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The International Comparative Legal Guide to:

Private Client 2019

8th Edition

A practical cross-border insight into private client work

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Country Question and Answer Chapters:

FOREWORD

Welcome to the 2019 edition of The International Comparative Legal Guide to Private Client which I am delighted to introduce this year. The Guide covers a comprehensive and diverse range of articles that would pique the interest of any domestic or international practice client adviser. The publication is designed to provide readers with a comprehensive overview of key issues affecting private client work, particularly from the perspective of a multi-jurisdictional transaction.

The Guide is divided into two sections and the first section contains seven general chapters. Each topical chapter is written by a different firm which will be most helpful for advisers with international clients.

The second section contains insightful country question and answer chapters. These provide a broad overview of common issues in private client laws and regulations in 35 jurisdictions.

As an overview, the Guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of private client work. The articles are provided by some of the most authoritative and respected advisers in the private client industry and I trust that you will find them just as valuable.

George Hodgson, CEO, STEP (Society of Trust & Estate Practitioners)

Navigating Complex US Immigration Laws: US Visas & Taxation

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Introduction

Over the past number of years, wealthy non-US individuals (also known as non-resident aliens or "NRAs") have established more presence in the United States, generally through direct investment in US assets (see the USA chapter), educating their children in the United States and ultimately moving to the United States. Often times, the knee-jerk reaction is to obtain a green card which, while allowing an NRA to stay in the United States permanently, also subjects him or her to worldwide taxation on his or her income. Fortunately, there are many other options available, short of obtaining a green card, which may allow an NRA to enter and remain in the United States either indefinitely or for a certain period of time without subjecting his or her worldwide income to taxation.

US Estate Tax Rules – *US v. NRA*

Overview of US Federal Income Tax

A person's status as a US citizen or "US income tax resident" (collectively referred to as a "US Person" or "US Persons") significantly affects the manner in which he or she is subject to US federal income tax. As discussed in more detail below, US Persons are subject to US federal income tax on worldwide income and capital gains, while non-US Persons (referred to as "non-resident aliens" or "NRAs") are subject to US federal income tax only on certain types of US source income and gains.

Generally, at the time of publication, US Persons are subject to US income tax on their worldwide income at graduated rates up to 37% (with a preferential tax rate of 15% or 20% applicable to long-term capital gains and dividends paid by US corporations and certain foreign corporations).[1] In addition to being taxed on assets held directly, US Persons may also be subject to tax on trust distributions and deemed distributions from certain US and non-US entities.

Non-US Persons will generally be subject to US federal income tax only on: (i) income that is, or is deemed to be, effectively connected with the conduct of a US trade or business (referred to as effectively connected income or "ECI"); and (ii) US source investment income (e.g., dividends, rents, annuities, royalties and similar income, collectively referred to as "FDAP Income"). In other words, a non-US income tax resident will generally not be taxed on non-US source income and gains. Additionally, a non-US Person is generally not subject to US federal income tax on (i) capital gains, excluding gains realised from the disposition of direct or indirect holdings of US real estate, and (ii) most non-contingent, non-related party interest income.

Non-US Persons are taxed on ECI in the same manner that US Persons are taxed on their worldwide income (i.e., on a net basis at graduated rates of up to 37%). FDAP Income earned by a non-US Person is subject to a flat 30% tax on a gross basis, unless an applicable income tax treaty provides for a lower rate or under tax code exemptions (e.g., portfolio interest). Finally, tax on FDAP Income is generally satisfied through withholding at source of payment (i.e., the tax is deducted by the payor of such income from the amount actually paid to the non-US Person recipient).

In addition, to prevent US shareholders from using offshore entities to defer US federal income tax, a US Person's ownership (or deemed ownership) in non-US companies is potentially subject to special anti-deferral regimes known as the controlled foreign corporation ("CFC") and passive foreign investment company ("PFIC") regimes.

US citizens, as well as green card holders and residents (collectively, "US Persons"), are subject to US income tax on their worldwide income at a maximum rate of 37%. Further, US Persons directly, indirectly or constructively owning interests in certain foreign corporations are subject to certain anti-deferral rules, which are generally intended to eliminate the deferral of the recognition of income to a US Person by using a foreign corporation. Each US shareholder of a foreign corporation that is treated as a controlled foreign corporation ("CFC") during any period of a taxable year must recognise certain types of income annually in the US, whether or not such income is actually distributed to the shareholder. Under current law, a foreign corporation is a CFC if more than 50% of the vote or value of the foreign corporation is held by US shareholders, which are US Persons directly, indirectly or constructively owning 10% or more of the vote or value of such foreign corporation. US Persons that are owners of or have certain transactions with a CFC must file Form 5471, *Information Return of U.S. Persons With Respect To Certain Foreign Corporations*.

If a foreign corporation owned by a US Person is not a CFC, it will generally be a passive foreign investment company ("PFIC") if 75% or more of its gross income for the taxable year consists of passive income, or 50% or more of its assets, on average, consists of assets that produce, or are held for the production of, passive income. A US Person with an ownership interest in a PFIC is generally subject to an interest charge on certain income of the PFIC and the capital gains of such PFIC are generally taxed at ordinary income rates. Certain elections may be available to mitigate or avoid these consequences. Further, US Persons with an ownership in a PFIC must file Form 8621, *Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*.

It is important for the NRA to analyse his or her current foreign holdings in order to possibly sell or restructure such holdings for purposes of US income, as well as US estate and gift tax planning.

A non-US citizen will be taxable as a US income tax resident for any particular year[2] if any of the three following requirements are met:

- such person is a "lawful permanent resident" of the United States (i.e., the individual holds a US "green card") (often referred to as the "green card test");
- such person meets the so-called "substantial presence test"; or
- such person makes an affirmative election[3] to be treated as a US income tax resident.

Green Card Test. A lawful permanent resident of the United States (i.e., a US green card holder) is a US income tax resident for US federal income tax purposes. Unless the treaty tie-breaker exception applies (as discussed below), once lawful permanent residence is obtained, an individual generally continues to be a lawful permanent resident and therefore a US tax income resident until such status is either surrendered or administratively or judicially revoked. In the absence of such a revocation or determination, a green card holder is a US income tax resident, regardless of the amount of time the person spends in the United States in a given year.

If there is an income tax treaty between the prior country of residence ("foreign country") and the United States, the treaty tie-breaker exception may apply if the individual remains a tax resident of the foreign country. If an individual is a resident of both the foreign country and the United States, under the treaty the competent authorities of both countries shall determine through consultations the country of which that individual shall be deemed to be a resident for the purposes of the treaty. The competent authorities will then look to the individual's permanent home, the centre of vital interests, and the habitual abode, in descending order, to determine an individual's residence.

Under the treaty tie-breaker exception, a green card holder will not be treated as a US income tax resident if the person (i) is treated as a resident of another country under an income tax treaty between the United States and that country, (ii) does not waive the benefits of such treaty applicable to residents of that country, and (iii) notifies the IRS of the commencement of such treatment (the "treaty tie-breaker exception") by filing IRS Form 8833.

There is a potential risk that by tie-breaking to the foreign country under the treaty the individual may trigger the revocation of the individual's US green card for immigration purposes. Although tax filings with the IRS are not shared with US Immigration and Naturalization Services, one should be aware of this risk.

Substantial Presence Test. A person who is neither a US citizen nor a green card holder may still become a US income tax resident and be subject to US federal income tax on a worldwide basis for a given year, if the person is (i) physically present in the United States for 183 days or more (including days of arrival and departure) in the year, or (ii) substantially present under the following test:

- the person has been physically present in the United States for at least 31 days (including days of arrival and departure) during the current calendar year; and
- the total number of days (including days of arrival and departure) the person is physically present in the United States during the current year, plus 1/3 of the total days of presence from the first preceding year, plus 1/6 of the total days of presence from the second preceding year equals 183 or more,

unless the person can demonstrate (by filing a "closer connection" statement with the IRS) that he or she:

- was present in the United States for fewer than 183 days during the current year;
- maintained a "tax home" in a foreign country during this same year; and
- generally maintained a "closer connection" to this foreign country than to the United States.

All three of these conditions must be met to fall within the "closer connection" exception. A tax home, for purposes of the closer connection exception, is one's regular or principal place of business or one's regular place of abode in a real and substantial sense. Generally, this tax home must be in existence for the entire current year, and must be located in the same foreign country where the closer connection is claimed. An individual must timely file IRS Form 8840 to claim the closer connection exception.

In the event that one spends over 183 days in the United States in one year and is not an exempt individual (as discussed further below), they will be a US income tax resident in that year as the closer connection exception will not apply to them. However, if they (i) will be maintaining their residence in the foreign country, (ii) do not physically reside in the United States for more than 183 days in one year, and (iii) meet the substantial presence test in that year, they could potentially claim the closer connection exception to avoid US federal income tax liability during that year.

Overview of US Federal Gift and Estate Tax

In the case of a decedent who is neither a US citizen nor a US domiciliary[4] at the time of death, the US estate tax (currently 40%) is generally only imposed on such portion of the decedent's estate consisting of "US situate property" at the time of the decedent's death. While US citizens and domiciliaries are entitled to exempt $10 million as indexed for inflation ($11,400,000 in January, 2019) from estate and gift taxation. However, the $10 million indexed amount is set to reduce to $5 million is indexed December 31, 2025. NRA's are only able to exempt $60,000 of value from their US *situs* assets. For these purposes, US situate property generally includes US real property, tangible personal property physically located in the United States, and certain intangible personal property issued by or enforceable against a US Person (such as shares of a US corporation). Shares of non-US corporations are generally not treated as US situate property for US federal gift or estate tax purposes.

Assets held by a trust may be included in the US taxable estate of a grantor or beneficiary of such trust if that individual possesses certain powers or rights over the trust. Accordingly, a trust intended to provide estate tax protection should be drafted to limit such powers. Finally, even if the individual creates a trust that does not have US situate assets at the time of their death, they may have US estate tax exposure if US situate property was transferred to the trust that was subsequently converted to non-US situate property.

In addition to the estate tax regime, the United States also imposes a gift tax (currently 40%) on taxable gifts made by US citizens or domiciliaries. This gift tax may also be imposed on individuals who are not citizens or domiciliaries of the United States if they make gifts of US situate property. For these purposes, US situate property generally includes US real property, tangible personal property physically located in the United States (such as jewellery, art, and currency), and checks drawn on US bank accounts. Importantly, and in contrast to the estate tax rules, it does not include US intangible property (such as shares of a US corporation). Therefore, gifts by non-US donors of non-US situate property are not subject to US gift tax.

Currently, it is unlikely that one will be considered a US domiciliary if they have a lack of ties to the United States. Since the individual is also not a US citizen, only US situate assets in their estate will be subject to US estate tax. Additionally, transfers of property by the individual during their lifetime will not be subject to US gift tax unless

they transfer tangible US situate assets. If they fund one or more trusts with non-US situate assets prior to acquiring US domicile, no US gift tax will be imposed with respect to their gifts into the trust. If they choose to fund any trust with a cash gift, they should fund the trust with cash from a non-US account in order to limit US gift tax exposure.

US Federal Tax and Information Filings

If and when an individual becomes a US Person, they will start to be subject to US federal income tax on a worldwide basis. The individual should engage a US accountant to prepare their US income tax returns, which must be filed by April 15 after the end of each year in which they are a US Person, unless extended.

If an individual has an interest in any specified foreign financial assets, such as financial accounts maintained by a non-US financial institution, stock or securities issued by a non-US entity, and other interest in a non-US entity, they may be required to report their interest in such assets on IRS Form 8938, Statement of Specified Foreign Financial Assets.[5] IRS Form 8938 should be attached to their US federal income tax return and filed by the due date for that return.

In addition, to the extent that an individual has a financial interest or signature authority over any non-US bank or financial account, their US accountant must report such account on FinCEN Form 114 (also known as the Foreign Bank Account Report, "FBAR"). The FBAR for each calendar year must be filed by June 30 in the succeeding calendar year if the maximum balance of the non-US financial accounts, in the aggregate, exceeds $10,000 at any time during the calendar year. Failure to comply with the FBAR filing requirements can trigger onerous penalties.

As previously provided, to the extent that an individual has interests in any CFCs or PFICs, they would have an obligation to file IRS Form 5471 with respect to their CFC interests and IRS Form 8621 with respect to their PFIC interests.

Types of US Visas

Turning to visas, it is fundamental to first differentiate between "immigrant" and "nonimmigrant" visas. Whereas an immigrant visa is permanent and colloquially referred to as a "green card", all other visas are nonimmigrant visas and allow a person to remain in the US on a temporary basis, albeit sometimes indefinitely. It is widely accepted that American immigration laws are the most complex in the world, with visas identified by letters starting with "A" and covering practically every alphabet in the English language. Congress has even envisioned a "Z" visa. This section will not discuss the various ways to get a "green card" except to emphasise that for wealthy, successful individuals it is relatively easy to obtain one *vis-à-vis* investment or establishing a US office of a foreign entity, or self-sponsorship if one is extraordinary in his or her field or one's activities in the US are in our "national interest". One may also quickly obtain a green card by petition filed by a US citizen spouse or adult child.

Let us therefore turn to the various nonimmigrant visas. Rather than list each and every visa available under US immigration laws, this chapter will focus on the more common ones and summarise their requirements, and "pros" as well as "cons".

Visitor for Business or Pleasure (B-1/B-2)

By far the most common visa, a B-1/B-2 is the visa for persons desirous of visiting the US for business or pleasure. Procedurally, it is quite simple. One simply submits an application to a US Consulate overseas. If one has a legitimate (e.g.: no employment) reason to visit the US and provides evidence of ties to one's home country then the visa is generally issued. Depending on the country of one's nationality, a B-1/B-2 visa is issued for up to ten (10) years and provides for multiple entries. The duration of a B-1/B-2 is determined by America's reciprocity with other nations.[6] With a B-1/B-2, one is generally admitted to the US for a period of six (6) months. Short of employment or attending a full-time course or formal training, one can engage in almost any other type of activity, including investment in the US.[7]

Note that the US has designated 35 countries as participants in the Visa Waiver Program.[8] Citizens of VWP countries do not need a B-1 or B-2 visa to enter the US. They simply register themselves with the US government-administered Electronic System for Travel Authorization (ESTA). A key difference between a B-1/B-2 and ESTA is that the latter allows one to remain in the US for a maximum of ninety (90) days and does not permit one to change one's status to any other category.

Treaty Investor (E-2) or Treaty Trader (E-1)

The US maintains treaties of commerce and navigation with numerous countries[9] whereby a citizen of a treaty country who wishes to enter the US to engage in trade, including trade in services or technology, principally between the US and the treaty country, or develop and direct the operations of an enterprise in which the citizen has invested a substantial amount of capital, may apply for an E-1 or E-2 visa. So long as a person maintains the business activity underlying an initial application for an E-1 or E-2 visa, one may renew the E-1 or E-2 visa indefinitely. It is not uncommon to see very successful and wealthy persons reside in the US in E status for many years and even decades. The spouse and minor children of an E-1 Trader or E-2 Investor are entitled to derivative visas and may accompany the principal trader or investor.

Student (F-1)

The US issues approximately 400,000 student or F-1 visas per year. The recipients of these F-1 visas range from children attending private/boarding schools to highly successful persons engaged in post-graduate doctoral studies or those pursuing second careers later in life. A little-known but very important benefit to parents of minor children in F-1 status in the US is the eligibility to remain in the US as a B-1/B-2 with the minor child so long as the child maintains his or her student status. This is particularly valuable because it allows parents to remain in the US with their minor children without having to get a green card or one of the other work or investor visas.

Unlike other visas, a person in the F-1 status is generally not subject to US income tax on non-US source income. This is a very unique feature of the F-1 and clearly very important for wealthy individuals who wish to attend school in the US – one is never too old to go to school! While the principal student gets an F-1, his or her spouse gets an F-2; and neither is taxable on non-US income.

Specialty Occupation (H-1B)

Often one wishes to come to the US to work for a US employer. The most common visa for this purpose is the H-1B. To be eligible for an H-1B, there must be an offer of employment by a US employer. The position must be specialised enough that it must, at a minimum, require one to possess a body of theoretical knowledge customarily associated with a US baccalaureate degree and one must possess a degree or its foreign equivalent in the field of specialty or a related

field. As a condition to filing an H-1B petition, a US employer must offer the H-1B worker a prevailing wage, which is the higher of the salary paid to all its similarly situated workers or the prevailing wage in the region of employment. To make sure US employers comply with the prevailing wage and other employment conditions designed to protect an H-1B worker as well as US workers, an employer must first file a Labor Condition Application with the US Department of Labor, which is charged with making sure employers comply with prevailing wage and other requirements. The prevalence of the H-1B can be best seen by the fact there is, as of the date of the writing of this chapter, a quota of 65,000 H-1Bs that can be issued in any fiscal year. In recent years, the US government has received nearly three times this amount within the first week of filing eligibility, effectively creating a lottery system. An H-1B is valid for a maximum period of six (6) years. While the spouse of an H-1B is eligible for derivative status known as an H-4, he or she may not work.

Intracompany Transferee (L-1A/L-1B)

Often successful and wealthy persons are owners and/or executives of a business located outside the US. If such a company establishes a US subsidiary or affiliate, then the US entity may transfer its foreign executive or manager to the US and seek L-1A classification. Those persons that are not managers or executives but who possess specialised knowledge of a company's products, services or processes are eligible for L-1B visas. The spouse and minor children are eligible for derivate L-2 visas.

Person with Extraordinary Ability (O-1A)

As with the E and L visas, successful and wealthy persons frequently possess extraordinary ability in their field. For these individuals, one must always consider an O-1 visa because unlike an E or L visa, the O-1 does not require a minimum investment or treaty. It merely requires a US employer, of which the individual may be an owner, to file a petition with US immigration authorities and provide evidence that a person possesses extraordinary ability in the sciences, arts, education, business or athletics. By regulations, one may establish extraordinary ability by providing evidence that one has received a major, internationally-recognised award, such as a Nobel Prize, or evidence of at least three (3) of the following:

- Receipt of nationally or internationally recognised prizes or awards for excellence in the field of endeavour.
- Membership in associations in the field for which classification is sought which require outstanding achievements, as judged by recognised national or international experts in the field.
- Published material in professional or major trade publications, newspapers or other major media about the beneficiary and the beneficiary's work in the field for which classification is sought.
- Original scientific, scholarly, or business-related contributions of major significance in the field.
- Authorship of scholarly articles in professional journals or other major media in the field for which classification is sought.
- A high salary or other remuneration for services as evidenced by contracts or other reliable evidence.
- Participation on a panel, or individually, as a judge of the work of others in the same or in a field of specialisation allied to that field for which classification is sought.
- Employment in a critical or essential capacity for organisations and establishments that have a distinguished reputation.

Furthermore, if the above standards do not apply to one's occupation, then one may submit comparable evidence in order to establish eligibility.

Note that there is also an O-1B visa available for those persons who have a demonstrated record of extraordinary achievement in the motion picture or television industry and have been recognised nationally or internationally for those achievements.

Practice Pointer

While the various visas on the books remain available, the adjudication of applications has become increasingly inconsistent based on various Executive Orders[10] issued by the Trump Administration.

US immigration laws are very complex, but within their complexity lies a tremendous opportunity to live, work, study and/or invest in the US in ways that minimise US income and/or estate tax consequences as well as risk. Often, the easy path is not the most desirable. For wealthy individuals and families, no consideration of US immigration laws can be had without coordination with wealth planning and tax counsel.

Endnotes

1. Certain income may also be subject to the additional "Medicare surtax" at 3.8% on net investment income, which, if applicable, will bring the highest rate with respect to ordinary income to 43.4% and with respect to long term-capital gain or qualified dividend income to 23.8%.
2. Individuals are usually taxed in the United States on the basis of the calendar year. An alien individual who has established a fiscal year in a foreign country prior to becoming subject to US income tax, however, may instead adopt a fiscal year. Once the individual has established either a calendar year or a fiscal year as his US-taxable year, however, he or she may not change that taxable year without the approval of the Internal Revenue Service (the "IRS").
3. A person can make this election for a given year if certain requirements are met.
4. Unlike the rules for determining residency for US federal income tax purposes, US residency for US federal estate and gift tax purposes is determined on the basis of one's citizenship and domicile. To be considered a US domiciliary, an individual must be physically present in the United States while simultaneously possessing the intent to remain there indefinitely. This intent requirement makes the determination of US domicile subjective in nature, and hence, more uncertain than the relevant US Person tests for determining one's US federal income tax residency. To determine whether a person has the intent to remain in the United States indefinitely, the IRS will consider all surrounding facts and circumstances including but not limited to the location of possessions, immediate family, friends, and other relatives, time spent inside and outside of the United States, where such an individual has government documents such as a US driver's licence, where an individual belongs to social groups, where such individual's business activities occur, etc.
5. See 9 Foreign Affairs Manual ("FAM") 41.31, Notes.
6. See http://travel.state.gov/content/visas/english/fees/reciprocity-by-country.html.
7. See 9 FAM 41.31, N 7.
8. See 9 FAM 41.2, Exhibit II.
9. See http://travel.state.gov/content/visas/english/fees/treaty.html.

10. E.g.: "*Buy American and Hire American*" https://www.whitehouse.gov/the-press-office/2017/04/18/presidential-executive-order-buy-american-and-hire-american; "*Enhancing Vetting Capabilities and Processing for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats*" https://www.whitehouse.gov/the-press-office/2017/09/24/enhancing-vetting-capabilities-and-processes-detecting-attempted-entry.

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Mark's practice is focused on domestic and international private client matters for affluent individuals and their families. His clients include entrepreneurs, corporate executives, family offices, real estate developers, business owners and investment bankers, as well as artists, writers, collectors and philanthropists. He has more than 20 years' experience in all aspects of estate and gift planning for individuals and families, many with complex multi-generational or multi-jurisdictional issues. He regularly advises corporate and individual fiduciaries and beneficiaries on all aspects of trust and estate administration. He also represents clients in connection with disputes including Will and Trust contests, fiduciary appointments and contested accountings. He is dual qualified, in the US and in the UK.

A former estate tax attorney with the Internal Revenue Service, Manhattan District, Mark has extensive experience handling tax audits of complex estates and substantial gifts. He also counsels charitable organisations and advises individuals on philanthropic matters.

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Partner – Global Head of Immigration

Reaz has significant experience American businesses, multinational companies, foreign investors, entrepreneurs and ultra-high-net-worth individuals on all aspects of immigration law and nationality law. Reaz has developed a sterling reputation as a knowledgeable, creative and solution-oriented attorney who fully understands the commercial benefit of predictable, efficient immigration counsel as well as the personal and professional implications of immigration upon the lives of executives, investors, business owners, professionals and their families.

Reaz concentrates on business, investment and employment cases and has successfully represented thousands of clients obtain nonimmigrant visas. On matters relating to immigrant visas or "green cards" he has extensive experience with all types of employment and investment based cases including extraordinary ability, multinational executive, National Interest Waiver and EB-5. In addition, Reaz represents individuals on family-based immigration matters.

A trusted advisor to other law firms, Reaz serves as immigration counsel to companies and law firms on M&A transactions, advises clients on intergovernmental matters, represents foreign companies and investors in establishing US offices and counsels US companies in establishing foreign operations. He is well versed on all aspects of US expatriation surrender and is deeply knowledgeable about the various citizenship and residence by investment programmes, having personally visited and filed cases in nearly all of these jurisdictions.

Reaz is also CEO of Withers Global Advisors, LLP, a residency and citizenship consultancy providing strategic risk management advice in the area of global migration.

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