PART OF THE LEHMAN TAX LAW
KNOWLEDGE BASE SERIES
"United States Taxation Of Investors"

U.S. Taxation of Foreign Investors

Non Resident Alien Individuals & Foreign Corporations

By
Richard S. Lehman *Esq*.
TAX ATTORNEY
www.LehmanTaxLaw.com

Richard S. Lehman *Esq.*

• Masters in Tax Law from New York University Law School

• Four years of U.S. Tax Court and Internal Revenue Service experience in Washington D.C.

• Richard Lehman regularly works with law firms, accountants, businesses and individuals struggling to find their way through the complexities of the tax law. *In short, Lehman is a valuable resource to each of these audiences.*

• With over 35 years as a tax lawyer in Florida, Lehman has built a national reputation for being able to handle the toughest tax cases, structure the most sophisticated income tax and estate tax plans, and defend clients before the IRS.

Over 35 years of Florida real estate experience with foreign investors that purchase:

- shopping centers
- rental apartments
- rental apartment houses
- warehouses
- land acquisitions
- real estate development deals of all types

www.LehmanTaxLaw.com • **Tel:** (561) 368-1113 • **Skype:** LehmanTaxLaw

Define The Foreign Investor

– **Non Resident Alien Individual**
  A non U.S. citizen individual who is NOT a Resident Alien

  ***NOTE*: Resident Alien** (Resident for U.S. Income Tax Purposes)

– **Foreign Corporations**
  A Foreign Corporation is any corporation that is not formed in the United States or under the laws of the United States or any state.

TAXATION PATTERN

U.S. **Resident Alien** ("Tax Resident") - Subject to Taxation

1. Income Taxation - Worldwide Income
2. Estate Taxation - Worldwide Assets
3. Gift Taxation - Worldwide Assets

Non Resident Alien
Individual Investor – Subject to Taxation

1. **Income Taxation** - United States source income, limited type of foreign Source income

2. **Estate Tax** - United States Situs assets only (includes real estate)

3. **Gift Tax** - real and tangible personal property with a United States Situs

Branch Tax - Corporations only

STATUS FOR TAX PURPOSES

A. Non-Resident Alien - <u>Not</u> a “Resident Alien”

B. Resident for Income Tax Purposes

1. Green Card
2. Substantial Presence Test
3. Voluntary Election

Exceptions:

4. The Closer Connection
5. Treaties: Tie Breaker

C. Foreign Corporations

Substantial Presence Test

NON RESIDENT ALIEN				RESIDENT ALIEN	
Residency "Days"	**Days in US**	**Year**	**Formula**	**Days in US**	**Residency "Days"**
120	120	2010	100%	120	120
40	120	2009	33.33%	150	50
20	120	2008	16.67%	120	20
180	Total			Total	**190**

EXCEPTIONAL CIRCUMSTANCES AND SPECIAL BENEFITS

Students

- A foreign student who has obtained the proper immigration status will be **exempt** from being treated as a U.S. resident for U.S. tax purposes even if he or she is here for a substantial time period that would originally result in the student being taxed as a U.S. resident.

- This student visa not only permits the student to study in the United States, but to pay taxes only on income from U.S. sources not worldwide income.

- The visa also permits the student's direct relatives to accompany the student to the United States and receive the same tax benefits.

TWO TYPES OF FEDERAL INCOME TAXATION PATTERNS

Foreign Taxpayer

Foreign Investors (both Alien Individuals and Foreign Corporations) pay U.S. tax on U.S. income in two entirely different ways depending upon whether the income the Foreign Taxpayer earns is from "passive" sources or whether the income results from the Foreign Taxpayer's conduct of an "active trade or business" in the U.S.

Source of Income Rules

1. U.S. Source Income
2. Foreign Source Income
3. Deductions

Taxation of ***Passive*** (Non Business Income)

1. 30% Flat Tax Rate - Gross Income
2. Withholding Obligations and Contingency

Taxation of ***Active Trade or Business*** Income

1. Graduated Corporate Tax Rates
2. Graduated Income Tax Rates
3. Effectively Connected Income
4. Income Effectively Connected with a U.S. Business

Treaties

SEVERAL IMPORTANT EXCEPTIONS

Capital Gains Taxation

Alien Individual = individual tax rates and generally no tax on capital gains

Foreign Corporation = corporate tax rates and generally no tax on capital gains

Estate Taxation

1. Alien Individual - Residency for Estate Tax Purposes
2. Non Resident Tax Rates

U.S. Real Property

1. U.S. companies holding U.S.Real Property and the U.S. Estate and Gift taxes

The Branch Profits Tax (*Foreign Corporation Only*)

Foreign Corporation

1. U.S. Trade or Business
2. Foreign Source Income

Unlike a Foreign Taxpayer that is taxed on passive U.S. source income only…

Income of a Foreign Taxpayer that conducts a trade or business in the U.S. will pay tax on <u>all of its United States source income</u> and in limited circumstances, U.S. tax must be paid on <u>income that is earned from foreign sources</u> and not U.S. sources.

Foreign source income that is attributable to a Foreign Taxpayer's U.S. trade or business activity may be taxed by the U.S. and is called "Effectively Connected Income".

Source of Income Rules

a. U.S. Source Income
b. Foreign Source Income
c. Deductions

There are a strict set of rules that govern the determination of whether income finds its source in the United States or a foreign place for U.S. tax purposes.

Source of Income

1. Compensation for personal services. The source of income from the personal services is located at the place where the services are performed.
2. Rents and Royalties: Rent or royalty income has its source at the location, or place of use, of the leased or licensed property.
3. Real Properly Income and Gain: Income and gain from the rental or sale of real estate has its source at the place where the property is situated.
4. Sale of Personal Property: Historically, gain from the sale of personal property has been sourced at the "place of sale" which is generally held to be the place where title to the goods passes; however, the rules have become more complex taking other factors in place.

Source of Income

5. Interest. The source of interest income is generally determined by reference to the residence of the debtor; interest paid by a resident of the United States constitutes U.S. source income, while interest paid by foreign residents is generally foreign-source income.
6. Dividends. The source of dividend income generally depends on the nationality or place of incorporation of the corporate payor; that is, distributions by U.S. corporations constitute domestic-source income, while dividends of foreign corporations are foreign-source income. There are, however, several important exceptions to these rules.

Source of Income

7. <u>Partially Within and Partially Without.</u> There is a set of source rules that consider the sources of income that can be partially earned in the U.S. and partially from foreign sources such as income from transportation services rendered partly within and partly without the United States; income from the sale of inventory property "produced", "created", "fabricated", "manufactured", "extracted", "preserved", "cured", or "aged" without and sold within the United States or vice versa, and several other types of income. Generally, this is done on some type of allocation basis between the source countries.

Source of Deductions

The source rules for deductions are considerably less specific than those dealing with gross income.

The rules regarding claiming deductions against U.S. income earned by a Foreign Taxpayer merely provide that taxable income from domestic or foreign sources is to be determined by properly apportioning or allocating expenses, losses, and other deductions to the items of gross income to which they relate.

THE EFFECT OF BILATERAL TREATIES - EXTREMELY IMPORTANT BENEFITS

Tax treaties between the U.S. and other countries can operate to;

1. reduce (or even eliminate) the rate of U.S. tax on certain types of U.S. income derived by Foreign Taxpayers situated in the treaty-partner country;
2. override various statutory source of income rules
3. exempt certain types of income or activities from taxation, by one or both treaty-partner countries; and
4. extend credit for taxes levied by one country to situations where the domestic law would not so provide.

SUMMARY

DEFINING THE FOREIGN INVESTOR-INCOME TAX PURPOSES

- Non Resident Alien Individual
- Foreign Corporation

TWO TYPES OF TAXATION

- U.S. Source Income
- Active Business Income
- Passive Income

EFFECT OF TAX TREATIES

EXCEPTIONS TO THE RULES

- REAL ESTATE
- EFFECTIVELY CONNECTED INCOME
- BRANCH TAX

THE BRANCH PROFITS TAX

A tax on Foreign Corporations (generally not treaty corporations) that taxes the annual un-invested cash of a foreign corporation that represents earnings and profits.

Foreign Corporation	
Net profit Before U.S. Taxes	$1,000,000
3% City Income Tax	(30,000)
5% State Income Tax	(48,500)
34% Federal Income Tax	(321,500)
30% U.S. Branch Tax	(180,000)
NET PROFITS	**$ 420,000**

(CORPORATE EXAMPLE)

Investing in U.S. Real Estate

Because the way in which Non Resident Aliens of Foreign Corporations passive income is treated by the U.S., the U.S. has had to devise a system to be able to assert its taxation on U.S. source income where they had no jurisdiction to tax the recipient.

Generally, in the case of passive capital gains caused by a Non Resident Alien or Foreign Corporation, there is no taxation. Therefore, there was no need to devise a taxing structure.[1]

1. this is not the case for Foreign Investors that invest in U.S. real estate or Foreign Investors that are not governed by "gains income" tax treaty and have "effectively connected capital gains income".

Practical Advice

1. Excellent time because dollar borrowing is cheap for strong investors. ***There is cheap money if you are strong*.**
2. Investment from Russia, China, Brazil, India, Israel, South Korea, Canada investment is strong because people are making money.
3. Investment is strong from Venezuela, Spain, and Latin America in general. These people are some of the people investing in America because they are afraid.
4. England, France, Germany, Netherlands, Belgium, Italy have always been investors in America and now investing in real estate in Europe where the shaky Euro prevails is certainly not the place to be.

Practical Advice

One client leads to another.

If you do the right job as a professional, it works.
If you do not, it does not work.

- Real Estate Attorney
- Tax Attorney
- Accountant
- Real Estate Broker(s)
- Appraisers

Any missing link spells the end if it is early in the relationship. A deal gone bad in Florida for someone who needs to fly in from New York for a day to fix it is alot different than a deal gone bad for a person who comes from Mumbai.

Taxation of Real Estate

History

Historical discussion until the mid 80's, N.V. corporations. Real Estate has its own Code Section separate apart from income and gains and losses from other kinds of income.

Basically, U.S. wants to have at least one tax.

- However, if you do not know what you are doing you can pay three taxes.
- If you really know what you are doing and the circumstances are right you can cut the normal tax an American would pay in half.

Potential Taxes

What are the taxes a foreign investor can be subject to?

- Tax planning for foreign investors' real estate requires a look at both the U.S. income tax consequences and U.S. estate and gift tax consequences and in the case of the foreign corporate investor, potential dividend taxes and a United States "branch tax".

- Often it means looking at the taxes in the Investor's home country to avoid double taxation.

Income Tax - Annual Income

There is a U.S. income tax that is applied on annual net income which starts at 15% and can be as high as 35% for both corporations and individuals.

There is a tax on capital gains from the sale of assets which is only 15% to an individual taxpayer, but may be as high as 35% to a corporate taxpayer.

Estate Tax

There is an estate tax when a non resident alien individual dies owning U.S. real estate of shares of certain types of entities that own U.S. real estate. Unlike Americans who get huge deductions in calculating their Estate tax, the first $60,000 of value is excluded. Thereafter this estate tax can be as high as 35% of the equity value of the real estate.

Gift Tax

There is also a gift tax if a non resident alien individual gifts U.S. real estate to a third party. This can be as high as the estate tax, depending upon the value of the gift.

Definition of Domicile

- A person acquires a domicile in a place by living there, for even a brief period of time, with no definite present intention of later removing there form.
- Residence without the requisite intention to remain indefinitely will not suffice to constitute domicile, nor will intention to change domicile effect such a change unless accompanied by actual removal.

The Branch Profits Tax

There is an additional tax that foreign corporations must be aware of.

This is a major trap for the unwary.

- Absent the tax benefits of an applicable United States tax treaty; a Foreign Corporation may be subject to not only two combined State and Federal income tax approaching 50%; but depending upon the facts and circumstances, foreign corporations with earning from United States investment could be subject to an <u>additional</u> United States tax known as the Branch Profits tax.

- The 30% tax is applied to U.S. income that is either not distributed as a dividend or reinvested in U.S. assets by the Foreign Corporation.

There are a multiplicity of tax strategies that can be used to make the most of all worlds.

NUMEROUS TYPES OF OWNERSHIP (ENTITIES)
FOR THE OWNERSHIP OF U.S. REAL ESTATE. ALL MUST BE
TAILOR MADE TO FIT THE INVESTORS

Available Entities

Entity	Advantage	Disadvantage
Individual Ownership	• Graduated Individual Income • Tax only on U.S. source income • Capital Gains Tax Rates @ 15% • No Branch Tax Concern	✓ Estate Tax Applies ✓ Gift Tax Applies ✓ Unlimited Personal Liability ✓ Disclosure of Ownership (Real Estate Records)

Available Entities

Entity	Advantage	Disadvantage
Limited Liability Co.	• Graduated Individual Income • Tax only on U.S. source income • Capital Gains Tax Rate at 15% • No Branch Tax • Limited Personal Liability • No Disclosure of Ownership	✓ Estate Tax Applies ✓ Gift Tax Applies to Transfer of Interest

Available Entities

Entity	Advantage	Disadvantage
Partnership	• Graduated Individual Income • Tax only on U.S. source income • Capital Gains Tax Rate at 15% • Limited Personal Liability • No Branch Tax • No Disclosure of Ownership	✓ Estate Tax Applies ✓ Gift Tax Applies To Transfer of Interest

Available Entities

Entity	Advantage	Disadvantage
U.S. Corporation	• Graduated Corporate Tax Rates • No Branch Tax • No Gift Tax on Transfer of Shares • Limited Personal Liability • No Disclosure of Ownership • Inexpensive Separate Tax Entity	✓ Capital Gains Taxed as Ordinary Income ✓ Dividend and/or Interest Tax (Double Tax) ✓ Estate Tax

Available Entities

Entity	Advantage	Disadvantage
Foreign Corporation (Not w/Tax Treaty Country)	• Graduated Corporate Rates • No Estate Tax on Death • No Gift Tax on Transfer of Shares	✓ Capital Gains ✓ Taxed as Ordinary Income ✓ Dividend/Interest Tax (Double Tax) ✓ Branch Tax ✓ Expensive Separate Tax Entity

Available Entities

Entity	Advantage	Disadvantage
Foreign Corporation	• Graduated Corporate Rates	✓ Capital Gains
(w/Treaty Country)	• No Gift Tax on Transfer of Shares	✓ Taxed as Ordinary Income
	• No Estate Tax	✓ Expensive Separate Tax Entity
	• Generally, No Branch Tax	
	• Reduced Tax on Dividends	
	• Reduced Tax on Interest	
	• Limited Personal Liability	
	• No Disclosure of Ownership	

Available Entities

Entity	Advantage	Disadvantage
Non Grantor Trust	• No Estate Tax • Income Tax Rate at Individual Personal Rates • Capital Gains Tax - 15% • No Branch Tax • No Personal Liability	✓ Give Up Ownership And Control of Asset

Available Entities

Entity	Advantage	Disadvantage
Tiered Corporate Entities	• Graduated Corporate Tax Rates • No Estate Tax • Flexibility for Income Tax Planning • No Gift Tax on Transfer of Shares • No Branch Tax • No Disclosure of Interests	✓ Expensive Separate Entity ✓ Capital Gains Taxed as Ordinary Income ✓ Dividend/Interest Tax (Double Tax)

The Individual Foreign Investor – The Problem of the Estate Tax

There are many exceptions to this general rule but it is still the general rule.

– The United Sates Estate tax is so onerous that the individual Foreign Investor will generally not want to assume the risk of his or her estate having to pay the United States a large tax on the death of the individual foreign owner.

– As a general rule, the individual foreign investor that invest in United States real estate in equity amounts of $1,000,000 or more is going to be forced to use a corporation formed outside of the United States (Foreign Corporations) somewhere in their investment structure if they are going to avoid the U.S. estate tax.

The Individual Foreign Investor - The Problem of the Estate Tax

- The Estate tax may not be a factor if one of the exceptions applies.
  - For example, if the Foreign Investor is from a country with whom the United States has an Estate Tax Treaty, the U.S. estate tax may not apply to that foreign individual.
  - If the individual Foreign Investor is from a country that has its own high estate tax, then the U.S. estate tax may not be of concern because it can be credited against the Foreign Investor's estate tax to his or her own country, so that there is no double estate tax.

Tax Planning Opportunities

Corporate Liquidations

- The principal tax planning tool of the use of the Foreign Corporation that owns a U.S. corporation to own its U.S. real estate is to make sure that when the United States real estate is sold by the U.S. Corporation, that U.S. Corporation must be liquidated after the sale.
  - In this fashion only one single U.S. tax is paid at the U.S. corporation level. The proceeds of sale may be transferred free of tax by the U.S. corporation after it has paid its U.S. tax if it is liquidating after the sale.
  - Often one Foreign Corporation may be used as a holding company and will set up several U.S. corporations to own different projects. That way each U.S. Corporation may be liquidated on a deal by deal basis, leaving the Foreign corporation in place.

Corporate Liquidation

Purchase Price and Basis =$1,000,000
Sales Price =$2,000,000
Taxable Gain = $1,000,000

Step 2 on chart below reflects the tax effects of liquidation. Step 3 reflects the tax effects of continuing the company's business.

STEP 1	STEP 2	STEP 3
Foreign Investor	$1,680,000 Cash to Shareholder	$1,472,000 Cash to Shareholder
Corporate Entity U.S. or Foreign		Corporate Entity
Real Estate	Cash net of Taxes $1,680,000 $1,000,000 Investment - 320,000 Corporate Tax ______ $1,680,000	Cash net of Taxes $1,680,000 $1,000,000 Investment - 320,000 Corporate Tax ***plus*** - 194,000 Dividend Tax ______ $1,472,000

Portfolio Loans

Another often used tax planning tool is known as the "Portfolio Loan".

- As a general rule a Foreign Corporation or a U.S. Corporation that owns U.S. real estate will be able to deduct as a business deduction all of the expenses of that ownership, which include the payment of interest on loans made to acquire the real estate.
- As a general rule, loans made by a Foreign Investor to his or her own Foreign Company, U.S. Company or Limited Liability Company will be deductible by the company.

*** However, the payment of such interest to the Foreign Owner of the company may be subject to a tax as high as 30% on the gross interest paid to the investing company's foreign shareholder.

Portfolio Loans

There is, however a major exception to this general rule provided in the Internal Revenue Code.

That is that a Foreign Investor who owns less than 10% of the real estate investment will be able to receive the interest that is deductible by the Foreign Company free of any U.S. tax whatsoever.

- This rule does not work in the event the investor owns 10% or more of the real estate investment or the entity that owns that real estate investment.
- This less than 10% requirement includes interest in the deal owned by certain relatives or related companies of the Taxpayer

Portfolio Loans

- Exclusion for interest paid to Foreign Investors.
  - This can be accomplished at the actual time of sale by a Foreign Investor of his or her U.S. investment.
  - To understand this, it is important to keep in mind that the portfolio interest deduction and exclusion from income is only appropriate if the Foreign Investor no longer has a 10% or less interest in the property.

Portfolio Loans

A Foreign Seller may wish to sell the property, not for all cash but rather for cash and the balance due in the form of a note payable by the U.S. Buyer to the Foreign Seller who no longer owns any part of the U.S. real estate.

- At that point the Foreign Seller will be receiving tax free interest from the note that the Foreign Seller holds as a result of the U.S. real estate and the property can be used to secure the note until its full payment.

- This method of converting what otherwise might be taxable sales proceeds into tax free interest income could be of significant tax value under the right circumstances.

SALE OF REAL ESTATE

Cost of	$1 ,000,000
Sales Price	$1,200,000
TAXABLE INCOME	**$ 200,000**

PORTFOLIO LOAN

Cost of Real Estate	$1,000,000
Sales Price	$1,000,000
Interest Paid over 2 years @ 15%	$ 300,000
(Real Interest 5%)	
TAXABLE INCOME	**0**

Example of Portfolio Loan Sales

Sale and Liquidation and Conversion of Portion of Sales Price to Interest Payments.

1.	Sales Price	$1,200,000.
	Basis is	$1,000,000.
	Gain	200,000.
	Tax Cost	70,000.
	Net	$1,130,000.
2.	Sales Price	$1,000,000. (No Gain)
	Interest	300,000. (No Tax)
	Two Calendar Years	$1,300,000. (Net)

Like Kind Exchange

- Another method used by both Foreigners and Americans alike to grow their U.S. real estate portfolios free of U.S. tax is to make sure of the "Like Kind Exchange Rules".
  - Essentially these rules hold that an investor in U.S. real estate may exchange the U.S. real estate project that they own for a different U.S. real estate project without paying any immediate tax of any gain or profit that may be accrued in the first investment.

Like Kind Exchange

For example:

A Brazilian investor owns a U.S. corporation which owns raw land that the investor purchased for $3 Million. Assume the raw land is now worth $6 Million and the investor wishes to terminate his investment in the raw land and instead own an income producing asst such as a shopping center. Assume the shopping center is worth $6.

– Even though the raw land has increased in the amount of $3 Million, none of that gain will be recognized or will it become taxable until the Corporation actually sells the real estate that it has acquired as part of the exchange.

– At that point the investor's investment in the shopping center has its original cost of $3 Million and any gain over and above that would be taxable if the shopping center were later sold.

Sale of Stock in a Foreign Corporation

Theory is no U.S. Jurisdiction.

Assume a Foreign Corporation owned by a Non Resident alien individual acquired a shopping center in the United States in 2000 for $10,000,000 and is selling it for $20,000,000, all cash in 2010. The tax on the gain is $3,350,000.

- Cash Distribution to Seller [$16,650,000]

Seller is Non Resident Alien

STEP 1.	**Non Resident Alien is the Seller**	**United States**
	Foreign Corporation	
	$10,000,000 Purchase Price and Adjustments	
	$20,000,000 Sales Price	
	$10,000,000 Gain	$3,350,000 U.S. Taxes
	Cash to Seller	**$16,650,000**

ALTERNATIVE STEP 1.

Non resident Alien individual sells stock of foreign corporation to U.S. buyer for **[$18,000,000]**

United States Buyer

STEP 2. **U.S. Buyer**

Acquires $20,000,000 Replacement Property with Corporations

$10,000,000 Cash Purchase Price

Borrows $18. Million for payment to Foreign Seller

- Cash $ 2,000,000
- Mortgage $18,000,000

United States

Conversion of Foreign Corporation To SubChapter S

Like Kind Exchange with Pre-Arranged Property - No Tax Paid

TEN YEARS LATER

STEP 3. **10 years Later**

Buyer Sells the property $20,000,000
Replacement Property for $25,000,000

Simplicity Assume Interest only
Mortgage for 10 years

Taxes paid equal
purchase price ($25,000,000)
minus original basis ($10,000,000)
multiplied by 15%

United States

SubChapter S
Corporate Seller

Sales Price	$25,000,000.
1st Mortgage	$18,000,000.
Net Cash	$ 7,000,000.
Taxable @	15%
Taxes paid	$2,250,000.
Net to Buyer	$ 4,750,000.
Investment by Buyer	$ - 0 -
Profit due Buyer	[$ 4,750,000.]

The Residency Starting Date

1. Green Card
2. Substantial Presence

Income Tax Planning for a U.S. Taxpayer

A. Foreign Businesses and Deferral w/15% Tax Rates
B. U.S. Tool Capital Gains, Tax Free Investments
C. Deferred Compensation Plans
D. Personal Deductions

U.S. Situs Assets

- Any tangible and intangible property located in the United States at death
- Real estate located in the United States
- Generally shares of stock owned in United States corporations
- Generally partnership interests in U.S. assets
- Generally debt obligations of United States persons, states and governmental authorities

  ** debt exceptions - do <u>not</u> include:*

  - bank deposits
  - life insurance proceeds
  - portfolio debt

Real Estate Tax Planning Tools

1) Liquidation of corporation after sale
2) The portfolio loan
3) Like kind exchanges
4) Sale of stock in foreign corporation

United States Taxation of Foreign Investors

Richard S. Lehman, Esq.
Of Counsel to The Oliver Law Group

Tel: (561) 368-1113 (*Palm Beach*)
Tel: (954) 419-9191 (*Broward*)
Fax: (954) 719-2428

1166 West Newport Center Drive / Suite 100
Deerfield Beach, FL 33442

www.LehmanTaxLaw.com