRC § 2503(b)

非定居美国的外国公民

Non-Resident Alien

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

6. 每年免税赠予额

Annual gift exclusion, IRC § 2503(b)

■ 14.8万美元额度赠予非公民配偶

Gift to Non citizen spouse increased to \$148,000 indexed

■ 不是信托 **Not to a trust**

■ 1.4万美元额度赠予其他人

\$14,000 Gift to others

5. Unlimited Marital Deduction

A U.S. Citizen receives an unlimited marital deduction for gifts to a spouse. There is no unlimited marital deduction for non-citizen spouses. However, a non-citizen spouse may receive property in a Qualified Domestic QDOT and delay taxation until the second death. The taxation of a QDOT is discussed.

6. Annual Gift Amount

A U.S. citizen may gift \$14,000 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 \$14,000 of U.S. situs property per year to whomever they choose to do so. However, this annual amount is increased to \$143,000 (indexed 2013) for gifts to a non-citizen spouse. IRC § 2523(i).

While the annual amount is increased to \$143,000, only \$14,000 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 \$14,000 annual 2503(b) exclusion (i.e. \$143,000 - \$14,000 [indexed]= \$129,000) 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.

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. 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 1.4 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 1.4 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 14.3 万美元（2013 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 14.3 万美元，但其中只有 1.4 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。

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

7. 分开赠予

Gift Splitting

8. 不能联合报税

No Joint Return

9. 委托人信托制度

Grantor Trust Rules

7. 不能分开赠予

No Gift Splitting

8. 不能联合报税

No Joint Return

9. 委托人信托制度不适用

**Grantor Trust Rules
Do Not Apply**

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. Joint Returns

Only if both spouses are citizens or resident aliens are they able to file joint returns. If one is a citizen or resident alien, there is a special election IRC § 6013(g) where the non-resident alien may elect to be taxed on world-wide income and also file a joint return.

9. 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 generally not possible.

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. 联合报税

只有当夫妻两个人都是公民或者定居美国的外国公民时才能够联合报税。如果有一方是非定居美国的外国公民，那么根据税法法典条例§6013(g)，他（她）可以选择按照全球收入来报税，这样他们就可以联合报税了。

9. 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。

财产所属地

Situs of Property

■ 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 Printemps 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

E. 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 classification system is similar to the source of income tests used for income tax purposes. For gift tax purposes, there are two major classification categories: tangible and intangible property. For gift tax purposes, tangible property has a U.S. situs, but intangible property does not. Likewise, for estate tax purposes, tangible property and several types of intangible property have a U.S. situs.

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.

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。

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

<p>现金 Cash</p>		<p>非美国财产 Not U.S.</p>
<p>年金 Annuities - 发行公司所属地 Situs of the issuing company</p>		
<p>知识产权 Intellectual Property - 主要的档案建立所在地 Where the primary filing was completed</p>		

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. Cash

Cash held in bank accounts of US banks is intangible, and it will be deemed to be US situs, only if it is connected with a US trade or business. Rev. Rul. 82-193; Rev. Rul. 54-623 and IRC § 2105(b)(1) bank deposit interest exception.

b. Annuities

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

c. Copyrights, Patents, and Trademarks

The Treasury Regulations hold that a copyright is foreign source if it is not enforceable against a U.S. person. This old definition in the Treasury Regulations is of little help because of all the international treaties on copyrights, patents, and trademarks. Some help is provided if the U.S. has an estate tax treaty with another country. Absent such treaty, some authors use the primary place of filing as a general rule to determine situs.

1. 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. 现金

美国银行账户的现金属于无形资产，并且只有当现金和美国的贸易经营活动有关时才属于美国所属地资产。参见美国税收裁定 82-193, 54-623 和美国税法典条例§ 2105(b)(1)银行存款利息例外条例。

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。

c. 版权、专利和商标

财政法规规定对美国公民不具有约束力的版权属于外国来源版权，但由于目前国际税收协定在版权、专利和商标方面的条例，这个老的规定已经基本起不了作用了。如果美国和另一个国家有遗产税方面的税收协定，那么可能会有一些条例可以帮助判断。在没有这些税收协定的前提下，一些作者会主要根据版权的申请地点来决定版权的所属地。

财产所在地

Situs of Property

d. 共同基金 Mutual Funds

- 美国共同基金-所在地为美国（美国私信裁定 9748004）

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

- 外国共同基金-所在地为外国

Foreign Mutual Fund (PFIC) – should be foreign situs

- 基金为外国合伙企业时根据相关资产判断（美国私信裁定 9748004）

Foreign Partnership the underlying assets (PLR 9748004)

- 结果不同于税收裁定55-701

Inconsistent with Rev. Rul. 55-701



d. Mutual Funds

U.S. mutual funds are generally organized as a regulated investment company. A regulated investment company must be a domestic corporation. IRC § 2105(d) applies a look through rule. To the extent of bank deposits, debt obligations, or foreign stock, the mutual fund is treated as sited outside the U.S. On the other hand, an offshore mutual fund is also many times classified as a corporation (i.e. a PFIC). In this case, situs should be outside the U.S. On the other hand, if the offshore mutual fund is classified as a partnership, the Service may look to the underlying assets of the partnership. PLR 9748004. Looking to the underlying assets of the partnership seems inconsistent with Rev. Rul. 55-163 discussed on the following page.

d. 共同基金

美国的共同基金通常是一些受管制的投资公司。一个受管制的投资公司必须是美国的公司。美国税法法典§ 2105(d)提供了一个“透视法”税收制度(即根据基金下的每一项财产来判断)。共同基金下的银行存款、贷款、外国股票都属于外国来源财产。而离岸共同基金很多情况下都被归为是公司性质（“被动的外国投资公司”），这样一来，它的所在地应该是国外。但如果共同基金被归为合伙企业性质，那么税务局会根据合伙企业的财产来决定。参见美国私信裁定 9748004。这个裁定方法和美国税收裁定 55-163 的规定（见下一页分析）并不太一致。

财产所属地
Situs of Property

合伙企业 **Partnership**

合伙企业营业地点

**Where the partnership does
business (Rev. Rul. 55-701)**



股票 **Stock**

公司成立地点

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



e. Partnership or LLC Interests

Partnership and LLC interests are US situs if the entity is conducting a trade or business in the United States. In other words, the Service does not look through to the underlying assets of the partnership. Rather, the decision is at the entity level – where the partnership does business. Rev. Rul. 55-701. Unfortunately, for situs a partnership does not use a place of formation rule like a corporation below. This creates some unclear planning issues that are discussed later in this outline.

f. 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).

e. 合伙企业和有限责任公司的权益

如果合伙企业和有限责任公司是在美国经营业务，那么它们的权益属于美国财产。也就是说，税务局不会根据实体的相关财产所属地来决定。并且，这个经营所在地是看企业层面的。参见美国税收裁定 55-701.由于合伙企业的这个所属地判定和公司所属地的判定不同，不是根据它的成立地点来决定的，它引起了一些不明确的规划问题，这些问题将会在之后做讨论。

f. 股票

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

财产所属地
Situs of Property

债务工具 **Debt Instruments**

投资组合利息免税
Portfolio Exclusion
(IRC § 2105(b)(3))



保险单 **Insurance Policies**

不属于美国财产
Situs outside U.S.
(IRC § 2105(a))



g. 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).

h. Insurance Policies

Insurance policies on the decedent non-resident alien's life are not US situs property. IRC § 2105(a); Treas. Reg. § 20.2015-1(g). This is true regardless of whether the insurance policy is a whole life policy, a universal life policy, or a variable life policy.

g. 债务工具

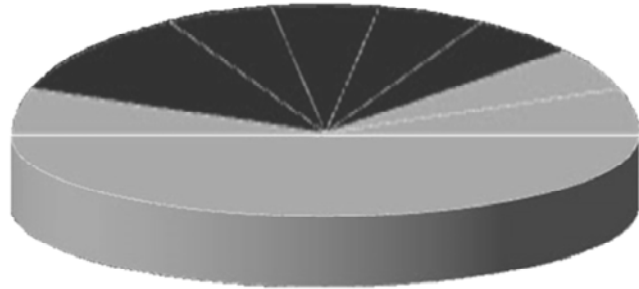
由美国个人或法律实体发行的债务属于美国财产。和非定居美国的外国公民的所得税制度很相似的是，被列为组合投资利息的债务工具免于遗产税。参见美国税法典§ 2105(b)(3)。

h. 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。参见美国税法典§ 2105(a)和财政法规 § 20.2015-1(g)。

中国公民(非定居美国)的全球资产
Chinese Citizen's (non-resident) Assets

美国资产 U.S. Assets



中国资产和其他非美国资产
**Chinese Assets & Other Non-U.S. **

F. U.S. Situs Assets For Estate Purposes

The above pie chart divides U.S. assets and foreign assets (non-U.S. assets).

F. 遗产税上的美国所属地财产

以上的饼图将财产分为了美国财产和外国财产（非美国）。

中国资产和其他非美国资产
Chinese & Non-U.S. Assets



无需缴纳遗产税
No estate tax



1. Chinese and Non-U.S. Assets

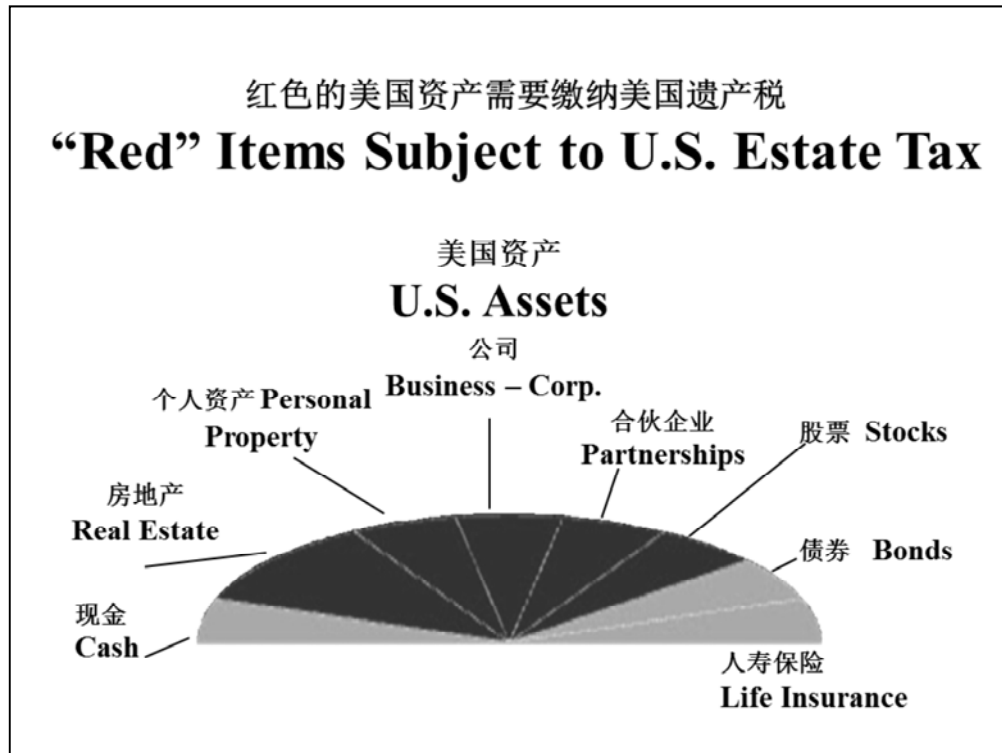
A Chinese person (i.e. non-resident alien) only pays estate tax on his or her U.S. situs assets. Therefore, there is no estate tax on the Chinese person's Chinese and Non-U.S. assets.

1. 中国财产和非美国财产

中国纳税人（非定居美国的外国公民）只需对美国所属地的财产支付遗产税，也就是说，对于中国财产和其他非美国的财产都不需要支付美国的遗产税。

红色的美国资产需要缴纳美国遗产税

“Red” Items Subject to U.S. Estate Tax



2. U.S. Situs For U.S. Estate Tax

Just because an asset is located in the U.S. does not mean that it is a “U.S. situs” asset subject to U.S. estate tax. As noted in the discussion of situs of assets, unless cash is involved in a trade or business, it is not a U.S. situs asset. 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 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. business interests, U.S. partnerships, and U.S. stocks.

2. 美国遗产税上的美国财产

财产位于美国并不意味着它就是美国遗产税意义上的“美国财产”了。如我们在财产的所属地里面讨论过的，只要现金和贸易经营无关，它就不属于美国财产。债券由于组合投资利息免于遗产税的原因一般也不属于美国财产。另外，受保对象为非定居美国的外国公民的人寿保险也不属于美国财产。

用红色标记出的财产是美国财产，需要缴纳美国遗产税。美国所属地的财产包括了美国的房地产，位于美国的个人财产，美国公司权益，美国合伙企业权益和美国股票。

Tax Issues With a South Dakota Trust



26th GSTT Tax

25th Gift Tax

20th Estate Tax

1 – 14th Income Tax
Grantor trust



G. Tax Issues With a South Dakota Trust

The author finds the U.S. Income Tax Code a little more simple to understand if it is viewed as similar to the elevator banks in a large sky scrapper. The 26th floor (or 2600's) is the generation skipping transfer tax, the 25th floor is the gift tax, the 20th floor or (2000s) is the estate tax, and floors one through fourteen are the income tax. Of particular importance in the income tax rules will be the grantor trust rules.

U.S. Child Beneficiaries



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For an example, assume Mom and Dad are nonresident aliens. They have two children, both who are either residents or citizens of the U.S. They wish to form a South Dakota trust to pass on their wealth to their children.

World-Wide Taxation

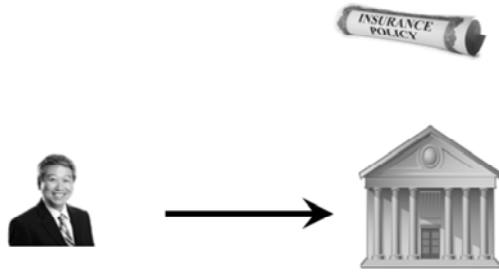


- Domestic trust for U.S. tax purposes
- Subject to world-wide tax
- Foreign trust for tax purposes

1. World-Wide Taxation

A U.S. trust is a U.S. person. As a U.S. person, it is subject to tax on its world-wide income. The author would suggest that probably the last thing that a foreign person would wish is to create a U.S. trust that would have a substantial portion of their assets taxed in the U.S. Therefore, most of these trusts will be designed as foreign trusts for tax purposes with a U.S. trustee.

Exception: Life Insurance Trust



- Generally designed as a revocable trust
- Becomes irrevocable on Settlor's death
- What then?

a. Exception – Life Insurance Trust

Many times a foreign person will wish to purchase U.S. life insurance due to the greater security and benefits offered by many U.S. companies when compared to the foreign alternatives. However, in almost all cases, the insurance company will require a U.S. person to be the owner of the life insurance. For this reason, a U.S. trust is used to purchase the life insurance on the owner of the foreign person.

A major exception to the U.S. world-wide taxation rule is a life insurance trust holding U.S. life insurance. The exception is that the receipt of life insurance is not taxable under IRC §101(a). Therefore, many foreign persons will create a revocable trust (not an irrevocable trust) to hold U.S. life insurance.

Upon death, there should not a U.S. estate issue, because at the time of death, the situs of the U.S. life insurance was foreign. However, upon the death of the Settlor, the revocable life insurance trust becomes irrevocable. It now owns the proceeds from the life insurance and additional planning needs to be done as to whether the trust will remain domestic and how would the trust funds be distributed.

Irrevocable Trust & Throw Back Rules

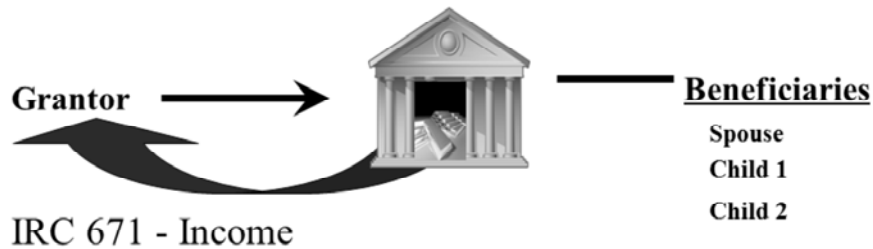


- Irrevocable foreign trust with U.S. beneficiaries is subject to the throw back rules
- Tax computed on prior years plus interest

2. Throwback Rules

As to any distribution to a U.S. beneficiary, a foreign irrevocable trust is subject to the throwback rules. In essence, this requires the income on a distribution to be assumed to have been made proportionally over the years of the trust, and then taxed to the beneficiary with interest compounded over the period. In addition to the complexity of the computations, this is one of the most punitive U.S. income taxes, with the effective tax rate rising each year due to the compounding interest, which is most likely non-deductible.

Grantor Trust Rules



- Since 1996, don't apply to a foreign person
- Except:
 - Irrevocable trust
 - All income must be paid to settlor or spouse of the settlor

3. Irrevocable Grantor Trust

A planner might conclude that a simple way to avoid the throwback rules is to create an irrevocable grantor trust. One might include a power to substitute property of equivalent value (IRC § 674) or have a spouse as a beneficiary with an independent trustee (IRC § 676 & § 677). However, in 1996, the grantor trust rules were changed as to a foreign person. IRC § 672(f). For a foreign person, a grantor trust may only be created if (1) it is revocable; or (2) if irrevocable – all income during the lifetime of the grantor may be distributed only to the grantor or the grantors spouse.

Death of the Settlor



- No longer a grantor trust
- Foreign trust now subject to the throwback rules
- U.S. and foreign beneficiaries

4. Death of the Grantor

Using the grantor trust rules is an effective strategy to avoid the throwback rules until the death of the Settlor. However, upon the death of the settlor, the foreign trust is now subject to the throwback rules. At this time, further planning needs to be done. The trust may have both foreign as well as U.S. beneficiaries. As to the U.S. beneficiary, the trust will most likely need to be domesticated. Conversely, as to the foreign beneficiaries, these beneficiaries will not want all of the trust assets subject to U.S. worldwide taxation. The result is the trust will need the flexibility to split into more than one trust with different tax results depending on the situs of the trust as well as the type of beneficiaries.

Opening a Bank Account



责任有限公司
LLC

1. FACTA

2. CRS

U.S. Entity

a. World Taxation

b. Foreign tax credit

5. Opening a U.S. Bank Account

Another issue is opening a U.S. bank account with the U.S. FACTA rules. Banks also have Know Your Customer rules that are integrated into the FACTA rules. In this respect, opening a U.S. bank account also becomes a major hurdle for the creation of a South Dakota trust.

As a general rule, most banks will require a U.S. company, such as a U.S. LLC to open the operating account. Please remember, the U.S. LLC is subject to world-wide taxation. Further, there are issue in how does the settlor's country treat the U.S. LLC for foreign tax credit purposes.

Other Structures

- 1. No U.S. Beneficiary**
- 2. Settlor Immigrates**
- 3. Spouse of Settlor Immigrates**
- 4. Invert an Offshore Company**

H. Other Structures

Knowing the client's goals become critical in trust design. A U.S. trust structure may start with no U.S. beneficiary, but later the Settlor or the Spouse of the Settlor immigrates. Further, prior to such immigration, the U.S. trust structure may have been structured to invert an offshore company.

No U.S. Beneficiary



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- Income Tax
- Withholding Tax Issues



1. No U.S. Beneficiary

If there is no U.S. beneficiary and the client never plans on any family member immigrating to the U.S., the structure becomes simpler. One does not need to worry about either the throwback rules, grantor trust rules, or possibly domesticating a foreign trust for tax purposes on the settlor's death. Conversely, there are income tax issues as well as withholding tax issues to address on U.S. assets.

Settlor Immigrates



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2. Settlor Immigrates to U.S.

From a tax perspective, having the settlor immigrate to the U.S. is usually not a good idea. This results in world-wide taxation. However, if the settlor still wishes to proceed with immigrating, then the entire structure will need to be reviewed and restructured. Generally, it will need to be converted to a flow through international structure so that foreign tax credits are not lost. Further, the client will need to understand that he or she will be taxed on his or her world-wide income, regardless of the trust structure.

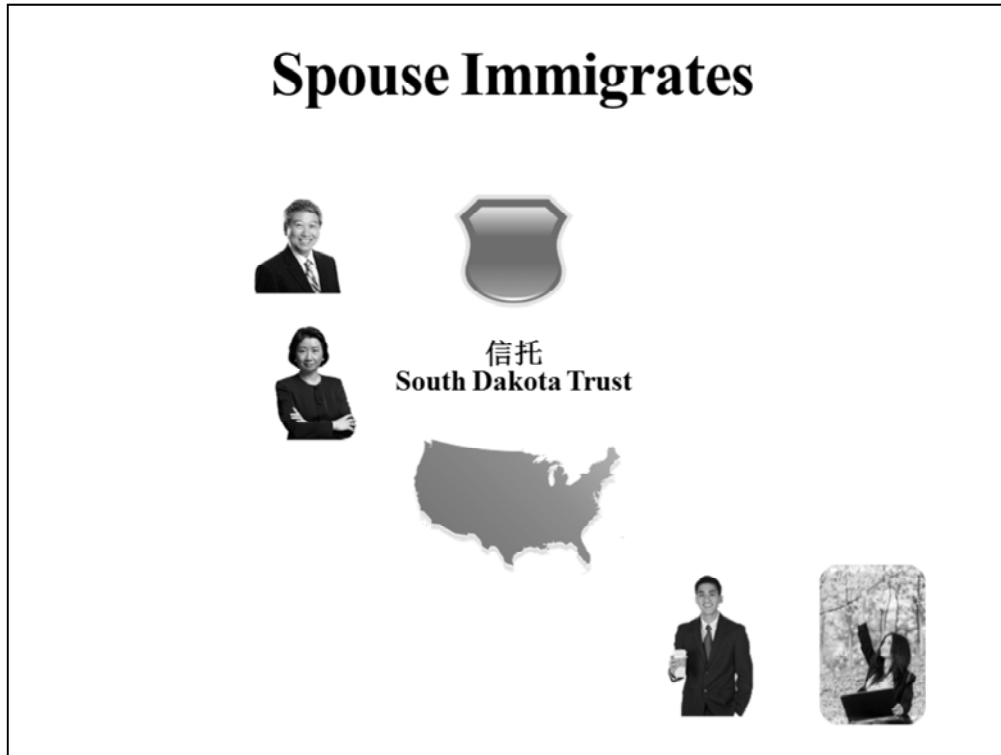
Penalties on Foreign Trust Reporting



- a. Form 3520
- b. Form 3520 A
- c. Form 8938
- d. Fincin 114

Upon immigrating to the U.S., foreign tax reporting becomes critical. For a U.S. person or resident failing to timely file Form 3520, the penalty is 35% of the fair market value of the assets of a foreign trust. Five percent per year for failing to file form 3520A. Further, there will be the traditional forms 8938, Specified Foreign Asset Filings, as well as the Fincin 114 for foreign bank accounts and securities.

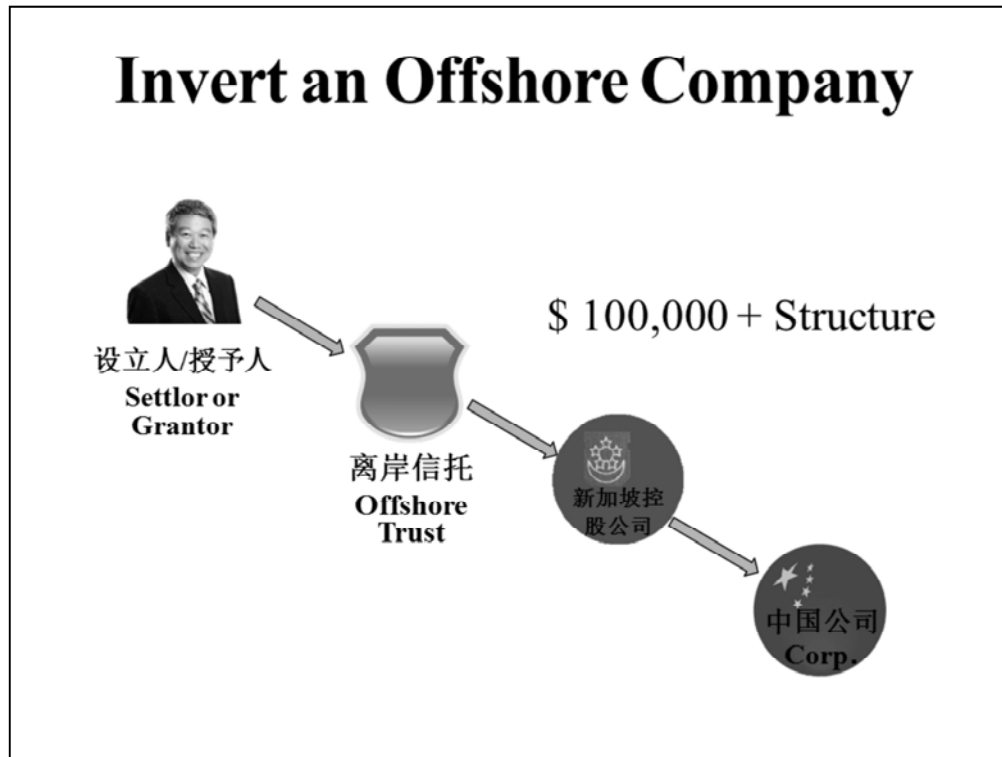
Spouse Immigrates



3. Spouse immigrates to the U.S.

Upon realizing the problems of having the settlor immigrate to the U.S., sometimes the settlor's spouse will choose to immigrate, instead of the settlor. In this case, all of the issues of a U.S. beneficiary are involved as well as the filing status of the settlor's spouse – separate U.S. income tax return.

Invert an Offshore Company



4. Inverted an Offshore Company

Finally, the offshore trust structure may be structured to invert a foreign company. Where the U.S. has anti inversion rules for U.S. companies, few foreign nations have similar legislation. Therefore, it is not uncommon to come across this type of structure. These structures are more complex regarding the international tax planning of the other nation's laws. However, tracking the source of the income becomes critical should the settlor wish to immigrate to another nation.