Estate Planning for Non-U.S. Citizens

By Paula F. Montoya, Attorney at Law

Though I am not a citizen of the United States, I am married to a U.S. citizen and have permanent residency status. Is it true that, if my husband were to pass away, without estate planning, I would pay a greater tax upon our property than if I were a U.S. citizen?

If you own property in the United States but are not a U.S. citizen or permanent resident (also known as a green card holder) of the U.S., you are not entitled to the same tax advantages as U.S. citizens and may be subject to substantial estate taxes when you or your spouse dies. Instead of the $5,250,000 exemption from estate taxes to which U.S. citizens and green card holders are entitled, a non-resident alien is entitled to an exemption of only $60,000. This means that a non-resident alien may only transfer $60,000 worth of U.S. property to his or her heirs when he or she dies. If more than $60,000 is passed on at a non-resident alien's death, any amount over $60,000 will be taxed.

Avoiding Dual Taxation

Even though green card holders, like U.S. citizens, are entitled to transfer $5,250,000 without being subject to U.S. estate tax, they are subject to U.S. estate tax on their worldwide assets, including assets held in their home country. Both non-resident aliens and green card holders may also be subject to estate tax in their home country unless the U.S. and the non-resident alien or green card holder's home country have entered into an estate tax treaty with the U.S., so that both countries do not tax the same assets at the time of death. A treaty might also reduce or eliminate such tax on the U.S. property of a non-resident alien.

Tax Impact on Non-U.S. Citizens

When both spouses are U.S. citizens, there are substantial estate tax advantages. Unfortunately, if one spouse is a U.S. citizen and the other is not, and the U.S. citizen spouse dies first, then estate taxes can become due immediately upon the death of the U.S. citizen. The U.S. government is concerned that the foreign spouse will go back to his or her home country and die there, whereby the U.S. government will be unable to collect any estate tax.

Immediate Estate Tax

There is planning that can be done to avoid the immediate estate tax on the first spouse's death when the surviving spouse is a not a U.S. citizen. A qualified domestic trust (QDOT) may be established to allow the U.S. citizen spouse to leave all of his or her assets to the non-U.S. citizen spouse without any estate tax due at the death of the U.S. citizen.

There are specific requirements that must be adhered to when setting up the trust. If the QDOT is set up properly, no estate tax will be payable on the U.S. citizen spouse's death but will be postponed until the foreign spouse dies. How much tax will be paid at that time will depend on whether the surviving spouse has become a U.S. citizen before he or she dies, or whether he or she is a green card holder or non-resident alien.

The rules governing estate taxes for non-U.S. citizens are complex. If you are not a U.S. citizen but live here on a visa or hold a green card, you should consult an attorney experienced in estate planning and immigration to make sure you properly plan for the transfer of your assets and minimize the estate tax impacts at your death. ■

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