

## Estate and Gift Tax Rules for Non-Citizen Spouses

This memorandum provides a general understanding of the special estate and gift tax rules applicable to non-U.S. citizen spouses.

### ESTATE TAX

**1. U.S. Estate Taxation.** The estates of U.S. citizens (and resident aliens) are subject to estate tax with respect to all property held by the decedent, wherever located. By contrast, the estates of nonresident aliens are taxed only on property situated in the U.S. at death. Property that is subject to estate tax at a person's death is referred to as the decedent's "gross estate," from which various deductions are available to arrive at the decedent's "taxable estate." The appropriate tax rate is then applied to the decedent's taxable estate, and from there, a number of dollar-for-dollar tax credits may be applied to finally arrive at the estate's estate tax liability.

**2. The Estate Tax Marital Deduction.** An important estate tax deduction for U.S. citizens and resident aliens is the unlimited marital deduction for certain transfers to a surviving spouse. In other words, the value of property transferred to a surviving spouse is deducted from the deceased spouse's gross estate to arrive at the deceased spouse's taxable estate. However, the marital deduction is available only for transfers to surviving spouses who are U.S. citizens or, if the surviving spouse is not a U.S. citizen, it is available for transfers to a "qualified domestic trust" for the spouse's benefit (commonly referred to as a "QDOT"). A U.S. citizen or resident alien who uses a QDOT to leave property to a nonresident spouse is permitted an estate tax marital deduction for the value of the property transferred to the trust.

**3. Qualified Domestic Trusts.** As described above, a qualified domestic trust allows the U.S. citizen or resident alien decedent to deduct from his or her gross estate the value of property transferred to the trust. Estate tax is then imposed upon distributions of capital from the trust to the surviving spouse during his or her lifetime and on the value of the property remaining in the trust on the date of the surviving spouse's death. In short, a QDOT allows the estate tax to be deferred until the surviving spouse's

death (or until distributions of capital are made to the surviving spouse).

In general, to qualify as a QDOT, a trust must: (1) have at least one trustee who is a U.S. citizen or domestic corporation and (2) provide that no distribution (other than a distribution of income) may be made from the trust unless the trustee who is a U.S. citizen or domestic corporation has the right to withhold from such distribution the estate tax described in the paragraph above. The decedent spouse's executor must also make an election on the estate tax return to treat the trust as a QDOT.

### GIFT TAX

**1. U.S. Gift Taxation.** The U.S. gift tax applies to transfers of property made during the transferor's lifetime. For resident aliens and U.S. citizens, the tax applies to all gratuitous transfers of property, wherever situated. But for nonresident aliens, the tax applies only to gratuitous transfers of tangible property situated in the U.S.

**2. The Gift Tax Marital Deduction.** Similar to the unlimited estate tax marital deduction, spouses are allowed an unlimited deduction for certain lifetime transfers to each other. Unlike the estate tax marital deduction, however, the unlimited gift tax marital deduction is available only for gifts to spouses who are U.S. citizens, and is not available for gifts to a nonresident spouse through a QDOT. Rather, a spouse is limited to giving \$133,000 per year (adjusted for inflation) to his or her non-citizen spouse free of gift tax.

**3. Gifts to Third Parties.** In addition to the marital deduction described above for gifts between spouses, U.S. law also provides for tax-free transfers by spouses to third parties (such as children). Currently, a person can give away \$15,000 per year, per donee, gift-tax free. This is known as the "annual exclusion." Typically, spouses are allowed to "split" gifts, which means that both of their annual exclusions are applied to a single gift, thereby doubling the total annual exclusion to \$30,000 per year, per donee. However, this gift-splitting is not available where one of the spouses is a nonresident alien (unless a gift tax treaty provides otherwise). Gift-splitting is available

if either (or both) of the spouses is a non-citizen, but both spouses must be U.S. residents.