Selected Issues in Preparing the Form 706-NA Return¹

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I. Introduction

A “nonresident not a citizen of the United States,”³ investing in United States situated assets, often is unaware of or overlooks U.S. federal transfer taxation consequences and associated U.S. compliance requirements of transferring these investments during lifetime or owning these investments at death. Compliance requirements may include the filing of the Form 706-NA, United States Estate (and Generation-Skipping Transfer) Tax Return, after the death of the nonresident noncitizen. Before addressing the preparation of the Form 706-NA return, section II of this outline provides an overview of federal transfer taxation as impacting the nonresident noncitizen under the Internal Revenue Code⁴ (“Code” or “IRC”).⁵ Section III reviews specific treaty-based positions that may override or modify Code provisions via treaties between the United States and the United Kingdom, Japan and Canada, respectively. These treaties specifically are utilized to highlight the different types of bilateral transfer tax treaties. Sections IV and V, respectively, review the filing requirements for the Form 706-NA return and payment of federal estate tax. Sections VI and VII identifies primarily those issues unique and relevant to the preparation of the Form 706-NA return. This outline is not a comprehensive review of the issues, but highlights certain concepts for the accompanying presentation.

II. Overview of federal transfer taxation as impacting the nonresident noncitizen under the Code

A. Residence is domicile. For purposes of imposition of federal transfer taxation, a resident is a domiciliary at date of transfer. See Reg. § 20.0-1(b)(2) (for federal estate tax purposes, “[a] nonresident decedent is a decedent who, at the time of his death, had his domicile outside the United States”⁶); Reg. § 25.2501-1(b) (for federal gift tax purposes, a donor’s residence is his domicile “at the time of the gift”); Reg. § 26.2663-2(a) (same federal estate and gift tax definition for generation-skipping transfer (GST) tax purposes).

¹ This outline and accompanying presentation is for educational purposes only.
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³ The term “nonresident not a citizen of the United States” is used in the Internal Revenue Code. For this outline, the term “nonresident noncitizen” will be used as a shorthand for the Internal Revenue Code term.
⁴Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986, as amended, or regulations issued thereunder.
⁵ Code section 2801 provides for a tax on certain gifts and bequests from “covered expatriates.” This tax, more akin to an inheritance tax than a transfer tax, is beyond the scope of this outline.
⁶ “United States,” as used in the estate and gift tax regulations pertaining to residence, includes the states and the District of Columbia. See Reg. § § 20.0-1(b)(1); 25.2501-1(b). “The term also includes the Territories of Alaska and Hawaii prior to their admission as States.” See Reg. § 20.0-1(b)(1). See also Reg. § 25.2501-1(b) (same).
1. **Acquiring domicile.** According to Regulation section 20.0-1(b)(1), a person acquires a domicile in a place by living there, for even a brief period of time, with no definite present intention of moving therefrom. Residence without the requisite intention to remain indefinitely will not constitute domicile, nor will intention to change domicile effect such a change unless accompanied by actual removal.\(^7\)

2. **Differs from federal income tax definition.** Unlike the determination of residence for federal income tax purposes, determination of residence for federal transfer tax purposes is based upon facts and circumstances to support subjective intent and physical location. *See, e.g.*, Farmers Loan & Trust Co. *v.* U.S., 60 F.2d 618 (S.D. N.Y. 1932). *Compare IRC § 7701(b) (definition of “resident alien” for federal income tax purposes).*

### B. Citizenship

1. **Determination of U.S. Citizenship.** With the exception of a resident of a U.S. possession (as discussed below), citizenship, for U.S. federal transfer tax purposes, is determined in accordance with the U.S. Constitution and the Immigration and Nationality Act. *See U.S. Constitution, 14\(^{th}\) Amendment, sec. 1.*\(^8\) *See also 8 USC § 1101 et seq.*


3. **Resident of a U.S. possession: nonresident noncitizen.** A resident of a U.S. possession and U.S. citizen at time of making a gift or at date of death, after September 14, 1960, is a nonresident noncitizen for purposes of federal transfer taxation if “he acquired his U.S. citizenship solely by reason of (1) his being a citizen of [the] possession of the United States, or (2) his birth or residence within [the] possession of the United States.” *See IRC §§ 2501(c); 2209. See also Reg. § § 25.2501-1(d); 20.2209-1.* U.S. possessions include the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa and the Commonwealth of the Northern Mariana Islands.\(^9\)

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\(^7\) *See also Reg. 25.2501-1(b) (same; gift tax).*

\(^8\) *Section 1 of the Fourteen Amendment of the U.S. Constitution states, in part, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”*

\(^9\) *Apparently, the Internal Revenue Code (Code) provides no definition of “possessions” specifically for federal transfer tax purposes. For purposes of the entire Code, section 7701(d) states that, unless “distinctly expressed or manifestly incompatible with the intent thereof, references to possessions of the United States shall be treated as also referring to the Commonwealth of Puerto Rico.” For purposes of federal income taxation, IRS Publication 570 (2018) specifically refers to American Samoa, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands as United States possessions. See Pub. 570*
4. **Resident of a U.S. possession: U.S. citizen.** A resident of a U.S. possession and U.S. citizen at time of making a gift or at date of death, after September 2, 1958, is a U.S. for purposes of federal transfer taxation “unless he acquired his U.S. citizenship solely by reason of (1) his being a citizen of [the] possession of the United States, or (2) his birth or residence within [the] possession of the United States.” See IRC §§ 2501(b); 2208. See also Reg. §§ 25.2501-1(c); 20.2208-1.

5. **Expatriation.** Depending on the date of expatriation (i.e., date of either relinquishment of U.S. citizenship or termination of long-term U.S. residence), an U.S. citizen or a long-term U.S. resident may be subject to a federal estate tax regime different than that of a nonresident noncitizen who never was a U.S. citizen or long-term green card holder. See, e.g., IRC § 2107; 2801. See also USC § 1481(a).

C. **Federal estate taxation.** Generally, federal estate taxation is imposed on the value of the taxable estate of a decedent. See IRC § 2101(a).

1. **Taxable estate.** The value of the taxable estate of a deceased nonresident noncitizen is limited to the value of property deemed situated in the United States (i.e., gross estate in the United States), less allowable deductions, many of which are subject to a pro-rata calculation under Code section 2106(a).

2. **Gross estate in the United States.** The gross estate of nonresident noncitizen includes “all property, real or personal, tangible or intangible,” as provided in sections 2033 through 2044, as long as the property is deemed situated in the United States. Examples of property deemed situated in the United States are:
   a. real property located in the United States,
   b. tangible personal property located in the United States, except for works of art on loan for exhibition (meeting Code requirements),
   c. shares of corporate stock issued by a United States corporation.

(Introduction) at 2. See also Reg. §§ 20.2208-1, Ex. 1 (Puerto Rico as possession); 20.2209-1, Ex. 1 (Puerto Rico as possession), Ex. 2-5 (Virgin Islands as possession).  

10 See note 9 and accompanying text.

11 “It is immaterial whether the amounts to be deducted [under Code sections 2053 or 2054] were incurred or expended within or without the United States.” Reg. § 20.2106-2(a)(2).

12 IRC § 2103 (cross-referencing IRC § 2031).

13 IRC § 2103; Reg. § 20.2104-1(a)(1).

14 Reg. § 20.2104-1(a)(2). See also IRC § 2105(c).

15 IRC § 2104(a). Generally, for estates of nonresidents noncitizens dying after 2004 and before 2012, the decedent’s “stock in a regulated investment company (as defined in section 851)” was not deemed situated in the United States in the proportion that the assets of the investment company, at the end of the quarter of the investment company’s taxable year immediately preceding the decedent’s date of death (or at such other time as the Secretary of the U.S. Treasury may designate in regulations), if owned directly by the decedent would not be deemed situated in the United States, bore to the total assets of the investment company. See IRC § 2105(d)(1). See also IRC § 2106(d)(3)(Code section 2106(d) does not apply to estates of decedents dying after December 31, 2011) A “regulated investment company” is a domestic corporation that may be registered as a management company or a
d. United States bank deposits effectively connected with a trade or business within the United States,\textsuperscript{16}

e. "money deposits held in brokerage accounts (e.g., brokerage firm money market account),\textsuperscript{17}

f. life insurance on the life of someone other than the deceased nonresident noncitizen,\textsuperscript{18} and

g. “any property of which the decedent has made a transfer by trust or otherwise, within the meaning of [Code] sections 2035 to 2038,\textsuperscript{19} inclusive,” if so situated either at the time of the transfer or at the time of the decedent’s death.”\textsuperscript{20}

3. Gross estate outside the United States. Examples of property not deemed situated in the United States under the Code are:

a. real property located outside the United States,\textsuperscript{21}

b. tangible personal property located outside the United States,\textsuperscript{22}

c. works of art on loan for exhibitions in the United States (meeting Code requirements),\textsuperscript{23}

\textsuperscript{16}IRC § 2105(b)(1) (cross-referencing IRC § 871(i)(3), (i)(1)). See also, e.g., Pinchot v. C.I.R., 113 F.2d 718 (2d Cir. 1940), aff’d Estate of Johnstone v. C.I.R., 1939 P-H BTA Memo Dec 39,380 (1939) (facts support rental management activity was considerable, regular and continuous; consequently U.S. bank deposits are effectively connected with trade or business and treated as situated in US).

\textsuperscript{17}Because a brokerage firm is not in the banking business, the brokerage account money deposit is situated in the United States for federal estate tax purposes. See IRC § 2105(b)(1); 871(i)(3)(a). See also Estate of Ogarrio v. C.I.R., 40 T.C. 242 (1963), aff’d 337 F.2d 108 (D.C. Cir. 1964) (per curiam).

\textsuperscript{18}Compare note 28 and accompanying text.


\textsuperscript{20}IRC § 2104(b). Gift tax paid with respect to gifts made within three years of death is not a transfer within the meaning of Code sections 2035 to 2038 for purposes of Code section 2104(b). See CCA 20102009. But see IRC § 6110(k)(3), (b)(1)(A) (unless otherwise established as regulation, chief counsel advice may not be used or cited as precedent).

\textsuperscript{21}Reg. § 20.2015-1(a)(1).

\textsuperscript{22}Reg. § 20.2015-1(a)(2).

\textsuperscript{23}IRC § 2105(c). See also Reg. § 20.2105-1(b).
d. shares of corporate stock issued by a foreign corporation,\(^{24}\)
e. U.S. bank deposits not effectively connected with a trade or business within the United States,\(^{25}\)
f. debt obligations of which the interest earned by a nonresident noncitizen is eligible for the portfolio interest exemption under Code section 871(h),\(^{26}\)
g. American Depositary Receipts (ADRs),\(^{27}\)
h. life insurance proceeds on the life of the deceased nonresident alien,\(^{28}\) and
i. annuity proceeds (under specific conditions).\(^{29}\)

PRACTICE NOTE: If the decedent acquired U.S. assets via a foreign corporation, the executor must ascertain whether the decedent respected the foreign corporation and its ownership of U.S. assets so to exclude the assets from the gross estate in the United States. See Fillman v. U.S., 353 F.2d 632 (Ct. Cl. 1966).\(^ {30}\)

\(^{24}\)Reg. § 20.2105-1(f). A foreign corporation is not a domestic corporation. See IRC § 7701(a)(5). A domestic corporation is “… created or organized in the United States or under the law of the United States or any State…” See IRC § 7701(a)(4). See also note 35 (Code definition of “United States”). U.S. corporate stock also can be excluded from the gross estate in the United States if the executor claims a benefit under a treaty that gives primary taxing jurisdiction of corporate stock to the country of decedent’s domicile other than the United States. See, e.g., PLR 9128001 (stock included in gross estate in United States under Code sections 2103 and 2104 is excluded under article 9 of U.S.-Germany Estate and Gift Tax Treaty). See also subsection III.1. of this outline (regarding articles 5, 6, and 7, U.S.-U.K. Estate and Gift Tax Treaty).

\(^{25}\)See note 35.

\(^{26}\)See IRC § 2104(b)(3). Portfolio debt obligations, issued by U.S. debtors after July 18, 1984, are not deemed situated in the United States if the interest from the obligation is exempt from federal income tax withholding. See, e.g., TAM 9748004. Nonetheless, for debt obligations issued after March 18, 2012, interest from debt obligations, required, but not issued in registered form, generally does not constitute “portfolio interest.” See IRC § P.L. 111-147 (Hiring Incentives to Restore Employment Act), Subtitle A (Foreign Account Tax Compliance), §502(b), codified at IRC § 871(h)(2)(B)(i).

\(^{27}\)PLR 200243031. See also IRC § 6110(k)(3), (b)(1)(A) (unless otherwise established by regulation, PLR not used or cited as precedent). According to the U.S. Securities and Exchange Commission website, “[t]he stocks of most foreign companies that trade in the U.S. markets are traded as [ADRs]. U.S. depository banks issue these stocks. Each ADR represents one or more shares of foreign stock or a fraction of a share.” See www.sec.gov.answers/adrs.htm (last visited May 2, 2019). See also Richard Toolson, Strategies to Pay No Income Taxes on Capital Gains and Dividends, 160 Tax Notes 203 (July 9, 2018) (ADRs are foreign stock traded in the United States; explaining three categories of ADRs).

\(^{28}\)IRC § 2105(a).

\(^{29}\)See PLR 200842013 (annuity proceeds not deemed situated in the United States under Code section 2105(b)(1)). See also IRC § 6110(k)(3), (b)(1)(A) (unless otherwise established by regulation, PLR not used or cited as precedent).

\(^{30}\)See also IRC §§ 2036; 2038. But see Estate of Swan v. C.I.R., 24 T.C. 829 (1955), aff’d (on issue), 247 F.2d 144 (2d Cir. 1957) (suggesting transfer to a foreign corporation for its stock is a transfer for full and adequate consideration).
4. Valuation. The value of the gross estate generally is determined at date of death unless the executor timely elects the alternate valuation method. See IRC § 2033; 2032(a); 2032(d)(2).31

5. Charitable deduction. For the estate of a nonresident noncitizen, Code section 2106(a)(2) limits the allowance of the charitable deduction for transfers of property to the United States, a political subdivision of the United States or a domestic corporate charity. See also Reg. § 20.2106-1(a)(2)(i) (“deduction is allowed only for transfers to corporations and associations created or organized in the United States, and to trustees for use within the United States”). In addition, the amount of the charitable deduction cannot “exceed the value of the transferred property required to be included in the gross estate [deemed situated in the United States].” See IRC § 2106(a)(2)(D). For the pro-rata calculation of the amount of the charitable deduction for the estate of a nonresident noncitizen, please refer to section III.E.5 of this outline.

6. Marital deduction. Assuming certain requirements are met, Code section 2056(a) allows for a marital deduction in “… an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse32 …” Id. One Code requirement is the surviving spouse must be a U.S. citizen. See IRC § 2056(d)(1)(A). If the surviving spouse is not a U.S. citizen, the Code generally allows for the value of the property passing to a qualified domestic trust (QDOT) to qualify for the estate tax marital deduction. See IRC § 2056A.33

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31 See also section VI. of this outline.
32 For federal tax purposes, a marriage of two individuals is recognized “if the marriage is recognized by the state, possession, or territory of the United States in which the marriage is entered to, regardless of domicile.” See Reg. § 301.7701-18(b)(1). See also United States v. Windsor, 570 U.S. 744, 133 S. Ct. 2675 (2013); Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015) (Fourteenth Amendment requires a state to license a marriage between two individuals of the same sex and to recognize a marriage between two individuals of the same sex when lawfully licensed and performed out-of-state). For federal tax purposes, “two individuals who enter into a relationship denominated as marriage under the laws of a foreign jurisdiction are recognized as married .. if the relationship would be recognized as marriage under the laws of at least one state, possession, or territory of the United States, regardless of domicile.” See Reg. § 301.7701-18(b)(2). Regulation section 301.7701-18 is effective for taxable years ending on or after September 2, 2016. See Reg. § 301.7701-18(d). But see I.R.S. Notice 2017-15; 2017-6 I.R.B. 783 (IRS procedure for recalculating applicable exclusion amount and GST exemption amount).
33 If the property passes directly to a QDOT, the executor is required to make a QDOT election and also may be required to make a QTIP election under section 2056(b)(7) on the federal estate tax return. See Reg. § 20.2056A-2(b)(1). If the surviving spouse becomes a U.S. citizen after the federal estate tax return is made and is a U.S. domiciliary at the date of the decedent’s death and generally at all times thereafter, no QDOT tax will be imposed on distributions from the QDOT after the surviving spouse becomes a U.S. citizen. See IRC § 2056(b)(12)(A); Reg. § 20.2056A-10(a)(1) (cross-referencing Reg. § 20.2056A-1(b)). See also Reg. § 20.2056A-1(b) (cross-referencing Reg. § 20.0-1(b)(1).
a. **Amount.** In the case of the estate of a nonresident noncitizen, the deductible amount is limited to the gross estate situated in the United States. *See* IRC § 2106(a)(3).

7. **Unified credit.** The estate of a nonresident noncitizen is allowed a unified credit of $13,000 against the federal estate tax. *See* IRC § 2102(b)(1). The unified credit of $13,000 is the equivalent of tax on the amount of $60,000. *See* IRC § 2001(c). The estate of a resident of a U.S. possession, considered to be a nonresident noncitizen for purposes of the federal estate tax, is allowed a unified credit equal to the **greater of**:

i. $13,000 or

ii. a proportion of $46,800 calculated as follows:

\[
\text{value of gross estate situated in the United States}
\times \frac{\text{entire gross estate wherever situated}}{	ext{value of gross estate situated in the United States}} = \text{unified credit}
\]

*See* IRC § 2102(b)(2). “The estate of a nonresident surviving spouse who is not a U.S. citizen at the time of such surviving spouse’s death [is not allowed to] take into account the DSUE amount of any deceased spouse of such surviving spouse within the meaning of [Regulation section] 20.2010-1(d)(5), except to the extent allowed under any applicable treaty of the United States.” *See* Reg. 20.2010-3(e) (referencing IRC § 2102(b)(3)).

8. **Rate of tax.** “In the case of estates of [nonresident noncitizen] decedents dying after November 10, 1988, the tax is computed at the same rates as the tax that is imposed on the transfer of the taxable estate of a citizen or resident of the United States in accordance with the provisions of [Code] sections 2101(b) and (c).” Reg. § 20.2101-1(a). Thus, in 2019, the maximum federal estate tax rate is 40% for the estate of a nonresident noncitizen.

D. **Federal gift taxation.** Generally, the Code imposes a tax on the direct or indirect transfer of property by gift during each calendar year by any individual, resident or nonresident, to the extent the date of gift value exceeds the amount of any applicable exclusions or deductions. *See* IRC § 2501(a) (cross-referencing IRC § 2502). *See also* IRC § 2503.

1. **Property subject to federal gift taxation.** In the case of a nonresident noncitizen donor who is not subject to Code section 877(b),\(^{34}\) federal gift taxation is not imposed on the transfer of intangible property, even if the intangible property is located in the United States.\(^{35}\) *See* IRC § 2501(a)(2).

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\(^{34}\) Code Section 877(b) applies to donors who expatriated before June 17, 2008. *See* IRC § 877(h).

\(^{35}\) Under the Code, “[t]he term ‘United States’ when used in the geographical sense includes only the States and the District of Columbia.” *See* IRC § 7701(a)(9).
See also IRC § 2501(a)(3)(A). On the other hand, a nonresident noncitizen’s gift of real or tangible personal property, “situated within the United States” is subject to federal gift taxation. See IRC § 2511(a).

2. Valuation. A gift of property is valued at date of transfer for federal gift tax purposes. See IRC § 2512(a).

3. Intangible property. The Code does not define “intangible property” for purposes of federal gift taxation. However, in Private Letter Ruling 7737063, the Internal Revenue Service identified a list of items, namely, “corporate stock, bonds, notes, bank deposits, patents, partnership interests, goodwill . . . .” See id (June 17, 1977). Regulation section 25.2511-3(b) also provides examples of property deemed situated in the United States for purposes of the federal gift tax. See id. (e.g., corporate stock, debt obligations).

4. Cash. Determination of whether cash is intangible property for federal gift tax purposes is not clear. In private letter rulings, the IRS may rely solely on the location of the transferred property or a combination of property classification and location. For example, in PLR 8210055, the IRS determined that a transfer of $20,000 by check drawn on a foreign bank and payable by a United States bank is not subject to gift taxation because “such property is situated outside the United States.” See id. See also, e.g., PLR 201311004 (bank deposits holding currency issued by a foreign country not situated in United States); PLR 200340015 (IRS reliance on both property classification of cash and location of cash accounts).

5. Exclusions. Regardless of the donor’s citizenship or residency, Code gift tax exclusions are applicable. Exclusions under Code section 2503 include:

i. tuition or medical care payments directly to the providers and

ii. gifts of present interests of property no greater than $10,000, indexed for inflation (for 2019, $15,000) per donee during each calendar year. See IRC § 2503(e); 2503(b). See also Rev. Proc. 2018-57, § 3.43(1), 2018-49 IRB 827. For gifts of present interests of property to a non-U.S. citizen spouse, the annual exclusion amount is $100,000, indexed for inflation (for 2019, $155,000). See IRC § 2523(i)(2); Rev. Proc. 2018-57, § 3.43(2).

36 But see section II.D.4. of this outline. Regulation section 25.0-1(a)(1) also provides the “application of some of the provisions of [federal gift tax regulations pertaining to nonresident noncitizens] may be affected by the provisions of an applicable gift tax convention with a foreign country.”

37 But see IRC § 6110(k)(3), (b)(1)(A) (unless otherwise established by regulation, PLR not used or cited as precedent).

38 See note 37.

39 The inflation adjustment is tied to the chained consumer price index (CPI) not the traditional CPI. See IRC § 2503(b) (cross-referencing IRC § 1(f)(3)).

40 The inflation adjustment is tied to the chained consumer price index (CPI) not the traditional CPI. See IRC § 2523(i)(2) (cross-referencing IRC § 2503(b)). See also IRC § 2503(b) (cross-referencing IRC § 1(f)(3)).
6. **Gift splitting.** Both the donor and his spouse must be U.S. citizens or residents to elect to treat gifts, made by one spouse to a third party, as made one-half by each spouse (i.e., gift splitting election), thereby increasing the availability of the annual exclusion amount of $15,000 to $30,000 per donee in 2019. See IRC § 2513(a)(1).

7. **Charitable deduction.** In the case of a nonresident noncitizen donor, the charitable deduction is limited to certain gifts with United States connections (e.g., gift to domestic charity). See IRC § 2522(b).

8. **Marital deduction.** In the case of gifts made on after July 14, 1988, no gift tax marital deduction is allowed for a gift to a non-U.S. citizen spouse, regardless of the donor’s citizenship or domicile. See IRC § 2523(i)(1); Reg. § 25.2523(a)-1(a).

9. **No unified credit.** No “unified credit” is permitted in a nonresident noncitizen donor’s gift tax calculation. See IRC § 2102(b)(1). In addition, a nonresident surviving spouse who was not a U.S. citizen at the time of making a transfer subject to federal gift taxation is not allowed to take into account the deceased spousal unused exclusion (DSUE) amount of any deceased spouse, except to the extent allowed under an applicable U.S. treaty. See Reg. § 25.2505-2(f) (cross-referencing IRC § 2102(b)(3)).

10. **Rate of tax.** For gifts made after December 31, 2012, the maximum federal gift tax rate is 40%. See IRC § 2001(c). See also Reg. § 25.2502-1(b)(cross-referencing IRC § 2001(c)).

E. **Federal generation-skipping transfer (GST) tax.**

1. **Code and regulations.** Code section 2663(2) includes a statutory mandate for the Secretary of the Treasury or his delegate to “prescribe regulations (consistent with the principles of chapter 11 and 12 [i.e., gift and estate taxation] providing for the application of [chapter 13 (i.e., GST taxation)] in the case of the transferor who are [nonresidents noncitizens].” See also IRC § 7701(a)(11)&(12). The final regulations contained in Regulation section 26.2663-2 provide the following:

   i. A transfer by a nonresident noncitizen transferor is a direct skip subject to GST taxation only to the extent

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41 Code section 2523(i), disallowing the gift tax marital deduction in the case of a non-US citizen donee, does not apply to a “transfer resulting from the acquisition of rights under a joint or survivor annuity described in [Code section 2523(f)(6)].” See IRC §2523(i) (last sentence). In that case, the annual exclusion is limited to $10,000, instead of $100,000, both amounts indexed for inflation. See id. Regulation section 25.2523(a)-1(a) notes estate and gift treaties also may alter the Code disallowance. See id. (referencing section 7815(d)(14) of Pub. L. 101-239).

42 See generally Estate of Neumann v. C.I.R., 106 TC 216 (1996) (explaining statute directs the Secretary to prescribe the manner in which the GST tax is imposed on a nonresident noncitizen).

43 A direct skip is a transfer of an interest in property, subject to federal gift or estate taxation, to a “skip person.” See IRC § 2612(c). A skip person is (1) “[a] natural person assigned to a generation which is 2 [two] or more generations below the generation assignment of the transferor, (2) unrelated natural skip persons are more than
that the transfer is subject to federal gift or estate taxation.\textsuperscript{44}

ii. A taxable distribution\textsuperscript{45} or taxable termination\textsuperscript{46} is subject to GST taxation to the extent that the initial transfer to the trust by the nonresident citizen transferor, whether during life or at death, was subject to federal gift or estate taxation.\textsuperscript{47}

\textit{See Reg. § 26.2663-2(b)(1), (2).}

2. \textbf{Exemption.} Generally, the GST exemption amount tracks the basic exclusion amount, as adjusted for inflation,\textsuperscript{48} allowed for United States citizens and

\begin{itemize}
\item thirty-seven and one-half years younger than the transferor or (3) “a trust … if all interests in [the] trust are held by skip persons or … if there is no person holding an interest in the trust, and … at no time after [the] transfer may a distribution (including distributions on termination) be made from [the trust] to a non-skip person.” \textit{See generally IRC § 2651(b); 2651(c)(2); 2651(d).} \textit{See also IRC § 2613(a).} If the parent (transferor’s child) is predeceased, the transfer to the transferor’s grandchild is not a GST transfer because of application of the predeceased parent rule under Code section 2651(e). The predeceased parent rule, in part, provides that the generation level of an individual whose parent is deceased is assigned to the first generation below the transferor’s generation. As part of generation assignment instead of the direct skip Code provisions, the predeceased parent rule is applicable “for terminations, distributions, and transfers occurring on or after July 18, 2005.” \textit{See Reg. § 26.2651-3(a).} According to Regulation section 301.7701-4, “the term ‘trust’ as used in the Internal Revenue Code [generally] refers to an arrangement created either by will or by an inter vivos declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts.” For purposes of the GST tax, the term “trust” also refers to trust equivalents (not estates). These trust equivalents include life estates, remainders, estates for years, insurance contracts and annuity contracts. \textit{See IRC § 2652(b)(3). See also Reg. § 26.2662-1(c)(2)(vi), ex. 3.} A “non-skip person” is defined as any person who is not a skip person. \textit{See IRC § 2613(b).}

\textsuperscript{44} For purposes of GST taxation, a transfer is subject to federal gift taxation without regard to exemptions, exclusions, deductions, and credits. \textit{See Reg. § 26.2652-1(2).} For purposes of GST taxation, a transfer is subject to federal estate taxation if the value of the property is includible in the decedent’s gross estate as determined under section 2031 or section 2103. \textit{Id.}

\textsuperscript{45} A taxable distribution is a termination of an interest in property held in trust unless “immediately after [the] termination, a non-skip person has an interest in the property, or … at no time after [the] termination may a distribution (including distributions on termination) be made from [the] trust to a skip person.” \textit{See IRC § 2612(a). See note 43 (defining skip person).}

\textsuperscript{46} A taxable termination is a termination of an interest in property held in trust unless “immediately after [the] termination, a non-skip person has an interest in the property, or … at no time after [the] termination may a distribution (including distributions on termination) be made from [the] trust to a skip person.” \textit{See IRC § 2612(a).}

\textsuperscript{47} See \textit{PLR 201311004} (distributions from trust and deceased nonresident noncitizen’s estate are not subject to GST tax because the initial transfer of property situated outside the United States to the trust by the nonresident noncitizen transferor was not subject to federal estate or gift tax within the meaning of Regulation section 25.2652-1(a)(2)). \textit{See also IRC § 6110(k)(3), (b)(1)(A) (unless otherwise established by regulation, PLR not used or cited as precedent).}

\textsuperscript{48} The inflation adjustment is tied to the \textit{chained} consumer price index (CPI) not the traditional CPI. \textit{See IRC § 2010(c)(3)(B) (cross-referencing IRC § 1(f)(3)).}
residents. See IRC § 2631(a), (c). For calendar year 2019, the basic exclusion amount, indexed for inflation, is $1.4 million. Nonetheless Regulation section 26.2663-2 continues to state that the nonresident noncitizen is allowed a GST tax exemption of one million dollars ($1,000,000).

3. Rate of tax. Currently, the rate for the GST tax is a flat rate of 40%, equal to the current maximum rate of the estate and gift tax rate. See IRC § 2641(b) (cross-referencing IRC § 2001).

III. Treaty-based positions
A. Purpose of bilateral transfer tax treaty. Generally, the purpose of a bilateral transfer tax convention is to avoid double taxation that can arise when:

1. two countries … impose transfer taxes on the basis of domicile or
2. one [country] taxes on the basis of the transferor’s domicile or citizenship while the other taxes on the basis of the situs of the property or
3. one [country] taxes on the basis of the domicile of the transferor while the other, as in the inheritance tax context, taxes on the basis of the domicile of the transferee.


B. Types of treaties. The United States has entered into the following bilateral transfer tax treaties with the following countries:

Australia
Austria

51 The terms “convention” and “treaty” is used interchangeably in this outline. Treaties also may be limited to estate taxes. See, e.g., Convention Between the Government of the United States of America and Switzerland Relating To Taxes On Estates And Inheritances (signed on July 9, 1951 and effective September 17, 1952).
52 To date, the estate tax treaty between the United States and Belgium is not in force.
53 Although Australia abolished its estate tax in 1979, the United States-Australia Estate Tax Treaty has not been terminated. A separate United States-Australia Gift Tax Treaty also exists.
54 As of August 1, 2008, Austrian inheritance tax and gift tax generally are no longer in effect. See Worldwide Tax Daily, Austria: 2008 Year In Review (December 31, 2008). Nonetheless, there was political talk of introducing wealth taxes and reintroducing inheritance taxes and gift taxes. See, e.g., Global Tax Daily, Austria’s Spindelegger Slams ‘Faymann’s Taxes’ (May 21, 2013); Global Tax Daily, Austria’s SPÖ Mulls Wealth Taxes To Fund Universities (August 16, 2012); Global Tax Daily, Austria Focuses On Eradicating Tax Loopholes (January 24,
Generally, the transfer tax treaties may be placed into two categories, namely, domicile and situs type treaties. The United States-United Kingdom Estate & Gift Tax Treaty is an example of the domicile type treaty, wherein primary taxation lies with the country of domicile and tie-breaker rules are included in the treaty to avoid the assertion of domicile by both countries. The United States-Japan Estate & Gift Tax Treaty is an example of the older situs type treaty wherein situs rules and credit rules generally are utilized in preventing double taxation and internal law dictates domicile. The 1995 Canadian Protocol is unique in that, as an amendment to the US-Canada Income Tax Treaty, the protocol addresses double taxation under the United States estate tax and the Canadian capital gains tax.

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C. **United States-United Kingdom Estate and Gift Tax Treaty**

1. **Application of treaty: fiscal domicile.** Primary taxation is by the country of domicile as determined initially in accordance with country law. If each country asserts domicile on the basis of each country’s law, the treaty provides tie-breaker rules. *See* art. 4, US-UK Estate & Gift Tax Treaty.

2. **Situs.** Pursuant to articles 6 and 7 of the treaty, the following property may be taxed in the country in which the property is situated:
   - “immovable property (real property)” and
   - “business property of a permanent establishment and assets pertaining to a fixed base used for the performance of independent personal services.”

   Thus, the transfer of United States real estate by a United Kingdom domiciliary may be subject to United States federal transfer taxation.

3. **Deductions.** Paragraph 1 of article 8 provides that deductions are allowed in accordance with the law in force in the nation in which tax is imposed. Thus, the treaty may not override or modify the requirements of Code sections 2053, 2054 and 2106(a)(1). Yet paragraph 5 of article 8 of the treaty, if utilized, may make Code section 2106(a)(1) inapplicable.

4. **Gift or estate tax charitable deductions.** The treaty contains no specific provision to override or modify the Code provisions pertaining to the allowance of the gift or estate tax charitable deductions. Yet paragraph 5 of article 8 of the treaty, if utilized, may make the Code estate tax limitations pertaining to the estate of a nonresident noncitizen inapplicable.

5. **Gift or estate tax marital deductions.** Paragraph 2 of article 8 of the treaty effectively does not override or modify the current Code provisions for allowance of the gift or estate tax marital deductions.

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65 *See* subsection II.C.1. of this outline. Query whether the treaty defers to the pro-rata calculation of the state death tax deduction. *See generally* U.S. U.K. To Renegotiate Revision To Estate and Gift Tax Treaty (“The two Governments have decided that the current treaty needs to be updated to take into account developments in both countries’ tax systems and policies.”), 2000 WTD 37-31 (February 23, 2000).

66 *See* subsection III.C.1. of this outline.

67 *See* subsections II.C.7. and II.D.8. of this outline.

68 *See* note 67.

69 Paragraph 2 of article 8 reads:

Property which passes to the spouse from a decedent or transferor who was domiciled in or a national of the United Kingdom and which may be taxed in the United States shall qualify for a marital deduction there to the extent that a marital deduction would have been...
6. **Unified credit.** Except for paragraph 5 of article 8 of the treaty, the treaty contains no specific provision to override or modify the Code provisions of the allowance and amount of the unified credit. ⁷⁰

7. **US estate tax treatment of UK national as if US domiciliary.** Paragraph 5 of article 8 of the convention specifically provides:

> Where the property may be taxed in the United States on the death of a United Kingdom national who was neither domiciled in nor a national of the United States and a claim is made under this paragraph, the tax imposed in the United States shall be limited to the amount of tax which would have been imposed had the decedent become domiciled in the United States immediately before his death, on the property which would in that event have been taxable.

Thus, it appears that the estate of a United Kingdom national at date of death, has the option of utilizing the Code provisions pertaining to a U.S. domiciliary in its calculation of the U.S. federal estate tax. This alternate calculation includes use of the applicable credit amount for a U.S. domiciliary. ⁷¹ The U.S. Department of Treasury Technical Explanation of the treaty further explains:

> Paragraph (5) provides that U.S. tax imposed on the estate of a national of the United Kingdom, who was neither domiciled in nor a national of the United States, will not be greater than the tax which would have been imposed if the decedent had been domiciled in the United States and taxed by the United States on his worldwide property. **Paragraph (5) does not require a formal election; the appropriate information need**

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See also para. (1)(e), art. 3, US-UK Estate & Gift Tax Treaty (definition of “national” in relation to the United Kingdom).

⁷⁰ See subsection II.D.5. of this outline. See also subsection III.C.7. of this outline.

⁷¹ Query whether the applicable exclusion amount may be increased by a DSUE amount. See subsection II.D.7. of this outline.
only be included in an estate tax return, which is filed or amended within the applicable time period.

Id. (emphasis added).

8. **GST taxation.** The United States-United Kingdom Estate & Gift Tax Treaty specifically refers to the GST tax.72

**D. United States-Japan Estate and Gift Tax Treaty**73

1. **Application of treaty: nationality and domicile of donor or decedent; domicile of beneficiaries.** In the case of the United States, the treaty refers to donors and decedents who are nationals or domiciliaries of the United States. In the case of Japan, the treaty looks to the domicile of the beneficiary because the Japanese inheritance tax is imposed on the basis of the domicile of the beneficiary instead of the decedent. See Senate Foreign Relations Committee, August 6, 1954 (Memorandum from the Joint Committee on Internal Revenue Taxation), second paragraph, describing the differences between United States and Japanese tax laws. Paragraph (3) of article II of the treaty provides for determination of domicile by the country imposing the tax.

2. **Situs.** Article III of the treaty identifies certain property and assigns a situs rule to override or modify the pertinent Code provisions. If any property is not identified, paragraph (k) of article III of the treaty defers to the law of the contracting country. Examples of situs rules to determine where certain identified property is situated are as follows:

   a. “immovable property or rights therein (not including any property for which specific provision is otherwise made in this Article) shall be deemed to be situated at the place where the land involved is located,”

   b. “[t]angible movable property (including currency and any other form of money recognized as legal tender in the place of issue and excepting such property for which specific provision is otherwise made in this

72 See para. (1)(f)(i), art. 3, US-UK Estate & Gift Tax Treaty. Nonetheless, the treaty was negotiated before the 1986 version of the GST tax. See Senate Foreign Relations Committee, Official Explanation, article 2. It appears the current version of the 1986 GST tax has relevance for the United States-United Kingdom Estate & Gift Tax Treaty. See PS-73-88, Supplementary Information, 1993-1 CB 867, 870 (continued application of pre-1986 treaties to current version of GST tax). But see 60 Fed. Reg. 66,898, 66,902-66,903 (no reference to policy of continued application). The treaty also provides that the treaty shall apply to “any identical or substantially similar taxes which are imposed by a contracting [country] after the date of signature of the [treaty] in addition to, or in place of, the existing taxes.” See para. 2, art. 2, US-UK Estate & Gift Tax Treaty.

73 Convention Between the United States of America and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Estates, Inheritances and Gifts (signed April 16, 1954 and effective April 1, 1955). The United States-Japan Estate and Gift Tax Treaty is the first dual estate and gift tax convention. See Senate Foreign Relations Committee, August 6, 1954 (Memorandum from the Joint Committee on Internal Revenue Taxation), introductory paragraph.
Article) shall be deemed to be situated at the place where such property is physically located, or, if in transit, at the place of destination;”
c. “[d]ebts (including bonds, promissory notes, bills of exchange, bank deposits and insurance, except bonds or other negotiable instruments in bearer form and such debts for which specific provision is otherwise made in this Article) shall be deemed to be situated at the place where the debtor resides,” and
d. “[s]hares or stock in a corporation shall be deemed to be situated at the place under the laws of [the] corporation was created or organized.”

3. **Estate tax deductions.** The treaty contains no specific provisions to override or modify the allowance and pro-rata method of calculating Code sections 2053 and 2054 deductions nor apparently the allowance and pro-rata calculation of the state death tax deduction.\(^{74}\)

4. **Gift or estate tax charitable deductions.** The treaty contains no specific provisions to override or modify the Code provisions pertaining to the allowance of the federal gift or estate tax charitable deductions.\(^{75}\)

5. **Gift or estate tax marital deductions.** The treaty contains no specific provisions to override or modify the Code provisions pertaining to the allowance of the marital deduction.\(^{76}\)

6. **Pro-rata credit.** Article IV of the treaty effectively allows for a pro-rata unified credit\(^{77}\) calculated as follows:

\[
\text{unified credit for U.S. citizen} \times \text{value of U.S. situated property per treaty and subject to taxes of both countries}^{78} \text{value of entire gross estate}
\]

\(^{74}\) See subsection II.C.I. of this outline. Compare note 65 and accompanying text.

\(^{75}\) See subsections II.D.8. and II.C.4. of this outline.

\(^{76}\) See subsections II.D.9. and II.C.5. of this outline.


\(^{78}\) The numerator includes property subject to tax of both countries “or would be so subject except for a specific exemption.” *See Report of the Senate Foreign Relations Committee On the Estate And Gift Convention of April 16, 1954 With Japan (Memorandum form the Joint Committee on Internal Revenue Taxation), prorated allowances. See also para. (a), art. IV, US-Japan Estate & Gift Tax Treaty. Query whether the specific exemption does not include a DSUE amount. *See subsection II.C.7. of this outline. See also note 77 and accompanying text.*
7. GST taxation. The US-Japan Estate & Gift Tax Treaty does not specifically refer to GST taxation apparently because the treaty was signed before enactment of the repealed and current GST legislative provisions. The treaty, however, provides that the “present [treaty] shall also apply to any other tax on estates, inheritances or gifts which has a character substantially similar to [the federal estate and gift taxes] and which may be imposed by either contracting [country] after the date of signature of the present [treaty].”


1. Resident. The 1980 Canadian Treaty and Protocols do not rely necessarily on the domicile of the decedent. Instead, one looks to the Canadian income tax treaty which defines “resident” as “… any person that, under the laws of that State, is liable to tax therein by reason of that person’s domicile, citizenship, place of management, place of incorporation or any other criterion of a similar nature.” See art. 3, 1995 Canadian Protocol. See also U.S. Treasury Department Technical Explanation of the Protocol Done at Chelsea Done on September 21, 2007.

2. Situs. For purposes of federal estate taxation, the Canadian Protocols contain no specific situs provisions and instead rely on the situs Code provisions.

3. Small estate exemption. For gross estates (wherever situated) of 1.2 million US dollars “or its equivalent in Canadian dollars,” paragraph 8 of article XXIX B of the 1995 Canadian protocol limits the United States … taxing authority to real estate located in the United States and to property of a permanent establishment or fixed base in the United States. See Report of U.S. Senate Foreign Relations Committee (Summary).

79 The United States-Japan Estate & Gift Tax Treaty was signed on April 16, 1954. The Tax Reform Act of 1976 contained the initial version of the GST regime, repealed by The Tax Reform Act of 1986. Generally, the 1986 revised version of the GST is effective for any GST transfer occurring after October 22, 1986. See Reg. §26.2601-1(a)(1).

80 Compare note 72.


82 At the request of the United States, the 2007 Protocol includes a definition of “national” as “[a]ny individual possessing the citizenship or nationality of that State; and … [a]ny legal person, partnership or association deriving its status as such from the laws in force in that State.” See art. 1, 2007 Canadian Protocol. See also Department of the Treasury Technical Explanation of the Protocol Done at Chelsea Done on September 21, 2007.

83 See subsection VI. of this outline.

84 Paragraph 8 reads:

Provided that the value, at the time of death, of the entire gross estate wherever situated of an individual who was a resident of Canada (other than a citizen of the United States) at the time of
4. **Deductions.** The Canadian Treaty and Protocols do not override or modify Code section 2106(a) pro-rata method of calculating deductions under Code sections 2053 and 2054 nor apparently the pro-rata calculation of the state death tax deduction.\(^85\)

5. **Charitable deduction.**
   a. **1995 Protocol.** Paragraph 1 of article XXIX B of the 1995 Canadian Protocol modified Code section 2106(a)(2) by allowing a charitable deduction “for a bequest by a Canadian resident to a qualifying exempt organization that is a Canadian corporation.” *See* Treasury Department Technical Explanation of the Protocol Amending the Convention Between the United States of America and Canada (June 13, 1995).\(^86\) Nonetheless, the paragraph, as interpreted by Judge Vasquez of the United States Tax Court, did not alter the application of Code section 2106 in determining the amount of the deduction. *See* *Estate of Avrom Silver v. C.I.R.*, 120 T.C. 435 (2003). In *Estate of Silver*, Judge Vasquez disallowed the deduction of the full value of a deceased Canadian resident’s charitable bequests because the Canadian resident’s will did not direct payment of the bequests exclusively from U.S. assets. Thus, the charitable deduction is limited to the proportionate part of the U.S. assets that passes to the Canadian corporation, calculated as follows:

\[
\text{amount of charitable bequest at issue} \times \frac{\text{value of U.S. assets}}{\text{value of worldwide assets}}
\]

*Id.* at 430, 435-36.

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death does not exceed 1.2 million U.S. dollars or its equivalent in Canadian dollars, the United States may impose its estate tax upon property forming part of the estate of the individual only if any gain derived by the individual from the alienation of such property would have been subject to income taxation by the United States in accordance with Article XIII (Gains).

The 1997 Protocol amended article XIII (Gains) by, *inter alia*, deleting paragraph 3(a) of article XII and replacing it with the following:

In the case of real property situated in the United States, means a United States real property interest and real property referred to in Article VI (Income from Real Property) situated in the United States, but does not include a share of the capital stock of a company that is not a resident of the United States.

In turn, article VI of the 1980 Canadian treaty refers to, *inter alia*, “any option or similar right in respect thereof,” “usufruct of real property and rights to explore for or to exploit mineral deposits, sources and other natural resources.” Ships and aircraft are not regarded as real property. *See id.*

\(^85\) *See* subsection II.C.I. of this outline. *See also* notes 65 and 74.

\(^86\) *See* subsection II.C.4. of this outline.
b. **2007 Protocol.** Effective December 15, 2008, a new paragraph 1 of the 2007 Canadian Protocol replaced the old paragraph 1 of article XXIX B of the 1995 Canadian Protocol. The new paragraph is divided into two subparagraphs. Subparagraph 1(a) identifies the U.S. tax consequences of passage of property from a deceased United States resident to a Canadian exempt organization, namely, allowance of the charitable deduction for Federal estate tax purposes. Subparagraph 1(b) sets forth the Canadian tax consequences of the passage of property from a deceased Canadian resident to a U.S. exempt organization. As the U.S. Technical Explanation notes, new paragraph 1 does not address the situation in which a resident of one country [(e.g., Canadian resident)] bequeaths property with a situs in the other country [(e.g., United States)] to an exempt organization in the country of the decedent’s residence [(e.g., Canada)]. *See* Department of the Treasury Technical Explanation of Protocol signed at Chelsea on September 21, 2007. Thus, new paragraph 1, by omission, does not modify Code section 2106(b)(2), and thereby limits the allowance of the U.S. federal estate tax charitable deduction for U.S. property passing from a deceased Canadian citizen (not a U.S. citizen) to a U.S. exempt organization. In addition, the Code section 2106 pro-rata calculation has not been altered.

6. **Credit against tax.** For the estate of a Canadian resident who is not a U.S. citizen at date of death, paragraph 2 of article XXIX B of the 1995 Canadian Protocol allows for a nonrefundable credit against the federal estate tax that is greater than the pro-rata unified credit (as determined below) or the unified credit allowed for a nonresident noncitizen under U.S. law. [88] *See* id. *See also* IRC § 2102(b)(3)(A). The amount of the pro-rata credit is calculated as follows:

\[
\text{Unified credit allowed for a United States citizen}^{89} \times \frac{\text{US situated gross estate}}{\text{entire gross estate wherever situated}}
\]

NOTE: Paragraph 2 of article XXIX B of the 1995 Canadian Protocol specifically states that the pro-rata credit is allowed “only if all information necessary for the verification and the computation of the credit is provided.”

7. **Marital credit.**
   a. **Requirements.** Paragraph 3 of article XXIX B of the 1995 Canadian Protocol allows for a nonrefundable marital credit if:

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[88] For 2019, the “unified credit” is $4,505,800, equivalent to the estate tax on the basic exclusion amount, indexed for inflation, of $11,400,000 for a U.S. citizen or domiciliary. *See* IRC § 2001(c). Query whether a DSUE amount is included. Compare notes 71 and 77. The amount of any credit, otherwise allowable, is reduced by any credit allowed with respect to a gift made by the decedent. *See* para. 2, art. XXIX B, Canadian Protocol.

[89] *See* note 88.
• Property of the decedent’s gross estate in the United States passes to the surviving spouse within the meaning of United States law.
• The same property, passing to the surviving spouse, would qualify for the estate tax marital deduction under U.S. law if: i.) the surviving spouse were a U.S. citizen and ii.) all applicable elections were properly made.90
• The decedent is a U.S. citizen or a resident of either the United States or Canada at date of death.
• The surviving spouse is a resident of either the United States or Canada at the date of the decedent’s death.
• If the decedent and the surviving spouse were residents of the United States at the decedent’s date of death, one or both was a citizen of Canada.
• “The executor of the decedent’s estate elects the benefits of [paragraph 3] and waves irrevocably the benefits of any estate tax marital deduction that would be allowed under the law of the United States on a United States Federal estate tax return filed for the [decedent’s] estate by the date on which a qualified domestic trust election could be made under the law of the United States.”91

b. Amount. Generally, the amount of the credit is the lesser of:
• the pro-rata credit allowed under the 1995 Canadian Protocol or allowed under the law of the United States (“before reduction for any gift tax unified credit”) and
• the amount of estate tax that would otherwise be imposed by the United States on the transfer to the property qualifying for the marital credit.


IV. Federal estate tax return filing requirements
A. Threshold amount. If the value of the gross estate, deemed situated in the United States, of a nonresident noncitizen exceeds $60,000, the executor is required to file Form 706-NA, United States Estate (And Generation-Skipping Transfer) Tax Return. See IRC § 6018(a)(2). See also Instructions for Form 706-NA (Rev. August 2013) at 2. The $60,000 amount is reduced (but not below zero) by the sum of ‘adjusted taxable gifts’ made by the decedent after December 31, 1976) and the aggregate amount allowed as a specific exemption under Code section 2521 (as in effect before its repeal by the Tax Reform Act of 1976) with respect to gifts made by the decedent after September 8, 1976. See IRC § 6018(a)(3). See also IRC § 2101(b), (c).

90 This condition does not require that Code elections actually be made to qualify for the marital credit.
91 A QDOT election is timely if made on the last return filed on or before the due date (including extensions) of the federal estate tax return. See Reg. § 20.2056A-3(a). If a timely return is not filed, the election may be made on the first Federal estate tax return filed after the due date, but only if the election is made within one year of the time (including extensions) the return is required to be filed. See IRC § 2056A(d).

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B. **Filing deadline.** The Form 706-NA return must be filed “within [nine] months after the date of the decedent’s death, unless an extension is granted.” *See IRC §§ 6018(a)(3); 2101(b), (c).*

PRACTICE NOTE: For returns and other documents (except documents, e.g., petitions and notices of appeal, filed with the United States Tax Court), the IRS will accept a foreign postmark for purposes of timely mailing-timely filing treatment. *See Rev. Rul. 2002-23, 2002-1 C.B. 811.*

C. **Extension.** The executor may request an extension to file the Form 706-NA return by filing Form 4768, Application for Extension of Time To File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Tax,* at the address designated in the application’s instructions. *See Reg. § 20.6081-1(a).* Form 4768 allows the executor to request an automatic extension of six months if filed before the original due date of the return. *Id.; Instructions for Form 4768 (Rev. August 2012) at 1. See also Reg. § 20.6081-1(b) (same, but referring only to Form 706).* The executor may request an extension for cause if: (i) the executor has not filed a request for an automatic extension and (ii) the time for filing the extension has passed. *See Instructions for Form 4768 at 1.* To request an extension for cause, the executor must file Form 4768 and an explanation of “why a complete return was not filed by the due date, as soon as possible.” *See Instructions for Form 4768 at 1* (referring to Form 706). If there is more than one executor, only one is required to sign the Form 4768. *See Instructions for Form 4768 at 1.*

D. **Penalties for failure to file a timely return.** Failure to file a return on the prescribed date (including extensions) is subject to a penalty equal to 5% of the tax

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92 *See also IRM 4.25.5.2.1.1.6.* (chart, in effect, incorporates timely mailing-timely filing rule under Code section 7502(a) by stating the statute of limitation commences on the postmark date of the return if the return, without an extension granted, is “mailed on or before [the] due date but received after [the] due date.” If the return, with extension granted, is “mailed on or before [the] extension date but received after [the] extension date, the statute of limitations commences on the postmark date of the return. *See id.* The prescribed period for assessment of the estate tax (generally three years from commencement) cannot be extended by agreement. *See IRC § 6501(4)(A).*

93 *Forms and instructions are available on the IRS website, www.irs.gov.*

94 “Form 4768 must include an estimate of the amounts of estate and generation-skipping transfer tax liabilities with respect to the estate.” *See Reg. § 20.6081-1(a).*

95 If the executor is abroad, the executor may request additional time in excess of six months by properly completing the Form 4768 and attaching a statement “explaining why it is impossible or impractical to file Form 706 by the due date.” *See Form 4768 (Rev. August 2012) at 1 But see Instructions for Form 4768, Additional Extension (Part II) at 1 (“An additional extension is available only if you are an executor who is out of the country”). See also IRC § 6081(a). The Internal Revenue Manual further provides, “unless the executor is abroad, the extended due date for filing the estate tax return may not be later than 15 months from date of the decedent[‘]s death. *See IRM 3.12.263.3.1.5.4.B. (01-01-2019).*
shown on the return for each month or fraction thereof, not to exceed 25%, unless it is shown that the failure is due to reasonable cause and not willful neglect. See IRC § 6651(a)(1).

PRACTICE NOTE: Generally, the inability to secure all pertinent information before the filing deadline does not constitute reasonable cause for failure to file timely a federal estate tax return. See Estate of Gertrude Zlotowski v. C.I.R., T.C. Memo 2007-2003, n. 2 (July 24, 2007) (even if a formally appointed U.S. executor does not have complete information about foreign assets, the executor should file a timely filed tax return based upon the information available and later file a [supplemental] return, citing Estate of Vriniotis v. C.I.R., 79 T.C. 298, 311 (1982)).

D. Where to file. According to the respective cover pages associated with the Form 706-NA return and its instructions, the new mailing address is:

Department of the Treasury
Internal Revenue Service Center
Kansas City, MO 64999

E. Who is required to file. The executor is required to file the return. For purposes of the federal estate tax, Code section 2203 identifies “executor” as:

the executor or administrator of the decedent, or, if there is no executor or administrator appointed of the decedent, or, if there is no executor or administrator appointed, qualified, and acting within the United States, then any person in actual or constructive possession of any property of the decedent.

96 Regulation section 20.6091-1(b) provides, in relevant part, that, “if the decedent was not domiciled in the United States at the time of his death,... the estate tax return shall be filed ... as designated on the return form or in the instructions issued with respect to such form.” The regulation section applies “whether or not the decedent was a citizen of the United States and whether or not the return is made by hand-carrying.” Id. See also IRS website at www.irs.gov (last visited April 28, 2019). The previous mailing address, identified in the latest instructions (Rev. August 2013), is Department of the Treasury, Internal Revenue Service Center, Cincinnati, OH 45999.

97 See also IRS website at www.irs.gov (last visited April 12, 2019).

With the death of a nonresident noncitizen, an executor or administrator “appointed, qualified and acting within the United States” may be atypical. “Any person in actual or constructive possession of any property of the decedent” usually is referred to as the statutory executor. See, e.g., IRM 5.5.7.7(4) (09-16-2013). Regulation section 20.2203-1 provides examples of statutory executors to include, among others, “the decedent’s agents and representatives; safe deposit companies, warehouse companies, and other custodians of property in this country; brokers holding, as collateral, securities belonging to the decedent; and debtors of the decedent in this country.” See, e.g., Estate of Giulia Guida v. C.I.R., 69 TC 811 (1978). See generally Estate of Jane H. Gudie v. C.I.R., 137 TC 165 (2011). A trust beneficiary or a surviving joint tenant also may constitute a statutory executor. See IRC § 6018(a)(1). See also Instructions for Form 706 (Rev. August 2013) at 2.

F. Multiple returns. Because more than one institution or individual may be deemed a statutory executor, the filing of multiple federal estate tax returns is possible. Although the Code and regulations allow multiple filings, IRS return instructions express a preference for a single filing. See IRC § 6018(b); Reg. § 20.6018-2. See also Instructions for Form 706-NA (Rev. August 2013) at 1; GCM 34045 (February 11, 1969) (acknowledging similarity of executor’s obligations under 1939 Code and 1954 Code, whereby more than one estate tax return may be made).

Pursuant to Code section 6018(b), the executor, if unable to make a complete return, must file a return including a “description of [that] part [of the gross estate of which he is unable to make a complete return] and name every person holding a beneficial interest therein.” Regulations section 20.6018-2 also requires the executor to provide “all the information he has to [the] property, including a full description, and the name of every person holding a legal or beneficial interest in the property.” The IRS, in turn, has the statutory authority to notify the property holder to “make a return as to [that] part of the gross estate.” IRC § 6018(b). See also Regulation section 20.6018-2 (accord).

Note: In contrast to the Form 706, the Form 706-NA does not include a section on the form itself, requesting (1) the name of the beneficiary, (2) identifying number, (3) relationship to the decedent, and (4) amount.\footnote{99}{However, a Schedule E attached to the Form 706-NA may provide the names and addresses of surviving tenants. See subsection VI. of this outline.}

V. Federal estate tax payment

A. Who is responsible for paying the tax. The executor also is required to pay the estate tax. See IRC § 2002. If an executor or administrator is appointed, qualified and acting in the United States, his duty is to pay the entire tax,
regardless of whether the gross estate consists of property that does not come in his possession. See Reg. § 20.2002-1. If no executor or administrator is appointed, qualified and acting in the United States, a statutory executor (i.e., “any person in actual or constructive possession of any property of the decedent”) “is required to pay the entire tax to the extent of the value of the property in [the statutory executor’s] possession.” Id.

B. Timely payment of tax. The executor makes payment of the tax shown on the federal estate tax return at the time and place for filing the return (without regard to any extension of time for filing the return). See IRC § 6151(a).

PRACTICE NOTE: The Instructions for Form 706-NA indirectly inform the taxpayer of the option of making payment electronically. Also note “[p]ayment of the U.S. tax must be remitted to [IRS] in U.S. dollars.” If the IRS receives U.S. tax payments in a foreign currency, the exchange rate used by the IRS to convert the foreign currency into U.S. dollars is based on the date the foreign currency is converted to U.S. dollars by the bank processing the payment, not the date the foreign currency payment is received by the IRS.

C. Extension to pay tax. The executor may request an extension to pay the tax shown on the return, or required to be shown on the return, by also filing Form 4768 at the address designated in the instructions. Generally, the grant of the extension to pay the “amount determined by the executor as the tax imposed by chapter 11 [(relating to estate tax)]” may be for a “reasonable period” not to exceed 12 months. See IRC § 6161(a)(1). Upon showing reasonable cause, an extension may be granted “for a reasonable period not in excess of 10

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100 See Instructions for Form 706-NA at 6. In explaining the limitation amount for one check (less than $100 million), the instructions state: “[t]he $100 million or more amount limit does not apply to other methods of payment (such as electronic payments), so please consider paying by means other than check.” Id. Compare Instructions for Form 706 at 4 (payment can be made through the Electronic Federal Tax Payment System (EFTPS)). See IRS website at https://www.irs.gov/payments/eftps-the-electronic-federal-tax-payment-system (pertains to all federal taxes, last visited April 28, 2019).
102 Id.
103 See subsection IV.4.D. of this outline. Generally, the IRS will not consider an extension to pay tax after the estate tax due tax. See Instructions for Form 4768 at 1.
104 The grant of an extension to pay tax may exceed 6 months for a taxpayer who is abroad. See IRC § 6161(a)(1).
years.....” See IRC § 6161(a)(2)(A). According to the Instructions for Form 4768, “the application must establish why it is impossible or impractical for the executor to pay the full amount of the estate tax by the estate tax return due date.” See also Reg. § 20.6161-2(a) (imposition of “undue hardship” on estate). However, “[t]he extension will not be granted on a general statement of hardship.” Regulation section 20.6161-2(b) (emphasis added). Examples of circumstances that may constitute hardship are set forth in the instructions and in Regulation section 20.6161-2(b)(i). The grant of an extension to pay tax does not “relieve the estate from liability for the payment of interest thereon during the period of the extension.” See Reg. § 20.6161-1(c)(2) (cross-referencing Code section 6601). See also Instructions for Form 4768 at 2.

D. Penalties for failure to pay tax timely. Payment of tax beyond the due date (including payment extensions) is subject to a penalty equal to 5% of the tax for each month or fraction thereof, not to exceed 25%, unless the failure is due to reasonable cause and not willful neglect. See IRC § 6651(a)(2).

E. Federal estate tax lien. Unless the estate tax is paid in full or becomes unenforceable by reason of lapse of time, the estate tax becomes a lien on the decedent’s gross estate for ten years from date of death. See IRC § 6324(a)(1). Generally, if the estate tax is not paid when due, “the spouse, transferee, trustee (except the trustee of an employees’ trust which meets the requirements of Code section 401(a)), surviving tenant, person in possession … or beneficiary” is personally liable for the estate tax to the extent of the date of death value of the decedent’s non-probate property each “receives, or has on the decedent’s date of death, included in the decedent’s gross estate.” See IRC § 6324(a)(2). Transfer of the non-probate property to a purchaser or holder of a security interest may result in divestment of the lien, but a like lien may attach to the transferor’s property. See id.

VI. Form and attachments

A. Form. The return form is Form 706-NA, United States Estate (and Generation-Skipping Transfer) Tax Return. According to its instructions, the form is “used to compute [federal] estate and [GST] tax liability for nonresident alien decedents.” See Instructions for Form 706-NA at 1.

B. Instructions. Instructions for Form 706-NA also refer the executor to the schedules and instructions for preparation of Form 706.

C. How to prepare Form 706-NA.

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106 Generally, the election to pay the tax in installments when the estate consists largely of a closely held business is not available for the estate of a nonresident noncitizen. See IRC § 6166(a)(1). But see IRC § 2056A (property remaining in qualified domestic trust at death of surviving spouse allowed benefit of Code section 6166).

107 The reference to “tax” includes “additions to tax, additional amounts, and penalties.” See IRC § 6665(a)(2).

108 Forms and instructions are available on the IRS website, www.irs.gov. The latest renditions of the Form 706-NA (Rev. August 2013) and accompanying instructions (Rev. September 2016), each with a cover page announcing the change of filing address, are attached to the outline as Appendices A and B, respectively.

109 See appendices C and D of this outline.
1. **Anatomy of Form 706-NA.** The Form 706-NA is divided into three parts with part III containing a schedule A and a schedule B.

2. **Part I (identifying information).** Completion of Part I entails the identification of:
   
   (1) the decedent by his or her first given name, middle initial, and last (family) name,
   (2) U.S. taxpayer identification (I.D.) number, if any,
   (3) the decedent’s place and date of death,
   (4) the decedent’s domicile at time of death,
   (5) the decedent’s citizenship (nationality),
   (6) the decedent’s place and date of birth,
   (7) the decedent’s business or occupation,
   (8) the name and address of the executor in and outside the United States, and
   (9) the name and address of the attorney in and outside the United States.

3. **ID number.** According to the Instructions for Form 706-NA, one may enter “the decedent’s social security number (SSN) if applicable, or the decedent’s individual taxpayer identification number (ITIN), but only if the decedent had previously used the ITIN to file other US tax returns. If the decedent does not have an SSN or previously used ITIN, the IRS will assign an Internal Revenue Service Number (IRSN) to the decedent.” If the decedent has an IRSN assigned before the filing of the return, the IRSN may be entered. If the decedent does not have an SSN, ITIN of an IRSN, one is directed to leave the specified box on the return blank.

4. **Date of death.** The date of death may be relevant for (1) valuation purposes, (2) determination of the timeliness of the filing of the estate tax return, (3) indirectly in making timely elections, and (4) the expiration of the statutory lien.\(^{110}\) *See IRM 5.5.7.11.(09-16-2013).* In the case of a nonresident decedent, determination of the decedent’s date of death for federal estate tax purposes is contingent upon the decedent’s domicile at the instant of his or her death. *See Rev. Rul. 74-424, 1974-2 C.B. 294* (modifying Rev. Rul. 66-85, 1966-1 C.B. 213, “to remove the implication that the time at the place where a decedent’s estate tax return is to be filed is determinative of the time and date of decedent’s death for Federal estate tax purposes”).

5. **Domicile.** Recall determination of domicile for federal transfer tax purposes is a facts and circumstances test.\(^{111}\) It, therefore, mandates a factual investigation, allowing later for: (1) ascertainment of the value of the gross estate for exclusion purposes and, (2) if a return is required to be filed, selection of the

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\(^{110}\) *See* subsection V.E. of this outline.

\(^{111}\) No one factor or combination of factors determines domicile. *See, e.g., Estate of Paquette v. C.I.R.,* T.C. Memo 1983-571. *See also* subsection II.A. of this outline.

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appropriate type of form (i.e., Form 706 or Form 706-NA). If a Form 706-NA is selected, it may be helpful to attach an affidavit, signed by the executor, supporting the return position of domicile. See generally Reg. § 20.6018-4(a) (executor may file with return copies of any documents which the executor may desire to submit in explanation of the return).

PRACTICE NOTE: Further inquiry is required if the U.S. citizen is a resident of a U.S. possession at date of death. For example, if, after investigation, it is determined the decedent acquired his U.S. citizenship solely by reason of (1) citizenship of a U.S. possession or (2) birth or residence within the U.S. possession, Form 706-NA must be filed. See Instructions for Form 706-NA at 1. See also IRC § 2209.

6. Citizenship. Identification of the decedent’s citizenship is pertinent in determining (1) whether the entire gross estate, wherever located, is subject to tax; (2) whether an expatriation regime applies instead; and (3) which form, if a return is required to be filed, is utilized.

7. Executors and attorneys. The name and contact information of the executor is of significance in identifying the “responsible party to contact for payment of taxes.” See generally IRM 5.5.7.11.1. (09-16-2013) (IRS review of Form 706 for collection of IRS estate and gift tax accounts). Acknowledging the difficulty of serving and giving notice to executors outside the United States, the Internal Revenue Manual recommends checking the Form 706-NA return to contact the executor and/or the attorney of the estate in the United States. See IRM 5.5.7.29.3. (09-16-2013).112

PRACTICE NOTE: Unlike the Form 706, the Form 706-NA does not contain (1) an “[a]uthorization to receive confidential tax information…; to act as the estate’s representative before the IRS; and to make written or oral representations on behalf of the estate” and (2) a declaration for the representative to sign.113 One option is to attach a copy of a properly completed and executed Form 2848, Power of Attorney and Declaration of Representative.114

112 Executors and attorneys should notify the IRS of any change of address. See Rev. Proc. 2010-16, §2010-19 IRB 664 (procedures for change of address).

113 An individual may represent an individual or entity, located outside the United States, before IRS personnel only when the representation takes place outside the United States. See section 10.7(c)(1)(vii) of Circular 230, Regulations Governing Practice before the Internal Revenue Service, sec. 10.7(c)(1)(vii). See also Instructions for Form 706-NA at 6 (referring reader to section 10.7(c)(1)(vii), Circular 230).

114 Form 8821, Tax Information Authorization, can be used for the limited purpose of authorizing an appointee to inspect and/or receive confidential tax information for a specific type of tax, form, period, and matter. See id.
8. **Part II, Tax Computation.** Part II of Form 706-NA allows for the federal estate tax computation. Before computation of the federal estate tax on Part II, Schedules A and B of Part III of the return must be completed to determine the total value of the taxable estate to be placed on line 1 of Part II. Consistent with the computation of the estate tax specified in Code section 2101(b), a tentative tax (line 3) is computed on the total of the value of the taxable estate (line 1) and “adjusted taxable gifts”\(^{115}\) (line 2) less the tentative tax on the “adjusted taxable gifts,” in each instance using the rate schedule of Code section 2001(c). The computational difference is the estate tax before application of any credits. *See IRC § 2101(b).* *See also* Reg. § 20.2101-1(a).

**EXAMPLE:** After taking deductions, Jane’s taxable estate is $500,000. During her lifetime, Jane, an unmarried individual, has made gifts of tangible personal property situated in the United States, totaling $500,000 above the annual exclusion amounts per donee and per calendar year. Thus, the combined total of the taxable estate and taxable gifts is $1,000,000. The tentative tax on $1,000,000 is $345,800 (line 6). The estate of Jane, a nonresident noncitizen, is allowed a unified credit\(^{116}\) of $13,000 (line 7) under the Code, reducing the estate tax due to $332,800 (line 14).

**CANADIAN MARITAL CREDIT:** Assuming requirements are met, the executor may take a marital credit under the Canadian Protocol on line 9 of Part II of the return.\(^{117}\) To do so, the instructions direct the executor to “attach a computation of the credit and on the dotted line to the left of the line 9 entry, write “Canadian marital credit.” *See* Instructions for Form 706-NA at 6.

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\(^{115}\) For purposes of Code section 2101 (pertaining to the computation of the estate tax of the estate of a nonresident noncitizen), “the term ‘adjusted taxable gifts’ means the total amount of the taxable gifts (within the meaning of [Code] section 2503 as modified by [Code] section 2511) made by the decedent after December 31, 1976, other than gifts which are includible in the gross estate of the decedent.” *See IRC § 2101(c).*

\(^{116}\) If Jane is a nonresident noncitizen pursuant to Code section 2209, the unified credit may be greater than $13,000 depending on additional facts. *See* subsection II.E.6. of this outline.

\(^{117}\) This is in addition to the allowance of the pro-rata unified credit under the Canadian Protocol.
9. **Part II, General Information.** Along with completing Schedules A and B, Part III of Form 706-NA requires answers to the specific questions in the affirmative or the negative by checking a corresponding box for “yes” or “no.” See Appendix A at 2. Depending on the question and response, (a) a certified copy of a document, (b) a completed Schedule from Form 706, or (c) a statement must accompany the Form 706-NA return (as discussed later). In effect, the questions may inform and remind the executor to consider issues of documentation, substantiation, gross estate inclusion, and answers to these questions should be consistent with the contents or completion of the other parts of the return.

10. **Questions.** The following selected questions, if answered in the affirmative, require additional information as indicated below.

   **Question 1a, Did the decedent die testate?**
   If the question is answered in the affirmative, the executor should attach a certified copy of the decedent’s will. Accord, Instructions for Form 706-NA at 2, Attachments. See also Reg. § 20.6018-4(a).

   **Question 1b, Were letters testamentary or of administration granted for the estate?**
   If the question is answered in the affirmative, the executor should attach letters testamentary or administration granted. According to Instructions for Form 706-NA, the executor must provide documentation providing their status. A statement by the executor attesting his or her status is insufficient. See Instructions for Form 706-NA at 2. See generally Reg. § 20.6018-4(a).

   **Question 5, At the date of death, did the decedent own any property located in the United States as a joint tenant with right of survivorship; as a tenant by the entirety; or, with surviving spouse, as community property?**
   If the question is answered in the affirmative, the executor must complete and attach Schedule E of the Form 706.

   **Question 6a, Had the decedent ever been a citizen or resident of the United States?**
   If this question is answered in the affirmative, the executor must “attach a statement listing:

   - [t]he citizenship of the decedent’s parents,
   - [w]hether the decedent became a U.S. citizen through a naturalization proceeding in the United States, and

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118 The schedule should be taken from a version of the Form 706 for the decedent’s year of death.
119 The instructions further state: “If you are unable to obtain a certified copy, attach a copy of the Will an explain why it could not be certified.” Instructions at 2, Attachments.
120 See note 118.
• [w]hen the decedent lost U.S. citizenship or residency.”

See Instructions at 3.

Question 6b, If “Yes,” did the decedent lose U.S. citizenship or residency within 10 years of death?

If the question is answered in the affirmative “and the decedent lost his or her citizenship or long-term residence with 10 years of death … [before] June 17, 2008, but maintain that avoiding U.S. taxes was not a principal purpose for the decedent’s loss of citizenship or residency,” the preparer must “attach documents to sustain [the] position.” Instructions at 2.

Question 8, At the time of death, were there any trusts in existence that were created by the decedent and that included property located in the United States either when the trust was created or when the decedent died?

If the answer is in the affirmative, the executor should attach respective copies of the trust instrument and any amendments. See also Reg. § 20.6018-4(a).

Question 10a, Have federal gift tax returns ever been filed?

Question 10b, Period covered.

Question 10c. IRS offices where filed.

If question 10a is answered in the affirmative, the executor should attach copies of “available U.S. gift tax returns the decedent filed.” Accord, Instructions at 2, Attachments.121

Question 11, Does the gross estate in the United States include any interest in property transferred to a ‘skip person’ as defined in the instructions to Schedule R of Form 706?

If property is passing to a skip person, the executor must attach Schedule R for calculation of the federal GST tax. 122

11. Schedule A, Alternate valuation election. Schedule A of Form 706-NA allows for the irrevocable123 election of the alternate valuation method by requiring the executor to check the box next to the question, “Do you elect to value the decedent’s gross estate124 at a date or dates after the decedent’s death (as

122 See subsection II.F. of this outline. Allocation of the GST exemption also must be considered.

123 “Once the election is made, it is irrevocable, provided that an election may be revoked on a subsequent return filed on or before the due date of the return (including extensions of time to file actually granted). See Reg. § 20.2032-1(b)(1).

124 The gross estate refers to the gross estate in and outside the United States. Thus, election of the alternate valuation method applies to the gross estate wherever located. See Reg. § 20.2106-1(b).
authorized by [Code] section 2032)?” See Reg. § 20.2032-1(b)(1). See also IRC § 2032(d)(1). No election may be made unless the election decreases:

1. the value of the gross estate and
2. the sum of the federal estate and the GST tax “with respect to property includible in the decedent’s gross estate (reduced by credits allowable against such taxes).”\(^\text{125}\)

See IRC § 2032(c)(1), (c)(2). The election also must be made on “the last estate tax return filed by the executor on or before the due date of the return (including extensions of time to file actually granted) or, if a timely return is not filed, the first estate tax filed by the executor after the due date, provided the return is filed no later than 1 year after the due date (including extensions of time to file actually granted).” See Reg. 20.2032-1(b)(1). See also IRC § 2032(d)(2).\(^\text{126}\) If the alternate valuation method is elected, the gross estate is:

(1) “[i]n the case of property distributed, sold, exchanged, or otherwise disposed of, within 6 months after the decedent's death ... valued as of the date of distribution, sale, exchange, or other disposition.”

(2) “[i]n the case of property not distributed, sold, exchanged, or otherwise disposed of, within 6 months after the decedent's death ... valued as of the date 6 months after the decedent's death.

See IRC § 2032(a)(1), (a)(2).

12. Schedule A, Gross estate in the United States. Regulation section 20.6018-2 requires “an itemized list of that part of the gross estate situated in the United States…” See id (referencing Reg. §§ 20.2103-1 and 20.2104-1). Schedule A of Form 706-NA allows the executor to comply with the regulation by supplying individual columns to complete. Specifically, the executor must itemize the gross estate in the United States with an item number in column a, and provide, for each item, (1) a corresponding description in column b, (2) the alternate valuation date, if elected, in column c, the alternate value in U.S. dollars in...

\(^{125}\) The regulations allow the option of a protective election on the federal estate tax return if the return as filed does not satisfy the requirements of Code sections 2032(c)(1) and (c)(2). See Reg. § 20.2032-1(b)(2).

\(^{126}\) The executor’s request for an extension of time to make the election or a protective election (see note 125) pursuant to Regulation sections 301.9100-1 and 301.9100-3 “will not be granted unless the return [(i.e., the last return before the due date, including extensions granted, or the first return filed after the due date)] is filed no later than 1 year after the due date of the return (including extensions of time actually granted).” See Reg. § 20.2032-1(b)(3).
column d, and (3) the date of death value in U.S. dollars in column e. After providing this information, the executor must compute the total alternate value and the total date of death value. See Form 706-NA at 2.

CANADIAN SMALL ESTATE RELIEF: If the executor wants to secure Canadian small estate relief, the executor should not list the exempt assets on Schedule A. Instead, list the exempt assets on a separate statement specifying reliance on the Canadian protocol or on a Form 8833.127 See Instructions For Form 706-NA at 4.

13. Part IV, Schedule B. Taxable estate.
   a. Line 1, Gross estate in the United States. The total date of death value (alternate value, if elected) from Schedule A of the Form 706-NA is placed on line 1 of Schedule B of the return.
   b. Line 2, Gross estate outside the United States. This line may remain blank if the estate does not want to take deductions subject to the pro-rata calculations set forth in Code section 2106. See Reg. § 20.2106-1(b) (‘no deduction is allowed ... unless the executor discloses in the estate tax return the value of that part of the gross estate not situated in the United States.”

CANADIAN SMALL ESTATE RELIEF: If the executor wants to secure small estate relief under the Canadian Protocol, the Instructions for Form 706-NA require the value of the gross estate outside the United States to be disclosed on line 2.128 See Instructions for Form 706-NA at 4.

c. Line 3, Entire gross estate wherever the United States. Regulation section 20.2103-1 states that “[t]he ‘entire gross estate’ wherever situated of a [nonresident noncitizen] at the time of his death is made up in the same way as the ‘gross estate’ of a citizen or resident of the United States.”

d. Line 4, Amount of funeral expenses, administration expenses, decedent’s debts, mortgages and liens, and losses during administration. Regulation section 20.6018-3(b) requires the taxpayer to provide an itemized list of any deductions claimed. See id (referencing Reg. § 20.2106-1 and Reg. § 20.2106-2). In accordance with the foregoing regulation, Instructions for Form 706-NA directs the executor to attach an itemized schedule. Id. at 5.

127 See subsection VI.F. of this outline.
128 See subsection III.E.3. of this outline.
PRACTICE NOTE: The expenses are not limited to those incurred or expended in the United States. If not in U.S. dollars, the foreign exchange rate at date of payment generally is used in determining the U.S. dollar amount of the expense. See Rev. 80-260, 1980-2 C.B. 277.

e. **Line 5, Pro-rata portion of deductions.** Code section 2106 generally allows for deductions under Code sections 2053 and 2054 on a pro-rata basis calculated as follows:

   allowables deductions [line 4] \times \frac{\text{gross estate situated in the United States [line 1]}}{\text{"entire gross estate, wherever situated" [line 3]}}

   See IRC 2106(a)(1).

f. **Line 6, Charitable deduction and marital deduction.** If the decedent’s will does not direct payment of the charitable bequest exclusively from U.S. assets, the charitable deduction is limited to the proportionate part of the United States assets that passes to the charity, calculated as follows:

   \frac{\text{amount of charitable bequest at issue}}{\text{value of worldwide assets}} \times \frac{\text{value of United States assets}}{\text{total value of the assets in the gross estate}}

   See Estate of Silver v. C.I.R., 120 T.C. 430, 435-36 (2003). The marital deduction is not subject to a pro-rata calculation. Instead, the deductible amount is limited to the gross estate situated in the United States. See IRC § 2106(a)(3).

g. **Line 7, Pro-rata portion of state death tax deduction.** In 2005, the credit for state death taxes under Code section 2011 terminated, and was replaced with a state death tax deduction pursuant to Code section 2058. For the estate of a nonresident noncitizen, Code section 2106(a)(4) allows for a deduction for paid state death taxes subject to the following pro-rata calculation:

   \frac{\text{state death taxes paid}}{\text{gross estate situated in the United States}} \times \frac{\text{total value of the assets in the gross estate subject to state death taxes paid}}{\text{total value of the assets in the gross estate}}

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129 See note 11.


131 See also subsection III.E.5. of this outline.
See IRC § 2106(a)(4). See also Instructions for Form 706-NA (Rev. August 2013) at 5. Note that the numerator and denominator of the pro-rata fraction is not the same as those of the pro-rata fraction utilized for other Code deduction or treaty credit purposes.

h. Line 8, Total deductions. The Form 706-NA directs the executor to add lines 5, 6 and 7 to complete line 8.

i. Line 9, Taxable estate. Subtract line 8 from line 1. Determination of this number will allow the executor to commence the calculation of the estate tax in Part II of the Form 706-NA return.

D. Documents accompanying the return. Documents accompanying the Form 706-NA return include:

a. “a copy of the decedent’s death certificate,”

b. a certified copy of the will [See Reg. § 20.6018-4(a)],

c. “[a] copy of any inventory or property and schedule of liabilities claims against the estate and expenses of administration filed with the foreign court of probate jurisdiction, certified by a proper official of the court [See Reg. § 20.6018-4(b)(1)],”

d. “[a] copy of any return filed under any applicable foreign inheritance, estate, legacy, or succession tax act, certified by a proper official of the foreign tax department [See Reg. § 20.6018-4(b)(2)],”

e. for every life insurance policy “listed on the return,” a Form 712 completed by the company issuing the policy [See Reg. § 20.6018-4(d)],

f. trust or other written instrument in any case where a transfer, by trust or otherwise, was made by a written instrument, and the property is included in the gross estate, or the executor … has made a disclosure of the transfer on the return but has not included its value in the gross estate in the belief that it is not includible [See Reg. § 20.6018-4(f)],

g. “U.S. gift tax returns [See Instructions at 2, Attachments],”

h. “For closely held or inactive corporate stock, … balance sheets, particularly the one nearest the valuation date, and statements of the net earnings or operating results and dividends pay for each of the 5 preceding years [See Instructions at 2, Attachments],”

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132 Code section 2106(a)(4) refers the reader to Code section 2011(a). State death taxes are described in Code section 2011(a) as “estate, inheritance, legacy, or succession taxes actually paid to any State or the District of Columbia, in respect of any property (included in the gross estate (not including any such taxes paid with respect to the estate of a person other than the decedent).” Code section 2106(a)(4) also describes the numerator of the pro-rata fraction, in part, as “the value of the property … upon which state death taxes were paid…” Unlike Code section 2106(a)(4), the instructions for the preparation of Form 706-NA do not utilize the word “paid” in the numerator of the fraction.

133 The form (including instructions as part of the form) is available on the IRS website, www.irs.gov.
i. “copies of any documents which the executor may desire to submit in explanation of the return [See Reg. § 20.6018-4(a)]\textsuperscript{134}

j. English translation if document is not in English language [See Instructions at 2, Attachments].

E. Schedules. The executor is directed to utilize specific Form 706 schedules in preparing the Form 706-NA return. See Instructions for Form 706-NA at 1. See also Part, III, General Instructions, Form 706-NA. Two examples of schedules are:

a. Schedule E. If jointly held property is part of the gross estate in the United States under Code section 2040, the executor must complete and attach Schedule E of the Form 706 to the Form 706-NA return. For purposes of Schedule E and Code section 2040, jointly held property is property held as joint tenancy with right of survivorship or tenancy by the entireties, not as tenancy in common.\textsuperscript{135} In case of the surviving joint tenant who is not a U.S. citizen spouse, the entire value of property held jointly by the decedent and the surviving spouse is included in the gross estate “unless the executor submits facts sufficient to show that property was not acquired entirely with consideration furnished by the decedent, or was acquired by the decedent and the [surviving spouse] by gift, bequest, devise, or inheritance.” See Reg. § 20.2040-1. See also IRC § 2040(a).

b. Schedule M. Schedule M is essential in making a QDOT and/or QTIP election.\textsuperscript{136}

PRACTICE NOTE: If the gross estate in the United States includes, for example, U.S. real estate with nonrecourse debt, it may be advisable to attach Schedule A of the Form 706, reflecting the equity of the real estate, before placing the equity on Schedule A of the Form 706-NA. If the debt is recourse, the executor may want to attach Schedule A of the Form 706, reflecting the total value of the U.S. real estate, before placing the total value on Schedule A of the Form 706-NA. Then, the executor also may want to attach Schedule K of the Form 706, reflecting the deduction before the pro-rata calculation and then include the deduction on Schedule B of the Form 706-NA return for pro-rata calculation. A copy of the

\textsuperscript{134} Instructions provide similar guidance, namely, to attach any other documents, such as appraisals, to provide explanation. See Instructions at 2, Attachment.

\textsuperscript{135} The decedent’s interest in U.S. property as a tenant in common is listed on Schedule A of Form 706-NA. See also IRC § 2033.

\textsuperscript{136} See note 33.
mortgage document also may be attached to the Form 706-NA return.

F. Treaty-based return position.
   a. **Form.** For returns due after December 15, 1997, a treaty-based position generally is taken on the Form 8833, Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b). See Reg. § 301.6114-1(d)(1). See also IRC § 6114(1)(a) (position must be disclosed as may be prescribed by Secretary on return or statement attached to return). In making the election, the taxpayer maintains that a treaty position overrules or modifies any provision of the Code, thereby effecting a reduction in tax. See Reg. § 301.6114-1(a)(1). See also IRC § 6114(a).

PRACTICE NOTE: In addition to the attachment of a completed Form 8833 to the return, the executor should place “IRC Section 6114” or “Treaty-Based Position” on top of the Form 706-NA return. Placement of the … clearly identifies the return as a treaty-based return by IRS Service Center personnel.

b. **Failure to comply.** If a taxpayer fails to meet the requirements of Code section 6114, a penalty equal to $1,000 ($10,000 in the case of a C corporation) is imposed unless the taxpayer shows “…that there was reasonable cause for the

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137 See Form 8833 (Rev. September 2017). Currently, instructions are not separate, but part of the Form 8833. Forms are available on the IRS website, www.irs.gov. Form 8833 specifically includes estate and gift tax treaties for purposes of taking a treaty-based position. See id. at 3.

138 For purposes of the Code, “taxpayer” is defined as “any person subject to any internal revenue tax.” See IRC § 7701(a)(14). “Person” includes “an individual, a trust, estate, partnership, association, company or corporation.” See IRC § 7701(a)(1).

139 See, e.g., treaty election of paragraph five of article 8 of the US-UK Estate and Gift Tax Treaty. See also Instructions for Form 706-NA at 4-5.

140 See generally IRM 3.11.106.10.6 (01-01-2019) (directions for IRS processing of Form 706-NA recognizes either ‘IRC Section 6114’ on top of Form 706-NA return or Form 8833 attached to Form 706-NA return). The Instructions for Form 706-NA do not refer the executor directly to Form 8833, but instead to a “statement” and a regulation that, in part, allows the U.S. Treasury to prescribe the method to make the election. Specifically, the Instructions state:

   If you are reporting any items on this return based on the provisions of a death tax treaty or protocol, attach a statement to this return indicating that the return position is treaty-based.

   See Regulations section 301.6114-1 for details.

Instructions for Form 706-NA at 2. Apparently, the instructions allow for flexibility, without reformation of the instructions, if the U.S. Treasury prescribes a different form or method. But see IRM 4.25.4.3.4. (“If an estate claims treaty benefits that change the tax treatment that property would normally be subject to under the Code, a notice invoking those treaty rights must be filed with the return. The notice is provided by attaching a statement or Form 8833…”).

141 Id.
failure and that the taxpayer acted in good faith.” See IRC § 6712. The penalty under Code section 6712 is in addition to any other penalty imposed by law. IRC § 6712(c).

G. Taxpayer’s signature.
The actual form of the 706-NA allows for the signature of two executors. See id. at 1. In contrast, Instructions for Form 706-NA specifically provide that, “[i]f there is more than one executor, all listed executors are responsible for the return. However, it is sufficient for only one of the co-executors to sign the return.” Id. at 6. See also Reg. § 20.2061-1 (return “shall be signed by the executor, administrator, or other person required or duly authorized to sign in accordance with the regulations, forms or instructions prescribed with respect to such return….”). This approach is consistent with the federal estate tax concept of statutory executor instead of the state or county approach of appointing co-executors. See Ewart v. Commissioner, 814 F.2d 321, 323 (6th Cir. 1987) (signature of other co-executor not required on federal estate tax documents; one co-executor binds the estate). The signature is under perjury of law, providing, inter alia, “a complete return requires listing all property constituting the part of the decedent’s gross estate (as defined by the statute) situated in the United States. See Form 706-NA at 1. See also Reg. § 20.6065-1(a).

VII. Miscellaneous items
A. Closing letter or account transcript. According to Instructions for Form 706-NA, “[e]ffective for all estate tax returns filed on or after June 1, 2015, closing letters will not be issued unless requested by the executor of the estate or the designated power of attorney.” Id. at 1. The executor is advised to “wait at least four months after filing Form 706-NA to request a closing letter” “to allow time for processing.” Id. The instructions further state,

Instead of an estate tax closing letter, the executor of the estate may request an account transcript, which reflects transactions including the acceptance of Form 706-NA and the completion of an examination. Account transcripts are available online to registered tax professionals using the Transcript Delivery System (TDS) or to authorized representatives making requests using Form 4506-T.143

Id.144

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142 “A person required or duly authorized to make the return may incur liability for the penalties provided for erroneous, false, or fraudulent returns.” See Reg. § 20.6011-1 (cross-referencing Code sections 7201, 7203, 7206, 7207, and 7269, relating to criminal penalties).


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B. **Transfer certificates.** To avoid possible liability for federal estate taxes and penalties to the extent of a nonresident decedent’s property in their possession, “corporations, transfer agents of domestic corporations, transfer agents of foreign corporations (except as to shares held in the name of a [deceased nonresident noncitizen]), banks, trust companies, or other custodians in actual or constructive possession of property,” should demand and receive a transfer certificate before transferring the property. *See* Reg. § 20.6325-1(a). Regulation section 20.6325-1(a) specifically defines a transfer certificate as “a certificate permitting the transfer of property of a nonresident decedent without liability,” effectively allowing for the release of the estate tax lien. A statutory executor is able to request a transfer certificate from the IRS by following the instructions on the IRS website.145 These web-based instructions identify the necessary documentation and/or return filings in a nonresident estate of a United States citizen and of a noncitizen. According to Regulation 20.6325-1(c), the Internal Revenue Service will issue the transfer certificate “when [it] is satisfied that the tax imposed upon the estate, if any, has been fully discharged or provided for.” The tax is considered fully discharged “only when investigation has been completed and payment of the tax, including any deficiency finally determined, has been made.” *See* Reg. § 20.6326-1(c).

C. **Basis consistency and reporting.** Generally, the basis of property acquired from the decedent or to whom property passed from the decedent is the property’s fair market value on the decedent’s date of death or the alternate valuation date, if

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145 For transfer of property of a nonresident United States citizen, *see* https://www.irs.gov/businesses/small-businesses-self-employed/transfer-certificate-filing-requirements-for-us-citizens (last visited May 2, 2019). For transfer of property of a nonresident noncitizen, *see* https://www.irs.gov/businesses/small-businesses-self-employed/transfer-certificate-filing-requirements-for-non-us-citizens (last visited May 2, 2019). For estates of nonresident noncitizen decedents dying in 2010 whose executors make a carryover basis election under section 1022, the IRS did not issue transfer certificates. *See* Notice 2011-66, IRB 2011-35. Note the IRS webpage applicable to nonresidents noncitizens, last updated on July 23, 2018, does not include the updated return filing address for the Form 706-NA, and also continues to use the previous return filing address for submission of materials in support of the issuance of a transfer certificate when no return is required to be filed. Query whether, in the case of a transfer certificate request, one must continue to file Form 706-NA at Cincinnati or the new address identified on the cover letter accompanying the Form 706-NA. *See* note 96 and accompanying text. It may be advisable to file the Form 706-NA return at the new address and submit a copy of the Form 706-NA at Cincinnati for transfer certificate request purposes. *See* Reg. § 20.6091-1(b) (“If the decedent was not domiciled in the United States at the time of his death, … the estate tax return … shall be filed … as designated on the return form or in the instructions issued with respect to such form.”). However, to avoid confusion, it may be helpful to indicate the copy of the Form 706-NA is a copy or duplicate, and not for filing purposes, because the original Form 706-NA was filed per the printed cover letter accompanying the printed instructions. To avoid any further delay during this transition period, one may also want to submit a copy of the packet of materials submitted for the transfer certificate request to the new return filing address. Hopefully, the IRS will specify the same mailing address for the filing the Form 706-NA return and the associated transfer certificate request.
elected. See IRC § 1014(a). For property with respect to a federal estate tax return filed after July 31, 2015, consistent basis may be required under Code section 1014(f). That is, the basis of property in the hands of a person inheriting the property from the decedent must not exceed the final value determined for federal estate tax purposes and, if not determined, the value identified on a statement required under Code section 6035(a). In addition to basis consistency, the executor required to file the return under Code section 6018(a) (i.e., statutory executor) and the person required to file under Code section 6018(b) (i.e., beneficiary) may be required to satisfy certain reporting requirements, namely,

1. file an information return (i.e., Form 8971, including copies of the Schedule A of Form 8971) for each beneficiary with the IRS and
2. furnish a statement (i.e., Schedule A of Form 8971) to each beneficiary who has or will receive property from the estate.

See Prop. Reg. § 1.6035-1(a);-1.6035- 1(g)(2), (3).

The information return generally is required to be filed with the IRS and the statement is required to be furnished to each beneficiary on or before the earlier of (1) thirty days after the due date of the filing of the federal estate tax return (including extensions actually granted) or (2) thirty days after the date the federal estate tax return is filed. See Prop. Reg. § 1.6035-1(d)(1). See also IRC § 6035(b). Penalties may be imposed for failure to file a timely and complete


The federal estate tax return includes the Form 706-NA. See generally IRC §§ 1014(f) (cross-referencing Chapter 11); 6035(a) (cross-referencing IRC § 6018(a)).


See subsection IV.G. of this outline.

See subsection IV.H. of this outline.


information return and statements.\textsuperscript{154} \textit{See IRC} §§ 6721, 6722. \textit{See also} Prop. Reg. § 1.6035-1(h). In addition, accuracy-penalties under Code section 6662 may be imposed for utilizing a basis inconsistent with the federal estate tax value of the property.\textsuperscript{155} \textit{See IRC} § 6662(a). The basis consistency requirement only applies to property includable in the decedent’s gross estate for federal estate tax purposes and results in an increased federal estate tax before application of credits. \textit{See IRC} § 1014(f)(2). \textit{See also} Prop. Reg. § 1.1014-10(b).

\textbf{PRACTICE ALERT}

Property qualifying for the marital deduction does not generate estate tax liability and, therefore, is excluded from property subject to the basis consistency requirements of Code section 1014(f). \textit{See Prop. Reg.} § 1.6035-1(a)(2). Nonetheless, the basis must be reported pursuant to Code section 6035. \textit{See Prop. Reg.} § 1014-10(b)(2); 1.6035-1(b).

Property excluded from reporting includes:

1. Cash “(other than a coin collection or other coins or bills with numismatic value),”
2. Income in respect of the decedent (as defined in Code section 691),
3. Tangible personal property for which an appraisal is not required under Regulation section 20.2031-6(b) “(relating to valuation of certain household goods and personal effects),”\textsuperscript{156} and
4. Property “sold, exchanged, otherwise disposed of (and therefore not distributed to the beneficiary) by the estate in a transaction in which capital gain or loss is recognized.”

\textit{See Prop. Reg.} § 1.6035-1(b).

\textsuperscript{154} \textit{See I.R.C.} §§ 6721, 6722; \textit{see also} Prop. Reg. § 1.6035-1(h). Penalties may be waived due to reasonable clause. \textit{See IRC} § 6724.

\textsuperscript{155} \textit{See IRC} § 6662(b)(8), (k), added by Pub. L. No. 114-41, \textit{supra} note 148, § 2004(c) (July 31, 2015). \textit{See also} Prop. Reg. § 1.6662-8. Property later discovered or omitted from the federal estate tax return also may be subject to a zero basis. \textit{See Prop. Reg.} § 1.1014-10(c)(3).

\textsuperscript{156} This property also is excluded from property subject to the basis consistency requirement. \textit{See Prop. Reg.} § 1014-10(b)(2).