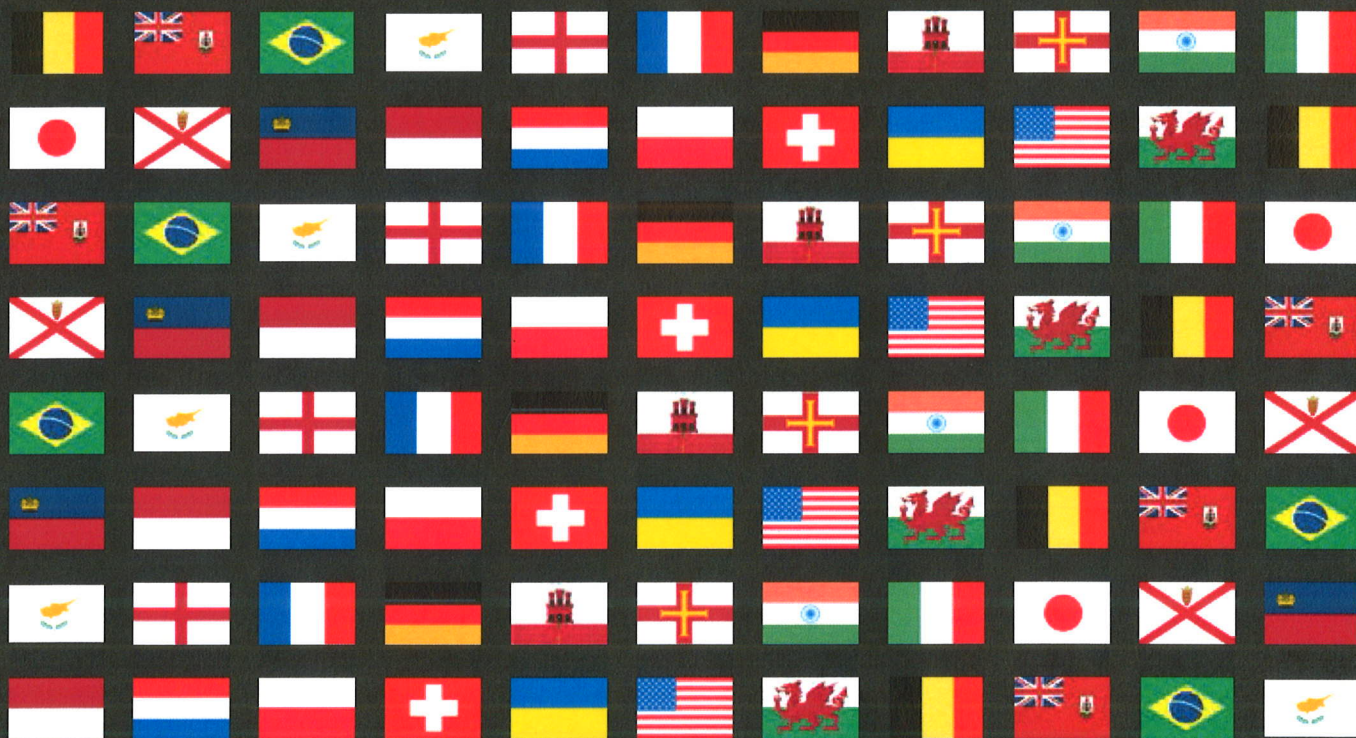


Private Client

Contributing editors

Anthony Thompson and Nicole Aubin-Parvu



United States

Stephen K Vetter and Eric Dorsch

Kozusko Harris Duncan

Tax

1 How does an individual become taxable in your jurisdiction?

The US imposes a tax on income (the income tax) and a tax on the transfer of wealth under the gift, estate and generation skipping transfer tax regimes (collectively transfer taxes). The determination of whether an individual is resident in the US for income tax or for transfer taxes is based on different standards, with the result that each category must be analysed separately.

Income tax

Non-resident aliens (NRAs) that are not considered resident in the US for income tax purposes are subject to federal income tax on their US-source fixed and determinable income (eg US-source interest, rent and dividends), and their income effectively connected with a US trade or business. The tax on an NRA's fixed and determinable income is collected through withholding, commonly referred to as the withholding tax. An NRA with effectively connected income must file a US income tax return.

US citizens and income tax residents are subject to federal income tax on their worldwide income.

Non-citizens are deemed to be income tax residents, and therefore subject to taxation on their worldwide income, if:

- they are lawful permanent residents of the US (ie, green card holders); or
- they meet the substantial presence test. Under the substantial presence test, an individual is US income tax resident if he or she is present in the US at least 31 days in the current year and at least a total of 183 days over the prior three years, counting each day in the current year as one day, each day in the prior year as one-third of a day and each day in the second year prior as one-sixth of a day. Partial days count as one day, but days spent in the US as a student, teacher or in transit generally do not count for the purposes of the substantial presence test. An individual who would otherwise meet the substantial presence test but has spent less than 183 days in the US in the current year may still be deemed not to be a US income tax resident if he or she has a closer connection to another jurisdiction.

Finally, individuals who are US income tax residents may qualify under a relevant income tax treaty to file non-resident income tax returns.

Transfer taxes

Individuals who are resident for US transfer tax purposes are subject to tax on the gratuitous transfer of their worldwide assets. Non-residents are only subject to US transfer tax on the gratuitous transfer of US situs assets.

An individual is deemed to be a resident of the US for transfer tax purposes if he or she is a US citizen or domiciliary. Unlike income tax residency, domicile is a facts and circumstances test. Courts consider a number of factors in determining an individual's domicile, including, but not limited to, location of family, location of businesses, location of homes, jurisdiction of driver's licence, membership in civic organisations and clubs, location of bank accounts, and voter registration.

US situs assets are defined differently for US gift and estate tax purposes. Generally, US real property and tangible personal property located in the US constitute US situs property for gift tax purposes. For

estate tax purposes, the definition is extended to include US intangible personal property, eg stock of US corporations.

2 What, if any, taxes apply to an individual's income?

As described in question 1, an income tax resident is subject to federal income tax on his or her worldwide income. Income tax is applied on a graduated rate schedule ranging from 10 per cent to 39.6 per cent. As described in question 3, capital gains may be eligible for preferred tax rates. Individuals are also entitled to various exemptions, deductions and credits, including deductions for charitable gifts and credits for foreign taxes paid.

As mentioned in question 1, the tax on a non-resident alien's US-source interest, rent and dividends is generally collected through a 30 per cent withholding at the source. A non-resident alien's income effectively connected with a US trade or business is subject to tax on the same terms as a US income tax resident.

3 What, if any, taxes apply to an individual's capital gains?

Long-term capital gains – gains from the sale of assets held more than one year – of US income tax residents are generally eligible for a preferred tax rate: 15 per cent for some taxpayers, but 20 per cent for those taxpayers in the highest bracket. In addition, the net investment income tax may apply an additional 3.8 per cent tax on the gains from assets held for investments for those taxpayers with income above a certain threshold, currently US\$250,000 for a married couple. Capital gains from the sale of assets held for less than one year are taxed at ordinary income tax rates.

Non-resident aliens are not generally subject to tax on capital gains unless such gains are effectively connected with a US trade or business. Further, NRAs are not subject to the net investment income tax. NRAs who are subject to capital gains tax may take advantage of the preferred capital gains rate.

4 What, if any, taxes apply if an individual makes lifetime gifts?

The US applies a gift tax to all gratuitous lifetime transfers from a US citizen or gift tax resident. A US citizen or gift tax resident is entitled to a unified lifetime estate and gift tax credit currently equal to a US\$5.45 million exemption (this is the amount for 2016 but is indexed for inflation). In addition, gifts of up to US\$14,000 per year per donee and certain gifts for educational and medical expenses are excluded from the gift tax.

Gratuitous transfers from individuals who are not US gift tax residents are not subject to the US gift tax unless the transferred property is a US situs asset; US real estate and tangible personal property located in the US.

Gifts to spouses who are US citizens are exempt from the gift tax. Gifts to non-citizen spouses of less than US\$148,000 per year (this is the amount for 2016, but is indexed for inflation) are excluded from the US gift tax. Transfers to charity may also qualify for a deduction from the US gift tax.

The gift tax is currently assessed at a maximum rate of 40 per cent.

5 What, if any, taxes apply to an individual's transfers on death and to his or her estate following death?

The US applies an estate tax to a US citizen's or estate tax resident's worldwide assets. A US estate tax resident is a person who is domiciled in the US. As discussed in question 4, the unified estate and gift tax credit applies to a US citizen or estate tax resident's estate, currently US\$5.45 million.

The estate of a non-US estate tax resident is only subject to US estate tax on US situs assets. US situs assets, for estate tax purposes, includes US real property, tangible personal property located in the US and intangible property located in the US; intangible property located in the US includes stock of US corporations. A non-US estate tax resident is entitled to a US estate tax credit equal to US\$60,000 exemption (this amount is not indexed for inflation).

Transfers at death to a US citizen spouse are not subject to the US estate tax. Transfers to a non-citizen spouse are subject to the US estate tax unless the transfer is made to a qualifying domestic trust. Transfers to charity, whether US or foreign, may qualify for a charitable deduction.

The estate tax is imposed at a maximum rate of 40 per cent. The US also imposes an additional tax on lifetime and testamentary transfers to individuals more than one generation removed from the transferor, called the generation skipping transfer tax (GST). Transfers by non-gift and estate tax residents are currently only subject to the GST tax if the transfer would have been subject to US gift or estate tax.

6 What, if any, taxes apply to an individual's real property?

Gains from the sale of real property by a US citizen or income tax resident may be subject to federal and state income tax. Generally, gains from the sale of real property will be treated as capital gains and may be eligible for a preferred tax rate. In addition, up to US\$250,000 (US\$500,000 if married) of gains from the sale of a principal residence may be excluded from income.

Gains from the sale of real property by a non-resident alien may also be subject to federal and state income tax. The Foreign Investment in Real Property Tax Act imposes a federal withholding tax regime on the gross proceeds, not gain, from the sale of US real property by NRAs.

Many states impose a tax on sales or transfers of real property. In addition, many state and local jurisdictions impose an annual property tax.

7 What, if any, taxes apply on the import or export, for personal use and enjoyment, of assets other than cash by an individual to your jurisdiction?

The US imposes a duty on the importation of personal use goods by residents and non-residents. Residents generally are entitled to a personal exemption on the importation of goods acquired while traveling abroad; however, the amount of the exemption varies depending on the location of travel. In addition, household effects generally are not subject to duty. There is generally no tax or duty levied on the exportation of personal use goods.

8 What, if any, other taxes may be particularly relevant to an individual?

The US imposes a generation skipping transfer tax (GST) on gratuitous lifetime and testamentary transfers to persons who are more than one generation removed from the transferor. The GST tax is imposed at the same rate as the gift and estate tax.

The US imposes an 'exit tax' on certain US citizens or long-term residents who expatriate from the US. In broad terms, the exit tax treats the covered expatriate as having sold all of his or her assets on the day before expatriation and imposes a tax on the deemed gain from such sale, less an exemption amount. In addition, the US imposes an inheritance tax on US persons who receive gifts from covered expatriates. This inheritance tax is imposed at the highest gift tax rate.

Many states and localities impose a state or local income tax, sales tax or real estate transfer tax.

9 What, if any, taxes apply to trusts or other asset-holding vehicles in your jurisdiction, and how are such taxes imposed?

Trusts are either treated as separate taxpaying entities (non-grantor trusts) or are disregarded as separate entities from their creators (grantor trusts).

A trust is a grantor trust if the creator of the trust retains sufficient control over it (eg the power to revoke, the power to control distributions). In the case of a grantor trust, the settlor is treated as earning the trust's income. The amount of tax actually owed by the settlor depends on whether the settlor is a US person (citizen or resident). A settlor who is a US person will be taxed on the worldwide income of the grantor trust. A non-resident non-citizen settlor will be taxed only on US-source fixed-determinable income and income effectively connected with a US trade or business earned by the grantor trust.

A non-grantor trust, on the other hand, may itself be taxable on recurrent income or may be entitled to a deduction for income distributed to the beneficiaries. The amount of tax owed by the trust depends on whether the trust is foreign or domestic. A beneficiary who is a US person is generally required to report as income the amount of the income earned by the non-grantor trust and distributed to the US person. A non-resident non-citizen beneficiary will generally be taxed only on US-source fixed-determinable income and income effectively connected with a US trade or business distributed by the non-grantor trust to the non-resident non-citizen beneficiary.

Under the two-part test for US federal income tax purposes, a trust must satisfy both the court test and the control test to be a domestic trust; otherwise it is a foreign trust. A trust satisfies the control test if one or more US persons have the authority to control all substantial decisions of the trust.

A trust satisfies the court test if a court within the United States is able to exercise primary supervision over the administration of the trust. Distributions from a foreign non-grantor trust to a US beneficiary may be subject to the 'throwback' tax regime. If the throwback tax applies, income will be taxed at the ordinary income tax rates plus an additional interest charge.

10 How are charities taxed in your jurisdiction?

In general, charities that have registered as tax-exempt entities are not subject to US income tax. However, the US does impose an income tax on a charity's business income that is unrelated to its purposes. Contributions to qualified charities are eligible for an income tax deduction.

Trusts and foundations

11 Does your jurisdiction recognise trusts?

Trusts are recognised and widely used in the US. When a trust is created, a settlor separates the legal title from the equitable title to property. The settlor conveys the legal title to a trustee, and the equitable title to a beneficiary or beneficiaries. The settlor may also be a trustee, a beneficiary, or one of several trustees or beneficiaries. The trustee takes title to property only for the purpose of protecting or conserving it for the beneficiaries of the trust. The beneficiaries, however, are usually not the creators of the trust, and as such do no more than accept the benefits of the trust. The trustee, while holding title, is obligated to deal with trust property solely in the beneficiaries' best interest. The beneficiaries, on the other hand, while being the beneficial owners of the property, do not have title to the property itself, and are not able to transfer or otherwise deal with trust property.

Trusts governed by the laws of other jurisdictions are recognised in the US.

12 Does your jurisdiction recognise private foundations?

In US custom and practice, foundations formed as non-profit corporations, along with charitable trusts, are the favoured vehicles for managing assets set aside for charitable purposes by a particular individual or subsequent third-party contributors. Since these organisations are usually established to be exempt from income taxes and to provide tax benefits to their contributors, the US tax rules govern a foundation's permitted activities (the purpose may be broad, such as 'educational', but the operations must comply with these purposes), and such entities may not be used to benefit individuals, engage in self-dealing with their major contributors, nor be used to transfer wealth from one generation to another.

A foreign private foundation may qualify as a private foundation under the IRS rules as long as it complies with the requirements of section 501(c)(3).

Same-sex marriages and civil unions

13 Does your jurisdiction have any form of legally recognised same-sex relationship?

In 2015, the US Supreme Court ruled that all US states must license and recognise same-sex marriages. Accordingly, same-sex marriages are recognised in every US state. As a matter of federal constitutional law, individuals in same-sex marriages are treated the same as individuals in heterosexual marriages for all tax and succession purposes.

14 Does your jurisdiction recognise any form of legal relationship for heterosexual couples other than marriage?

Many US states also recognise civil unions or domestic partnerships. The rules for establishing such relationships vary depending on the particular jurisdiction but generally involve registering with a state agency. These types of relationships are generally available to both same-sex and heterosexual couples.

While some states recognise these types of relationships for certain tax and succession purposes, the US federal government does not and individuals in a domestic partnership are still required to file individual tax returns.

Finally, some US states recognise common-law marriage, an informal marriage established through habit and time. Common law marriage does not require any formal steps.

Succession

15 What property constitutes an individual's estate for succession purposes?

An individual's estate for succession purposes consists of all those assets owned directly, and in some cases indirectly, by the individual. In addition to assets held directly by an individual, assets held in a trust over which the individual has a lifetime or testamentary general power of appointment may be considered part of the individual's estate. Property owned through certain legal relationships, such as a joint tenancy with rights of survivorship or a tenancy by the entirety, will not be considered part of an individual's estate.

16 To what extent do individuals have freedom of disposition over their estate during their lifetime?

An individual is generally free to dispose of his or her estate during his or her lifetime. However, in some community property states, an individual may not dispose of community property without consent of the spouse.

17 To what extent do individuals have freedom of disposition over their estate on death?

An individual is generally free to dispose of his or her assets at death. However, many states utilise a concept known as 'elective share' that protects a spouse's interests at death. It is a statutory right giving the surviving spouse a fractional share of the deceased spouse's estate, usually ranging from one-half to one-third depending on the state and the number and percentage of surviving children or other related persons. The elective share right includes real and personal property, and applies to husbands and wives. In addition, many states provide that minor children have a right to a certain amount of the estate. In community property states, a spouse can generally only dispose of one-half of the community property. Furthermore, certain ownership relationships, such as tenancy by the entirety and payable at death bank accounts, eliminate an individual's ability to dispose of such property at death.

18 If an individual dies in your jurisdiction without leaving valid instructions for the disposition of the estate, to whom does the estate pass and in what shares?

If an individual dies without a valid will, the individual's estate will be disposed of pursuant to the intestate succession rules of the jurisdiction of the individual's domicile at death. Each US state has different intestate succession laws, but the rules generally provide that the individual's estate will go to his or her closest relatives. For instance, in New York the intestate succession rules provide that a surviving spouse will receive US\$50,000 plus one-half of the remaining assets, and that the descendants will receive one-half of the remaining assets. Note that certain assets are not included in the individual's estate for intestate

Update and trends

The Foreign Account Tax Compliance Act (FATCA) reporting regime continues to be rolled out and has resulted in significant increases in reporting and compliance requirements.

The IRS has indicated that it intends to issue new regulations requiring the disclosure of the beneficial ownership of all US limited liability companies with a single non-US owner. In addition, the Department of Treasury has issued regulations requiring the disclosure of the beneficial ownership of any all-cash real estate purchases in all boroughs of New York City, and counties in or near Miami FL, Los Angeles CA, San Francisco CA, San Diego CA and San Antonio TX.

succession purposes (eg, life insurance proceeds, certain retirement assets and assets held in trust).

19 In relation to the disposition of an individual's estate, are adopted or illegitimate children treated the same as natural legitimate children and, if not, how may they inherit?

An individual can generally leave his or her property to anyone he or she wants, subject to qualifications discussed in question 16. Adopted children are generally treated the same as natural-born children. However, 'illegitimate' children may be treated differently in some states. If a parent of an illegitimate child dies without a will, most states do not protect the child's right of inheritance as strongly as if the child were born to married parents or otherwise legally legitimated. For example, in some states, in the absence of a will or trust, the child can fully inherit from the mother but not from an unmarried father. In light of these differences, many states provide for a legal paternity statement, which can eliminate some of the differences.

20 What law governs the distribution of an individual's estate and does this depend on the type of property within it?

For most of a decedent's property, the law of his or her state of domicile will govern. However, the distribution of certain property (eg real property and tangible personal property) will be governed by the law of the state where the property is located. Under these rules, an individual's estate will often be subject to multiple probate proceedings, one in his or her state of residence and then ancillary probate proceedings in the jurisdictions where his or her other property is located, for instance in the jurisdiction of the vacation home.

For a non-US decedent, original probate will generally be required in his or her home jurisdiction. Ancillary probate proceedings will then be required in the US states where his or her property is located. Generally, these ancillary probate proceedings will require the appointment of a US administrator or executor.

21 What formalities are required for an individual to make a valid will in your jurisdiction?

The most common form of will in the US is a formal written will often called a non-holographic will. Each state has different requirements for executing a non-holographic will, but most states have at least the following requirements:

- the testator is of sound mind;
- the testator is at least 18;
- the testator signs the will at the end; and
- the execution of the will is in the presence of two disinterested witnesses.

In addition to non-holographic wills, certain states permit holographic, also known as handwritten, wills and oral wills. The formalities required for these types of wills are not as rigorous.

22 Are foreign wills recognised in your jurisdiction and how is this achieved?

Foreign wills are recognised in the United States. Each state has different requirements for admitting a foreign will for probate. Generally, probate courts will require a copy of the foreign will, a certified translation of the foreign will by a qualified translator and an affidavit from the qualified translator.

23 Who has the right to administer an estate?

The person named in the decedent's will as the estate's executor (alternatively called the administrator or the personal representative) administers the estate. If there is no one named in a will or the named individual is unable to serve, state law will dictate who serves as executor. The probate court will issue letters testamentary (or similar such documents) empowering the executor to act on behalf of the estate. The executor acts in a fiduciary capacity and has broad powers to administer and distribute the estate.

24 How does title to a deceased's assets pass to the heirs and successors? What are the rules for administration of the estate?

With respect to assets included in the probate estate, upon distribution from the estate, the executor transfers title of the assets to the heirs. Title to certain assets that are not included in the probate estate (eg joint tenancy property, community property or pay on death accounts) transfer as a matter of law. Finally, title to assets held in trust is transferred by the trustee of the trust.

25 Is there a procedure for disappointed heirs and beneficiaries to make a claim against an estate?

Disappointed heirs can raise their objections in the probate proceedings. However, some form of waiver and consent is generally required in all jurisdictions in order to receive a distribution from the estate.

Capacity and power of attorney

26 What are the rules for holding and managing the property of a minor in your jurisdiction?

Minors generally do not have the legal capacity to own property or open bank accounts. Most states have adopted the Uniform Transfers to Minors Act (UTMA) and the Uniform Gifts to Minors Act (UGMA). These laws permit the creation of accounts for the benefit of the minor with a guardian or custodian acting on behalf of the minor until the minor reaches the age of majority, generally age 21 for the purposes of these accounts.

27 At what age does an individual attain legal capacity for the purposes of holding and managing property in your jurisdiction?

Generally, when an individual reaches the age of 18, he or she attains legal capacity to manage property.

28 If someone loses capacity to manage their affairs in your jurisdiction, what is the procedure for managing them on their behalf?

Prior to losing capacity, an individual may execute a financial power of attorney authorising an agent to manage his or her financial affairs. If an individual becomes incapacitated without having executed a financial power of attorney, a court can appoint a guardian to manage the individual affairs.

Immigration

29 Do foreign nationals require a visa to visit your jurisdiction?

Generally, foreign nationals need a visa to visit the US. However, citizens of countries that participate in the Visa Waiver Program do not need a visa to visit the US. Most European countries participate in the Visa Waiver Program.

30 How long can a foreign national spend in your jurisdiction on a visitors' visa?

Foreign nationals can generally spend up to six months in the US on a tourist visa. Citizens from countries participating in the Visa Waiver Program can generally spend up to 90 days in the US.

31 Is there a visa programme targeted specifically at high net worth individuals?

The EB-5 visa (employment-based fifth preference visa) programme provides a means for individuals who make certain investments in the US to obtain a visa and permanent residency. In order to qualify for the programme, the foreign national must invest at least US\$1 million (less in certain locales in the US) in a new commercial enterprise that generates at least 10 new full-time jobs.

32 If so, does this programme entitle individuals to bring their family members with them? Give details.

Spouses and unmarried children under the age of 21 of the investor may also obtain a visa and permanent residency under the EB-5 programme.

33 Does such a programme give an individual a right to reside permanently or indefinitely in your jurisdiction and, if so, how?

A participant in the EB-5 programme is initially granted conditional permanent residency (a green card). After two years, if the applicant has complied with the requirements of the programme, the participant is granted full permanent residency.

KHD

KOZUSKO
HARRIS
DUNCAN

Stephen K Vetter
Eric Dorsch

svetter@kozlaw.com
edorsch@kozlaw.com

1666 K Street NW
Suite 400
Washington, DC 20006-1219
United States
Tel: +1 202 457 7200
Fax: +1 202 457 7201

575 Madison Avenue
Suite 704
New York, NY 10022
United States
Tel: +1 212 980 0010
Fax: +1 212 751 0084

www.kozlaw.com

34 Does such a programme enable an individual to obtain citizenship or nationality in your jurisdiction and, if so, how?

Five years after having initially been granted conditional permanent residency, an EB-5 participant may apply for US citizenship. In order to qualify for naturalisation, as of the date of filing the green card holder must:

- be at least 18;
- have lived within the state for at least three months;
- have had continuous residence in the United States as a green card holder for at least five years immediately preceding the date of filing the application;

- be physically present in the United States for at least 30 months out of the five years immediately preceding the date of filing the application;
- reside continuously within the United States from the date of application for naturalisation up to the time of naturalisation;
- be able to read, write and speak English and have knowledge and an understanding of US history and government (civics); and
- be a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States during all relevant periods under the law.