

# Coming to America

## Inbound Tax Planning for Latin Americans

### TTN Miami Conference

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Coral Gables, Florida



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# Agenda

# Coming to America

- Immigration options for Latin American clients
- How to ensure you have ceased to be a tax resident of your old residence
- Pre-immigration income tax planning
- Pre-immigration estate tax planning

# Know Your Client

- Family
- Assets
- Business
- Citizenship, Residence and Domicile of all family members
- Investment Objectives & Diversification
- Tax and non-tax objectives



# Objectives

- Minimize United States and Home Country taxes
  - Consult with local counsel
  - Consider interim residence
  - Least aggregate amount of taxes in both countries and avoid double taxation to the greatest possible extent
- Coordinate tax and estate plan with non-tax issues
  - Family relationships
  - Cash flow
  - Access to assets
  - Understand United States financial disclosure and other relevant laws
- Maximize protection from creditors
- Address spousal rights, if any

# U.S. Federal Income Tax Residency

- Subject to U.S. federal income tax on worldwide income
  - Highest marginal federal income tax rate for ordinary income = 39.6%
  - Federal income tax rate for capital gains and qualified dividends = 15-20%
  - 3.8% Medicare tax on lesser of:
    - net investment income, or
    - excess of modified AGI over threshold amount (250K for jt. filer, 200K for ind.)
    - not applicable to nonresident aliens
- Includes:
  - U.S. citizens
  - Lawful permanent residents (“**Green Card**”)
  - Persons who meet the **substantial presence test** (day count)

## Substantial Presence Test

- Presence in U.S. at least 31 days during calendar year; and
- Presence in U.S. for 183 days or more taking into account,
  - All the days of the calendar year at issue,
  - 1/3 of the days of the 1st preceding calendar year, and
  - 1/6 of the days of the 2nd preceding calendar year.
- Plan to keep presence under 121 days per calendar year

## Substantial Presence Test (Exceptions)

- **Closer Connection to Foreign Country** (Form 8840)
  - Presence in U.S. for less than 183 days during current calendar year,
  - Tax Home in a foreign country,
  - Closer Connection to the same foreign country as tax home (unless closer connection to two foreign countries), and
  - No application for Green Card or affirmative steps to obtain Green Card
  - Attach to timely filed Form 1040NR (Non-resident alien income tax return)
  - Late filing will be accepted only with a showing of **clear and convincing evidence** that taxpayer **took reasonable actions to become aware** of filing requirements and **significant steps to comply** with those requirements.



## Substantial Presence Test (Exceptions)

- **Treaty Based Return Position** (Form 8833)
  - Applies to “dual-resident” taxpayers who may be considered a resident of the U.S. and a foreign country under both countries internal domestic laws
- Treaty Tie-breaker Factors
  - Permanent Home
  - Center of Vital Interests (Economic and Personal Relations)
  - Habitual Abode
  - Nationality
  - Mutual agreement between authorities of contracting states

## U.S. Income Tax Treaties Certain European, Asian and South American Countries

- UK
- France
- Italy
- Germany
- Switzerland
- Netherlands
- Sweden
- Russian Federation
- Japan
- China
- Mexico
- Venezuela
- Chile (proposed, not ratified)
- Barbados
- Jamaica
- Trinidad and Tobago

## U.S. Federal Estate and Gift Tax Residence; Domicile

- U.S. Citizens and residents (domiciliaries), subject to tax on worldwide assets
  - 40% highest marginal rate
  - 5.45M exemption, 10.9M with spouse (portability)
- Non-residents (non-domiciliaries) not U.S. citizens
  - Rate graduates from 26% over 60K to 40% over 1M
  - Taxed on U.S. situated assets (60K exemption on death only)
    - Real property or tangible personal property (art, cars, boats, planes) located in the U.S.
    - Transfer of U.S. situs intangibles subject to estate tax, but not gift tax
      - U.S. Corporate Stock
      - U.S. Partnership Interest arguable
      - U.S. LLC Interest treated as a disregarded entity for income tax purposes?

## U.S. Federal Estate and Gift Tax Residence; Domiciliary

- U.S. Domicile: physical presence with intent to reside in the U.S. indefinitely
- Subject to U.S. federal estate tax on worldwide assets
- Subject to U.S. federal gift tax on gratuitous transfers made during lifetime
- U.S. citizens are considered U.S. “domiciled” regardless of their actual residence
  - Planning opportunities for long term residents, avoid expatriation tax

## How to Maintain Non-U.S. Domicile (if desired)

- Facts and circumstances
- Maintain contacts in home country
  - Residence
  - Business interests
  - Other assets
  - Social memberships
  - Religious organizations
  - Statement in will/trusts as to domicile

## Withholding and Income Tax Free and Estate Tax Exempt Passive U.S. Investments for Nonresident Aliens

- Bank deposit interest
- Certificates of Deposit
- Portfolio Debt Instruments (look out for related parties)
- includes U.S. Treasury Bills that are registered
- Capital Gains on non-ECI (no exemption for USRPI gains)

## U.S. Pre-Immigration Planning – Income Tax Planning

- Identify Key Assets and Income Sources
- Note Attorney-Client Privilege
- Obtain Correct tax information on the various assets (e.g., the historic cost or other “*adjusted tax basis*”)
- Determine Entity Type (e.g., S.A. vs. SaRL or Limitada)
- Determine whether a long-term hold or an impending sale

## Pre-immigration Tax Planning; Step up Bases

- Pay capital gains tax only on appreciation post-immigration.
- Use foreign eligible entity treated as a corporation, then elect pass through treatment
  - Create factual relevance, then deemed liquidation by filing Form 8832
    - Open US bank or securities account and deliver Form W-8BEN to create relevance
      - otherwise, could be treated as initial election of irrelevant entity w/o step up
- Income acceleration, expense deferral



## Pre-immigration Tax Planning; Drop Off Trust

- Irrevocable, discretionary.
- Completed gift, avoids U.S. federal estate tax exposures.
- Asset protection (choose jurisdiction, offshore or onshore).
- Grantor trust if offshore and funded within 5 years of residency starting date. IRC s. 679.
- beware of other possibly applicable grantor trust provisions.
- Deemed sale of assets upon settlor's departure from US or death. IRC s. 684.
- Use domestic trust to avoid IRC s. 684
- leave domestication option open for foreign trusts
- remove powers of settlor if no longer treated as US person for income tax purposes

## U.S. Pre-Immigration Planning – Foreign Tax Credit Concerns

- Changing the ownership of a particular foreign corporation so that it will no longer constitute a CFC (de-control)
- PFIC – beware of trap for unwary
- No US gift tax consequences on resettlement of assets into one or more new pre-immigration trusts
- Avoidance of US estate/generation-skipping transfer taxes

## U.S. Pre-Immigration Planning – Anti-Deferral Regimes

- Changing the ownership of a particular foreign corporation so that it will no longer constitute a CFC (de-control)
- PFIC – beware of trap for unwary
- No US gift tax consequences on resettlement of assets into one or more new pre-immigration trusts
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## U.S. Pre-Immigration Planning – Community Property

- Key in identifying assets and income of both spouses
- Marital property ownership for US tax purposes is generally determined by the laws of the “marital domicile”
- Most LATAM jurisdictions have some form of community property as default marital property regime unless married under *separacion de bienes*

## U.S. Pre-Immigration Planning – Community Property (cont.)

- Need to fully understand all community property regimes applicable to the spouses
  - Do the spouses have a “vested interest” in the marital property (i.e., undivided 50% ownership interest regardless of how titled)?
  - What property does the community attach to?
  - Does non-earning spouse have an interest in income?
  - When does the community crystallize?
  - Can we change the community?
  - Do both spouses need to consent to a property transfer?

## U.S. Pre-Immigration Planning – Community Property (cont.)

- Are both spouses moving to the United States?
  - If only 1 spouse, consider if there are ways to divide the property and income between spouses to reduce overall US federal income and estate tax exposure
- Is one of the spouses already a US income tax resident and/or US domiciliary?
  - Need to be careful with acceleration of income techniques to avoid US income tax exposures for US spouse
  - Need to be careful with funding trusts and limit US gift tax exposures for US spouse
  - Is it still possible to divide the property and income between the spouses to reduce US tax exposures?

## Pitfalls to Avoid

- Failing to plan in advance
- Failing to identify all assets and types of income
- Failing to verify the domicile and tax status of all members of the family
- “My brother is back at home with my money”

# Questions





## Contact Information



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