Guidelines 04/24

US ESTATE AND GIFT TAXES

This guideline provides a general overview of the US inheritance and gift taxes that need to be considered when non-Americans invest in US situs assets.

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Wenger Vieli Ltd.
Dufourstr. 56
P.O. Box
8034 Zurich
—
Metallstr. 9
P.O. Box
6302 Zug
—
+41 58 958 58 58
guidelines@
wengervieli.ch

Considering the broad scope of US estate taxes and the significant differences between the US estate tax system and the Swiss inheritance tax system, Swiss owners of US situs assets (such as real estate in the USA or shares in US legal entities) are often unaware of the potential US estate tax implications. This guideline provides a general overview of the US estate and gift taxes to be considered when non-Americans invest in US situs assets.

A. Introduction

The US estate and gift tax system includes three types of transfer taxes:

1. Estate Tax
2. Gift Tax
3. Generation Skipping Transfer Tax

The US estate tax has broad effect and can apply both to US persons as well as to foreign (e.g., Swiss) persons who directly own assets located in the USA.

Considering the above, when Swiss individuals consider investing in assets situated in the USA such as real estate or corporations, potential US transfer tax obligations, especially the estate tax, should be considered and planned properly. Both the US gift and estate tax can typically be planned in advance.

B. US Estate Tax

1. Introductory Remark

When discussing the US estate tax, it is important to understand that the USA applies an estate tax instead of an inheritance tax, which is more common in Europe and especially in Switzerland. Based on this system, the tax is levied on the transfer of an estate rather than on the inheritance by the heirs. However, it may be noted that many states in the USA (e.g., New York) have implemented additional estate or inheritance taxes on a state level, which should be considered as well. The following overview is limited to the US Federal estate tax.

2. Estate Tax Subjects

While for US *income* tax purposes (see also our Guideline «Expansion into the USA: Do's and Don'ts from a Tax Point of View»), tax liability in the USA basically results if a person is a US citizen, a permanent resident (permanent resident card [green card]), has US source income (i.e., is working inside the United States) that is not protected by a tax treaty or if they meet the substantial presence test. As explained, US estate taxes apply more broadly, especially when US situated property is held directly.

US estate tax applies differently as between US "domiciled" decedents and a non-US domiciliary decedents.

2.1. US Domiciled Decedents

A person qualifies as a US decedent if he or she was a US citizen *or* had his or her domicile in the USA at the time of death. In this regard, a person is considered being domiciled in the USA based on the following facts and circumstances, focusing on an individual's intentions:

- Duration of the stay in the USA
- Living style, size of the house etc. in and outside of the USA
- Ties to the USA or other countries such as the location of family members
- Location of business interests
- Citizenship and permanent residency status
- Statement of intent in tax returns, last will etc.

Before spending significant time in the United States, non-US persons are advised to analyze whether their links to the USA result in them being viewed by US tax authorities as being US domiciled. If a decedent is classified as a US domiciled decedent, the decedent's *worldwide net assets* (estate) are subject to US estate tax.

2.2. Non-US Domiciled Decedents and US Situs Assets

A person qualifies as a non-US domiciled decedent if he or she was not a US citizen and not domiciled in the USA at the time of his or her death.

If a person qualifies as a non-US domiciled decedent, only the decedent's US situs assets are potentially subject to the US estate tax. In this regard, US situs assets include (non-exclusive, simplified list):

- Real estate in the USA
- Shares in US corporations
- US investment funds

«Both the US gift tax and the US estate tax can typically be planned for in advance.»

- US derivatives and structures products
- Art, cars, jewelry, physical property etc. located in the USA

Funds in US bank accounts are not treated as US situs assets for US estate tax purposes (but transfer of cash from US bank accounts can be viewed as taxable US gifts for US gift tax purposes).

3. Estate Tax Rates

The estate tax rate is based on a progressive tax table ranging from 18% to a maximum rate of currently 40% which is applied on a taxable estate of more than USD 1 million.

4. Taxable Estate

4.1. Gross Estate

For the determination of the taxable estate, the gross estate is to be calculated at the fair market value of all assets owned by the decedent on the date of death.

In this regard, generally 50% of the jointly owned property of married US citizens is included in the estate of the decedent. If the surviving spouse was not a US-citizen, on the other hand, all assets are basically included in the estate unless it can be substantiated that the surviving spouse provided the funds to purchase particular assets, which would then be excluded.

4.2. Deductions

Based on the gross estate, certain deductions such as mortgages and other debts, estate administration expenses, property that passes to surviving spouses (marital deductions for US-citizen spouses) and charities are allowed when determining the taxable estate. Additionally, the value of e.g. operating businesses of estates may be reduced. These deductions should be analyzed carefully.

4.3. Unified credit exemptions

Generally, an estate tax return must be filed if (amongst other things) the gross estate of the decedent is valued higher than the filing threshold or unified credit exemption limit. In this regard, it is important to note that the unified credit exemptions represent lifetime exemptions applied to gifts and/or inheritances. Therefore, the amount of credit exemption is decreased by the amount of the gifts made during the lifetime of the decedent.

In 2024, the filing threshold for non-US domiciled decedents is USD 60'000.

For US domiciled decedents, the 2024 filing threshold as adjusted to inflation is USD 13'610'000 (i.e., USD 11'180'000 plus inflationary adjustments). It may be noted that as of 2026, the current filing threshold of USD 11'180'000 plus inflationary adjustments, which was introduced for a limited period from 2018 to 2025, could be reduced again to USD 5'490'000 plus inflationary adjustments.

As already mentioned above, the exemption limit of USD 13'610'000 (2024) generally only applies to US decedents and to residents of a country which has concluded a double taxation agreement with the USA regarding estate and inheritance taxes, such as Switzerland. For Swiss resident decedents who qualify for US-Swiss estate tax treaty benefits, this essentially means that if their worldwide estate (all assets everywhere) are valued under USD 13'610'000 for deaths in 2024, they would be under the payment threshold but would likely need to coordinate with tax counsel to properly claim these estate tax treaty benefits in the required US estate tax filings. To the extent the worldwide estate exceeds the applicable threshold amount, US estate taxation may be owed. See section 4.4 below for how the lifetime estate tax exemption amount is allocated under the estate tax treaty.

Further, the Internal Revenue Service (IRS) grants a credit for estate and inheritances taxes paid in a foreign country in respect of property located in countries outside the US (e.g., non-situated US property for which non US jurisdictions impose an estate tax).

4.4. Swiss – US Estate Tax Treaty

As discussed, for non-US domiciled decedents that were Swiss tax residents at the time of their death that subject to US estate taxes on their US situs assets, the same lifetime US estate exemptions apply that would be allowable if the individual had been domiciled in the USA pursuant to art. 3 of the Convention between the Swiss Confederation and the United States of America for the avoidance of double taxation with respect to taxes on estates and inheritances ("ETT CH-US").

The following calculation formula is used (applicable in 2024):

$$\frac{US\ situs\ assets}{worldwide\ estate}\ x\ USD\ 13'610'000\ [exemption\ limit]\ =\ \boldsymbol{exemption}$$

Taking into account the exemption amount calculated above, the estate tax due is calculated as follows:

$$(US\ situs\ assets - exemption)\ x\ 40\%\ [applicable\ estate\ tax\ rate] = \boldsymbol{estate\ tax\ due}$$

Example 1:
- Non-US, Swiss decedent
- Worldwide estate: USD 10 million
  - US situs assets: USD 3 million (US real estate and listed shares)
  - Swiss situs assets: USD 7 million (Swiss real estate and shares in a Swiss family business)

$$\frac{3'000'000}{10'000'000}\ x\ 13'610'000\ =\ \mathbf{4'083'000}$$

$$(3'000'000 - 4'083'000)\ x\ 40\%\ =\ \textbf{no estate tax due}$$

Example 1 illustrates that no US estate tax is owed.

Example 2:
- Non-US, Swiss decedent
- Worldwide estate: USD 16 million
  - US situs assets: USD 8 million (US real estate and listed shares)
  - Swiss situs assets: USD 8 million (Swiss real estate and shares in a Swiss family business)

$$\frac{8'000'000}{16'000'000}\ x\ 13'610'000\ =\ \mathbf{6'805'000}$$

$$(8'000'000 - 6'805'000)\ x\ 40\%\ =\ \textbf{478'000 estate tax due}$$

Considering the above, it should be noted that a US estate tax return has to be filed by Swiss or non-US decedents if the estate exceeds USD 60'000. The application of the credit exempt in the amount of USD 13'610'000 as per the above by Swiss decedents must be claimed by filing IRS Form 8833 together with the estate tax return.

5. Potential Double Taxation

While the ETT CH-US allows for the application of unified credit exemptions of USD 13'610'000 for Swiss decedents, the ETT CH-US does not allocate taxation rights in the case of a Swiss decedent who is subject to US estate taxes on US situs assets. Therefore, double taxation could result.

Cantonal tax authorities may allow US estate tax to be considered as deductible debt. However, the effect is limited and only applies if inheritance taxes are due in Switzerland.

6. Relevant Estate Tax Filings

The estate executor (or relevant responsible party for the estate) of a non-US domiciled decedent with taxable US situs assets valued over USD 60'000 must file IRS Form 706-NA.

In addition, for non-US decedents IRS Form 8833 must be prepared and attached to their Form 706-NA in order to apply the applicable double tax treaty (i.e., relevant for Swiss decedents).

The filing deadline for a US estate tax return is 9 months after the death of the decedent. However, by filing IRS Form 4768, the filing deadline may be extended by 6 months.

7. Executors

It is important to bear in mind that the executor or administrator of the decedent's estate is responsible for payment of the estate tax. Additionally, executors must file IRS Form 8971 in order to report the final estate tax value of assets distributed or to be distributed from the estate.

If there is no executor, the heir(s) become de facto (co-) executors and must comply with the above-mentioned obligations. This is especially important to keep in mind as failure to file IRS Form 8971 could result in the imposition of significant penalties.

Further, it may be noted that a transfer certificate is required to release the funds. Therefore, it is advisable to engage a qualified executor domiciled in the USA as part of the estate planning.

8. Joint Liability

Besides the executor's liability referred to above, it should be noted that the IRS may collect any unpaid estate taxes from any person receiving a distribution of the decedent's property (joint liability). In certain situations, often relating to US investment accounts, those accounts will typically be frozen (as a matter of law) until the estate proves that the US estate tax filings have been made.

9. Planning Options: Assets held through a US Corporation

While there are many asset structuring options to potentially address US estate taxes, the following example could provide for a clearly structured and simple estate tax planning opportunity in connection with real estate ownership in the USA.

For example, when investing in real estate in the USA (as a Swiss person), consideration may be given to investing in a Swiss corporation (e.g., an AG or GmbH), which in turn establishes a US corporation (e.g., an LLC), which acquires the real estate in the USA.

In this case, the Swiss individual does not hold any US situs assets. Therefore, upon the individual's death, no US estate taxes should apply.

However, given the complex nature of US tax rules, the various exceptions and anti-abuse rules, setting up, maintaining and potentially resolving such a structure must be planned and executed carefully, involving Swiss and US expert tax advisors.

C. Gift Tax

1. Gift Tax Subjects

For US gift tax purposes, as for estate tax purposes, it is to be determined whether the donor qualifies as a US domiciled or non-US domiciled person.

1.1. US Domiciled Persons

Gifts from US persons are generally subject to the US gift taxation.

«The US gift tax is typically applied when no, or only insufficient, planning is undertaken.»

1.2. Non-US Domiciled Persons and US Situs Assets

Gifts from non-US domiciled persons are generally only subject to US gift taxes if property located in the USA (US situs assets) is gifted.

However, for gift tax purposes US situs assets are determined differently than for estate tax purposes. In general, tangible assets such as real estate, art, cars, jewelry, cash etc. physically located in the US are subject to US gift taxes. Intangible property such as shares in corporations, on the other hand, are basically not subject to US gift taxes for non-US donors. However, appreciating that US estate tax rules differ from US gift tax rules, it may be noted that assets gifted during a person's lifetime that were not subject to the gift tax (e.g., shares in a US corporation) could be become subject to the estate tax if the donor dies within 3 years of making the donation.

These exceptions apply even when e.g. US real estate is held through non-transparent (tax regarded) US companies. This highlights a tax planning opportunity and further illustrates that the US gift tax is generally applicable in situations where poor or no planning is performed by non-US persons. It is recommended to analyze and potentially implement these structural planning opportunities at the time of acquisition of US assets.

2. Unified credit exemption and filing requirements

Should there be a US person receiving a gift from a non-US person or estate, IRS Form 3520 must be filed if the amount per year exceeds USD 100'000.

While for US persons the same unified credit exemption may be applied for gift tax purposes as for estate tax purposes, the unified credit exemption of USD 13'610'000 (2024) is not granted to non-US donors, unless the respective country has entered into a specific gift tax treaty with the USA, which is not the case for Switzerland.

The general annual gift tax exemption per beneficiary amounts to USD 18'000 (2024), which is adjusted to inflation on an annual basis.

Taking the above into account, Swiss individuals subject to US gift tax, who are not considered to be US-persons, may only apply the annual exemption per beneficiary in the amount of USD 18'000 (2024), as there is no gift tax treaty in place between Switzerland and the USA.

Foreign gift taxes are not credited against the US gift tax. Should US gift taxes be due, IRS Form 709 must be filed by 15 April of the following year. Additionally, US individuals receiving gifts in the amount of more than USD 100'000 must file IRS Form 3520.

D. Generation Skipping Transfer Tax

In brief, the flat 40% (2024) generation skipping transfer tax is applied for US citizens or US residents making a taxable gift or bequest to beneficiaries who are two or more generations (i.e., more than 37.5 years) younger than the transferor, i.e., if a generation is skipped. In this regard, the generation skipping transfer tax is applied in addition to the estate or gift taxes.

For non-US residents, the generation skipping transfer tax is only applied if the donation is subject to US estate or gift taxes and if the exemption limit is exceeded.

E. Summary

To sum up:

- For non-US domiciled decedents, the decedent's US situs assets such as shares in a US corporation, US real estate or other assets physically located in the USA are subject to US estate tax of currently up to 40%.
- Swiss tax resident decedents may apply the same unified credit exemption limit as US-decedents, i.e., USD 13'610'000 in 2024 pursuant to art. 3 ETT CH-US. The amount of the exemption limit is to be determined carefully.
- It may be noted that assets gifted during a person's lifetime that were not subject to the gift tax for non-US donors (e.g., shares in a US corporation) could be become subject to the estate tax if the donor dies within 3 years of making the donation.
- When Swiss persons are investing in US assets, structural planning should be considered.

In light of the above, it is advisable to involve Swiss and US tax experts if investments in US situs assets are being considered in order to address potential estate tax implications upfront, or at the latest if US situs assets are part of an estate.

Bruno Bächli
Partner
b.baechli@wengervieli.ch
+41 58 958 53 01

Joël Doswald
Senior Associate
j.doswald@wengervieli.ch
+41 58 958 55 34

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