[University of Miami Inter-American Law Review](https://repository.law.miami.edu/umialr)

[Volume 12](https://repository.law.miami.edu/umialr/vol12)
[Number 3](https://repository.law.miami.edu/umialr/vol12/iss3) *Lawyer of the Americas, Volume 12 Number 3 (Fall 1980)*

Article 2

10-1-1980

Federal Estate Tax Planning and the Nonresident Alien: The Costly Privilege of Dying an American

Gladys R. Navarro

Follow this and additional works at: https://repository.law.miami.edu/umialr

Part of the Taxation-Federal Estate and Gift Commons

Recommended Citation

Gladys R. Navarro, *Federal Estate Tax Planning and the Nonresident Alien: The Costly Privilege of Dying an American*, 12 U. Miami Inter-Am. L. Rev. 503 (1980)
Available at: https://repository.law.miami.edu/umialr/vol12/iss3/2

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

Federal Estate Tax Planning and the Nonresident Alien: The Costly Privilege of Dying an American

GLADYS R. NAVARRO*

In the past, governments imposed taxes primarily for the production of revenue. Today, however, the power to tax is also used to change the distribution of wealth within the society.[1] Low rates of taxation[2] provide little incentive to the taxpayer to avoid or evade taxes.[3] However, rates in excess of fifty percent are now common in almost every industrial nation and are considered by many confiscatory.[4] These assessments, together with a philosophy that no one is obligated to pay more taxes than the law requires,[5] make tax planning a necessity and a way of life.

Four jurisdictional bases exist for taxing income,[6] all of which are used by the United States to impose its income tax.[7] The United

---

* J.D., University of Florida (1980); M.B.A., Florida International University (1978); B.B.A.,(Accounting) University of Miami (1965); Vice President Trust Division of Royal Trust Bank of Miami (1974-78). Ms. Navarro will be associated with the law firm of Roberts & Holland (Miami, Florida) in 1981.

See the appendix to this article, beginning on page 529, for a set of practical examples of estate tax planning for nonresident aliens. It is hoped that reference to these examples will aid the reader's understanding of this article.

1. M. LANGER, PRACTICAL INTERNATIONAL TAX PLANNING 3, (2d ed. 1979).

2. In 1916, estate tax rates were graduated to 10 percent. *See* 1 J. MERTENS, THE LAW OF FEDERAL GIFT AND ESTATE TAXATION § 2.01 (1959).

3. *See generally* Eichel, *Administrative Aspects of the Prevention and Control of International Tax Evasion*, 20 U. MIAMI L. REV. 25 (1965).

> Although international tax evasion has been a concern of tax officials for more than twenty years, only recently has any large-scale effort been made by the United States Internal Revenue Service to curb it. This has been no simple task, since administrative problems inherent in worldwide enforcement are both technically complex and fraught with political and diplomatic ramifications. To place in proper perspective the scope of the difficulties inherent in a worldwide enforcement program, as compared to its domestic counterpart, one might well envisage the complexities of a game of three-dimensional chess, as contrasted with its less formidable ancestor.

Id. at 27.

4. *See* M. LANGER, *supra* note 1, at 1.

5. Gregory v. Helvering, 293 U.S. 465, 469 (1935). "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."

6. These are: (1) source of income where all income derived from sources within the country is subject to income tax whether the individual or corporation earning the income is resident in the country or not; (2) territorial basis where residents of these countries pay income tax on their earnings from sources within the country; (3) residence basis where a resident of the country would pay income tax on their worldwide income; and (4) citizenship where a citizen of a country pays taxes on their worldwide income regardless of residence. *See* M. LANGER, *supra* note 1, at 7-12.

7. Cook v. Tait, 265 U.S. 47, 56 (1924).

States taxes its citizens and residents on their worldwide assets held at death,[8] and also attempts to tax the estates of deceased foreigners who own property situated in the United States.[9] When estate tax rates climb above fifty percent,[10] it becomes advantageous to avoid the costly privilege of dying as an American.

Some foreigners seek legal counsel prior to investing in the United States, but many are unfortunately advised either by laymen[11] or attorneys not familiar with this area of law. The estates of these aliens will therefore often be subject to unnecessary estate taxes. Because threshold determinations, such as who is a United States domiciliary,[12] require a great deal of experience with tax law, specialists in other legal areas should be aware of possible problems when dealing with foreigners. Misapplication of these rules may be the basis for a malpractice action.[13]

This Article will explore the federal estate tax consequences of nonresident aliens dying with assets situated in the United States.[14] The determination of domicile for estate taxes will be discussed, along with an examination of the related Internal Revenue Code sections, regulations and cases. In addition, the pertinent provisions of the existing death tax conventions will be compared with the federal

---

> The basis of the power to tax was not and cannot be made dependent upon the domicile of the citizen, but upon his relation as citizen to the United States. The consequence of the relation is that the native citizen who is taxed may have domicile, and the property from which his income is derived may have situs in a foreign country and the tax be legal—the government having power to impose the tax.

Id.

8. I.R.C. §§ 2001(a), 2031(a).

9. *See generally* Note, *Foreign Direct Investment in the United States: Possible Restrictions at Home and a New Climate for American Investment Abroad*, 26 AM. U. L. REV. 109 (1976) (hereinafter cited as Note, *Foreign Direct Investment*).

10. *See, e.g.*, I.R.C. § 2001(c), which imposes a maximum of 70% tax on amounts in excess of $5 million with respect to which the tentative tax is computed.

Some of the well-known tax havens have no estate or inheritance taxes: The British Virgin Islands, Bermuda and Turks & Caicos (even though there is a small probate fee), Cayman, and The Bahamas. *See generally* M. LANGER, *supra* note 1.

11. Many nonresident aliens consult only with their real estate brokers when purchasing property or their stock broker when purchasing securities.

12. Treas. Reg. § 20.0-1(b)(1) (1980) defines domicile as "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 therefrom. . . ." This definition provides few guidelines and further analysis is required.

13. *See generally* Heyer v. Flaig, 70 Cal.2d 223, 449 P.2d 161 (1969); Lucas v. Hamm, 56 Cal.2d 583, 364 P.2d 685 (1961).

14. The applicability of any state estate tax implications will not be considered in this article.

statutory law. Finally, examples for tax planning purposes will be explored.

I. Aliens: Residents or Nonresidents?

Federal taxation of decedents' estates in the United States varies according to whether the decedent is a resident[15] or nonresident.[16] The estate of a resident decedent for federal estate tax purposes includes all property owned by him, wherever the property is located.[17] On the other hand, the estate of a nonresident decedent is taxed only to the extent that his property is situated in the United States.[18] This dual system is designed to encourage investment in the United States by foreigners without creating a "tax haven"[19] for them.[20]

Residency for tax purposes does not necessarily coincide with residency under immigration law because each uses different definitional standards.[21] However, both the Internal Revenue Service and

---

15. The estate of a person who at the time of his death is a citizen or a resident of the United States is taxed pursuant to Subchapter A of Chapter 11 of the Internal Revenue Code. *See* I.R.C. §§ 2001-2057.

I.R.C. § 2056, for example, allows a deduction of 50% of the value of the adjusted gross estate passing from the decedent to the surviving spouse as a deduction. The section is only applicable to estates of United States citizens and residents, not to estates of nonresidents. Assuming a decedent died in 1977 with a taxable estate before marital deduction of $10,000,000, the tax payable if decedent is a nonresident is $2,780,000 and the tax payable if decedent is a resident utilizing the full marital deduction is $2,520,800.

16. The estates of nonresidents who are not citizens are taxed under Subchapter B of Chapter 11 of the Internal Revenue Code. *See* I.R.C. §§ 2101-2108.

17. I.R.C. §§ 2001, 2031.

18. I.R.C. §§ 2101, 2103.

19. Even though certain countries such as Bermuda, Bahamas, and the Cayman Islands are known as tax havens, tax practitioners classify a country imposing a maximum 20 percent rate of income tax as low-tax haven. M. Langer, *supra* note 1, at 2.

20. *See generally* Kanter, *The United States Estate Tax Treaty Program*, 9 Tax. L. Rev. 401 (1954). Excessive taxation of assets owned by aliens discourages foreign capital investment. A country must weigh its need to attract foreign capital with its desire to tax non-citizens at the same rates as nationals or at higher rates. One important reason to attract foreign investment may be the need to aid the nation's balance-of-payments position.

21. For immigration purposes, a person entering the United States is considered either as an immigrant or a nonimmigrant, depending on his visa. 8 U.S.C. § 1201 (1979). For income tax purposes, an alien who is present in the United States, and who is not a mere transient, is a resident of the United States. Treas. Reg. § 1.871-2(b) (1980). For estate tax purposes, the primary question is that of domicile. Treas. Reg. § 20.0-1(b)(1) (1980).

the Immigration Service regard the claiming of nonresident tax benefits to be inconsistent with permanent resident status in the United States for immigration purposes.[22] Thus, aliens admitted to the United States with visas permitting permanent residence are ordinarily considered resident aliens by the tax authorities.[23] Rather than being mere transients, persons so admitted usually have a sincere intention to establish residence in the United States.[24] Because the intention regarding the length and nature of an alien's stay is an important element for the determination of residency, the possession of a "green card"[25] carries a strong presumption that the alien is a resident.[26]

For estate tax purposes, "residence" means domicile.[27] A resident decedent is a person who, at the time of his death, had his domicile in the United States.[28] Such domicile is acquired when a person lives in a place with an intention to make it his domicile.[29] The question of domicile is factual rather than legal and frequently depends upon a wide variety of circumstances.[30] In order to effect a change of domicile, a present intent to do so must be coupled with some affirmative act.[31]

A temporary residence for a temporary purpose, with intent to return to the former home when that purpose has been accomplished, leaves the domicile unchanged.[32] However, if the residence was begun for a limited purpose, intention may convert it into a domicile.[33] Such conversion may occur when the person has a def-

---

22. I.R.S. Pub. No. 519 (1978). The filing of an income tax return as a nonresident may make the person ineligible for a visa or other document for which lawful permanent resident aliens are eligible.

23. *See* Navarro, *Do's and Dont's of Tax Planning for Nonresident Aliens*, 117 TR. & EST. 484, 484 (1978). "If, in spite of the visa, the character of an alien's stay resembles that of a nonresident alien, the alien is a nonresident for tax purposes."

24. I.R.S. Pub. No. 519, *supra* note 22, at 1.

25. Form 1-151 is a green card issued by the Immigration and Naturalization Service to all immigrants.

26. Whether a nonresident is a transient is determined by his intentions with regard to the length and nature of his stay. Treas. Reg. § 1.871-2(b) (1979).

27. *See* Treas. Reg. § 20.0-1(b)(1) (1980).

28. *Cf.* Treas. Reg. § 20.0-1(b)(2) (1980) (defining who is a nonresident).

29. *See generally* Farmers Loan & Trust Co. v. United States, 60 F.2d 618, 619 (S.D.N.Y. 1932). "The search is to determine the place where the decedent had his home, and an important, if not indispensable, factor is the intent of the decedent—facto et animo as the older cases dealing with domicile put it."

30. In re Newcomb's Estate, 192 N.Y. 238, 250, 84 N.E. 950, 954 (1908).

31. Rev. Rul. 58-70, 1958-1 C.B. 341; *see also* Rev. Rul. 74-364, 1974-2 C.B. 321.

32. *Supra* note 30, at 954.

33. *Id.*

inite, present, and honest purpose to give up his old home and retain the new place as his domicile.[34] Once domicile for estate and gift tax purposes has been acquired, it is kept unless facts indicate a new domicile has been established abroad.[35] "Less evidence is required to establish a change of domicile from one state to another than from one nation to another."[36]

The burden of proving a change from a place once established as a domicile to another place is upon the party who asserts the change.[37] The intent to make a permanent change of domicile without returning should be shown clearly, and there must be a concurrence of the fact and the intent.[38] Where facts are in conflict, there is a presumption in favor of the person's original domicile.[39] The personal representative must therefore present facts clearly establishing the intention of the decedent.[40]

The determination of domicile requires the examination of various factors.[41] In *Adams v. Commissioner*,[42] the court found the husband to be a nonresident alien for income tax purposes in spite of evidence supporting the opposite conclusion. The taxpayer's family spent the bulk of their time in Florida and his wife was found to be a resident for income tax purposes. However, the Tax Court held that these facts were not determinative of residency.[43] Even evidence such as an application for a United States immigrant visa, Florida manifestation of domicile, Florida homestead exemption, Florida driver's license, and registration of a car in the taxpayer's name were insufficient to support the claim of residence.[44]

---

34. *Id.*

35. Estate of Anthony H.G. Fokker, 10 T.C. 1225, 1245 (1948), *acq.* 1948-2 C.B. 2. *See generally* Simenon v. Comm'r, 44 T.C. 820 (1965).

36. *Supra* note 30, at 954.

37. *See* In re Daly's Estate, 178 Misc. 943, 946, 36 N.Y.S.2d 954, 957 (1942). The change of domicile must be proven by a fair preponderance of the evidence. *See also* In re Schomers' Will, 23 Misc. 2d 282, 284, 197 N.Y.S.2d 945, 947 (1960).

38. *See* In re Lippert's Will, 24 Misc. 2d 81, 83, 207 N.Y.S.2d 546, 548 (1960).

39. *See* In re Rogers' Will, 129 N.Y.S.2d 208, 209 (1954).

40. *See* Dolan, *Establishing Change of Domicile*, 5 THE TAX ADVISER 459, 461 (1974), in which the author suggests an extensive checklist to determine the client's domicile.

41. *See* M. Langer, *When Does a Nonresident Alien Become a Resident Alien for U.S. Tax Purposes?*, 44 J. TAX. 220 (1976) which explores the factors involving the determination of residency for income tax purposes.

42. 46 T.C. 352 (1966), *acq.* 1967-2 C.B. 1.

43. *Id.* at 359.

44. *Id.* at 360. Adams offered plausible explanations regarding the execution of all the sworn documents.

The primary factor missing in *Adams* and heavily weighed by the court was the length of time the husband spent in Florida.[45] Intent was not accompanied by his physical presence, and both elements are necessary to establish residence for income taxes purposes.[46] Because decedents who may be considered domiciliaries have the requisite presence in the United States, it is often difficult to determine which factor will tip the scale for a court to find that a person had the intent to remain in the United States.

Similarly, an alien employed in the United States under circumstances making him a resident for income tax purposes, may nevertheless be incapable of forming the intent necessary for the establishment of an American domicile.[47] This occurs, for example, when an alien is employed by a multinational corporation[48] that sends him to the United States for training in a high-technology field.[49] The alien's visa will allow him and his family to remain in the United States for as long as he remains in training, but the visa creates a legal disability to establish a domicile in the United States,[50] regardless of whether any income earned while in the United States is subject to income taxes.[51]

A. *Effect of Visas*

Generally, an alien may enter the United States either as an immigrant or a nonimmigrant.[52] The number of immigrants allowed to enter the United States is limited by statute,[53] but there are no

---

45. *Id.* at 361. Adams spent only 70 days a year in the United States. *Id.*

46. *See* Rudolf Jellinek, 36 T.C. 826, 834 (1961), *acq.* 1964-1 C.B. 4.

47. Rev. Rul. 74-364, 1974-2 C.B. 321.

48. One of the largest German investors in the United States is W.R. Grace & Co., which ranked fiftieth in sales in 1976 on Fortune's 500 list of the top U.S. industrials. The Friedrich Flick Group of Dusseldorf, West Germany now owns 12% of Grace's outstanding common stock. *See* M. WILKINS, FOREIGN ENTERPRISE IN FLORIDA, 28 (1979).

49. 8 U.S.C. § 1101(a)(15)(J) (1979) outlines a type of visa used for persons temporarily coming to the United States as participants in a program designated by the Secretary of State for the purpose of studying or receiving training.

50. Congress has provided that holders of class J visas are persons who reside in a foreign country which they have no intention of abandoning. *Id.*

51. I.R.C. § 861(a)(3) provides that compensation for labor or personal services performed in the United States by a nonresident alien are subject to United States income taxes unless the alien is here less than 90 days, compensation is less than $3,000, and services are performed as an employee of a company not engaged in trade or business in the United States.

52. *See generally* A. Efstratides, *Immigration: Nonimmigrant Visa Requirements for Corporate Executives*, 3 TAX MGT. INT'L J. 114 (1979).

53. 8 U.S.C. § 1151 (1979).

such restrictions for nonimmigrants.[54] Most immigrants will be considered resident aliens for tax purposes because of the permanent nature of their stay.[55] Until recently, all nonimmigrant visas requiring the alien to return home when the visa expired created an irrebuttable presumption of no United States domicile.[56] Holders of nonimmigrant visas were reasonably assured that, at least for estate tax purposes, federal law would not consider them American domiciliaries at their deaths.[57]

This reliance may have been upset by the 1978 Supreme Court decision of *Elkins v. Moreno*,[58] although the irrebuttable presumption issue of domicile was decided in a non-tax context. In 1974, three full-time students at the University of Maryland[59] applied to the University for preferential in-state tuition status. Their parents held G-4 visas[60] as employees of international organizations. The University denied the applications, based on its belief that a person holding a G-4 visa was unable to form the requisite intent to reside permanently in Maryland.[61] The general policy adopted by the University granted in-state status to immigrant aliens lawfully admitted for permanent residence. A nonimmigrant such as a holder of a G-4 visa could, therefore, never be a United States domiciliary, because of the nature of the visa.[62] The district court held that this irrebuttable presumption, that G-4 visa holders could not become Maryland domiciliaries, was a violation of the due process clause of the fourteenth amendment.[63] The Fourth Circuit Court of Appeals affirmed.[64]

---

54. 8 U.S.C. § 1201 (1979). Nonimmigrants must comply with the requirements of obtaining the requisite visa. *Id.*

55. I.R.S. Pub. No. 519, *supra* note 22, at 2.

56. Rev. Rul. 74-364, 1974-2 C.B. 321. The Internal Revenue Service held here that a French citizen with a G-4 visa who had lived in Virginia, was not a resident of the United States for estate tax purposes at the time of his death. He was a nonimmigrant alien and therefore had to agree to depart from the United States at the expiration of his visa. *Id.*

57. *Id.*

58. 435 U.S. 647 (1978).

59. The three college students, Juan Carlos Moreno, Juan P. Otero, and Clare B. Hogg, had resided in Maryland for fifteen, ten, and five years respectively. *Id.* at 652, n. 4.

60. 8 U.S.C. § 1101(a)(15)(G)(iv) (1979).

61. 435 U.S. at 654.

62. Only immigrants admitted to the United States as permanent residents under the immigration laws would qualify.

63. Moreno v. University of Maryland, 420 F. Supp. 541, 565 (D. Md. 1976).

64. 556 F.2d 573 (4th Cir. 1977).

After granting *certiorari*, the Supreme Court held that, under the Immigration and Nationality Act of 1952,[65] persons holding class G-4 visas have the legal capacity to acquire domicile in the United States.[66] The domicile question for the holders of G-4 visas was certified by the Supreme Court to be decided by the Court of Appeals of Maryland in order to clarify state law aspects of domicile.[67] The Supreme Court advanced two reasons for returning the case to the state level for a final definitional decision. First, the Supreme Court noted that state governments have the highest interest in this matter, for the reason that many issues of state law may turn on the definition of domicile.[68] Secondly, the status of any foreign national living in Maryland potentially affected that state's relations with the federal government, other state and local governments, and foreign nations.[69]

Although the Internal Revenue Service has previously ruled that, in the absence of exceptional circumstances, G-4 visa holders are not residents for estate tax purposes,[70] a re-examination of this ruling will

---

65. 8 U.S.C. §§ 1101 et seq.

66. 435 U.S. at 666.

67. The Maryland Court of Appeals held that persons residing in Maryland who hold or are named in a G-4 visa, or who are financially dependent upon a person holding such a visa, are capable under Maryland state law of becoming domiciliaries of Maryland. Toll v. Moreno, 284 Md. 425, 397 A.2d 1009 (1979).

In a memorandum decision which supplemented Elkins v. Moreno [435 U.S. 647 (1978)], the Supreme Court denied the Attorney General of Maryland's request to restore the case to the Court's docket for further briefing and argument, since the Board of Regents of the University of Maryland fundamentally altered the posture of the case by redrafting its policy to accommodate G-4 aliens. The Court vacated the judgment of the Maryland Court of Appeals and remanded the case to the U.S. District Court for further consideration. Toll v. Moreno, 441 U.S. 458 (1979).

On remand, the District Court held that (1) the Supreme Court's opinion did not remove the irrebutable presumption issue from the case; (2) the changing of the University's in-state eligibility policy after the decisions of the Supreme Court and the Maryland Court of Appeals could not retroactively deny the plaintiffs benefits to which they were entitled and had accrued up to that time; and (3) the post-June 1978 policy which include the University's limited definition of domicile and precluded nonimmigrant aliens from obtaining domiciliary status did not constitute an impermissible irrebuttable presumption. Moreno v. Toll, 480 F. Supp. 1116 (D. Md. 1979).

In the most recent reported development in the case, the plaintiff Moreno moved for a summary judgment holding that the University's policy denied equal protection of the laws and was violative of the supremacy clause. The District Court granted the motion. Moreno v. Toll, 489 F. Supp. 685 (D. Md. 1980).

68. 435 U.S. at 662 n. 16. As examples, voting rights, public office holdings, and obtaining a divorce would be determined based on domicile.

69. *Id.* at 663. *But see* United States v. Pink, 315 U.S. 203, 233 (1942), in which the Supreme Court held that power over external affairs is not shared by the States but is vested in the national government exclusively.

70. *Supra* note 47.

be required in light of *Elkins*.[71] G-4 visa holders domiciled in the United States could apparently be subjected to federal estate taxes on their worldwide holdings at their deaths. However, such persons may be exempted from United States taxation by an estate tax treaty.[72]

According to *Elkins*, only four types of nonimmigrant visas retain an irrebuttable presumption of no domicile.[73] Among the visas not included in these four categories are those used for ambassadors and consular officers[74] as well as those used for inter-company transfers of executives.[75] It is difficult to see how Congress could have intended that a member of the diplomatic corps from a foreign country dying in the United States be subject to estate taxes by the host country.[76] For this reason, *Elkins* probably cannot be interpreted any more broadly than that holders of G-4 visas have the legal capacity to acquire domicile in the United States.

B. *Dual Domicile: Dream or Tax Planning Nightmare?*

Although an individual can have only one legal domicile, he may have more than one residence, any of which may be his domicile.[77] The idea of having many homes has usually been associated with wealth, but this notion may have been changed by the mobility of our

---

71. *See generally* 19 HARV. INT'L. L.J. 1031 (1978). This article looks *only* at the potential impact of the case in the areas of federal income taxation and divorce.

72. *See* Treas. Reg. § 20.2104-1(c) (1980).

73. Specific language retaining a foreign domicile is contained in the B, F, H, and J visas. It can be argued that the intention to remain in the United States temporarily is part of the D visa. 8 U.S.C. § 1101(a)(15) (1979).

74. 8 U.S.C. § 1101(a)(15)(A)(i) (1979).

75. 8 U.S.C. § 1101(a)(15)(L) (1979).

76. Customary international law exempts ambassadors from taxes in the host country. In addition, the concept of sovereign immunity extends to ambassadors thereby prohibiting taxation by another country. Interview with Roy Hunt, Associate Dean, College of Law, University of Florida in Gainesville, Florida (February 6, 1980).

77. In re Newcomb's Estate, 192 N.Y. 238, 242, 84 N.E. 950, 954, (1908).

> As 'domicile' and 'residence' are usually in the same place, they are frequently used, even in our statutes, as if they had the same meaning; but they are not identical terms, for a person may have two places of 'residence,' as in the city and country, but only one 'domicile.' 'Domicile' means living in a particular locality with intent to make it a fixed and permanent home. 'Residence' simply requires bodily presence as an inhabitant in a given place, while 'domicile' requires bodily presence in that place and also an intention to make it one's domicile. The existing domicile, whether of origin or selection, continues until a new one is acquired.

Id. See also Comm'r v. Nubar, 185 F.2d 584, 587 (4th Cir. 1950), *cert. denied*, 341 U.S. 925 (1950).

society. The question of domicile thus becomes a crucial element in the determination of which assets may be subject to federal estate taxes.[78]

Under *Elkins*,[79] state law must be looked to first for a definition of domicile.[80] If no state statutory definition is available, the Supreme Court follows the common law rule that when one has acquired a domicile in one place, it is not lost by merely maintaining a residence elsewhere in the absence of an intention to make the new place a permanent home.[81] In *Elkins*, had the petitioning student Moreno been domiciled in Maryland for purposes of paying in-state tuition, he could be viewed as being domiciled there for estate tax purposes if he died in Maryland.

Today, however, the traditional "one man, one home" doctrine of domicile has become a social anachronism.[82] As a result, unfavorable estate tax consequences may ensue.[83] It is possible for a person in Moreno's position to have his estate taxed by at least two countries.[84] In fact, estates of American citizens domiciled in the United States have been subject to more than one state's inheritance or estate tax.[85] It is therefore quite possible for two nations to claim the same decedent as their domiciliary.[86]

---

78. *See* Rosenberg, *Departure of the Alien—An Opportunity for Estate Tax Savings*, 5 INT'L TAX J. 362, 364 (1977).

79. *Supra* note 58.

80. FLA. STAT. § 222.17 (1979) outlines evidence required to establish domicile in Florida. A person must reside and maintain a place of abode in a county which he recognizes and intends to maintain as his permanent home.

81. Texas v. Florida, 306 U.S. 398, 413-14 (1939).

> In determining whether a dwelling place is a person's home, consideration should be given to: 1) Its physical characteristics; 2) The time he spends therein; 3) The things he does therein; 4) The persons and things therein; 5) His mental attitude towards the place; 6) His intention when absent to return to the place; 7) Elements of other dwelling-places of the person concerned.

Id.

82. *See* Mr. Justice Frankfurter's dissenting opinion, 306 U.S. at 428-35. *Cf.* In re Newcomb's Estate, 192 N.Y. 238, 84 N.E. 950 (1950) where the court found that a man can have but one domicile.

83. *See* I.R.C. §§ 2001, 2031 which may have application.

84. It is assumed that Juan Carlos Moreno (because of his Spanish surname) was of Latin American descent. The United States has no estate tax treaty with Latin American countries at present.

85. *See generally* Hill v. Martin, 296 U.S. 393 (1935); New Jersey v. Pennsylvania, 287 U.S. 580 (1933); In re Dorrance's Estate, 309 Pa. 151, 163 A. 303 (1932), *cert. denied*, 287 U.S. 660 (1932); In re Trowbridge's Estate, 266 N.Y. 283, 194 N.E. 756 (1935). In Dorrance v. Martin, 116 N.J.L. 362, 184 A. 743 (1936) the Campbell Soup heirs paid an additional $14,394,698.88 to the Commonwealth of Pennsylvania. Both New Jersey and Pennsylvania claimed the decedent was domiciled there.

86. *See generally* Rosenberg, *supra* note 78.

The prospect of such possible dual taxation is ameliorated somewhat by the United States' network of estate tax treaties.[87] Unfortunately, at the present time there are only thirteen, making it very possible that Moreno's estate could be diminished substantially by dual taxation because there is no treaty with his country of origin.[88] It is therefore extremely important for a nonresident who wishes to reduce his estate tax liability to avoid any indicia of the United States being his permanent home.[89] Since it is uncertain which factor will ultimately be determinative, as many indications of permanence as possible should be avoided.[90]

II. Estates of Nonresident Aliens: Taxes Imposed

Estates of nonresident aliens are subject to special estate tax rules on their property situated in the United States.[91] Until November 13, 1966, the tax rates imposed on these estates were the same as those imposed on the estates of United States citizens and residents.[92] Since that date, however, nonresident alien tax rates were lowered substantially in relation to those for citizens and residents.[93] In spite of these lower taxes, the property subject to tax[94] and the inability to take certain deductions[95] may cause a higher total tax liability for the estates of nonresident aliens.[96] The Tax Reform Act of 1976[97] further modified the rate structure and changed the overall method of computing the tax.[98]

---

87. *See* notes 204-15 *infra*, and accompanying text.

88. Assuming, as above, that his place of origin is in Latin America.

89. *See* Rosenberg, *supra* note 78, at 362.

90. *See generally* Packman and Rosenberg, *How Foreigners (Unintentionally) Become U.S. Residents,* 57 TAXES 85 (1979). The authors have prepared a questionnaire to assist nonresidents and their tax advisors in determining whether the nonresident is a resident of the United States for income tax purposes.

91. I.R.C. §§ 2101-2108, I.R.C. § 2104 specifically provides situs rules for property owned by nonresident decedents which is considered property situated in the United States.

92. Treas. Reg. § 20.2101-1 (1980).

93. The Foreign Investors Tax Act of 1966, Pub. L. 89-809, 80 Stat. 1539 (1966). Also, *compare* I.R.C. §§ 2101 *with* 2001(c). *See generally* Note, *Inheritance Rights of Nonresident Aliens, A Look at California's Reciprocity Statute,* 3 PAC. L.J. 551 (1972); Rollison, *Some Modern Problems in Estate Planning,* 27 ALA. LAW. 92 (1966).

94. I.R.C. § 2104.

95. I.R.C. § 2106. *See* note 149 *infra*.

96. *See* Rosenberg, *supra* note 78, at 363.

97. Pub. L. 94-455, 90 Stat. 1520, 1850 (1976), 1976-3 C.B. 1, 326.

98. I.R.C. §§ 2102-2106 contain rules to limit the amount of credit allowed for State death taxes (§ 2011) and gift tax (§ 2012). I.R.C. § 2102 permits the estate of a nonresident alien credits for state death taxes (allowed citizens by § 2011), gift tax

A. *What Constitutes the Gross Estate*

Section 2101 of the Internal Revenue Code imposes a federal estate tax on the taxable estate of a decedent who is a "nonresident not a citizen"[99] of the United States. The gross estate of a nonresident alien decedent is that part of the gross estate which, at the time of his death, is situated in the United States.[100] If no treaty is controlling,[101] this determination is made by using both the rules applicable only to nonresidents,[102] and those estate tax sections applicable to estates of citizens and residents.[103]

The first step in the determination of the nonresident alien's gross estate is to fit individual items of property into rules provided by the Code for the determination of where property is situated.[104]

(allowed citizens by § 2012), and tax on prior transfers (allowed citizens by § 2013). Estates of nonresidents are not allowed credit for foreign taxes provided by § 2014. The estate tax treaties are supposed to alleviate this omission. § 2107 imposes the higher § 2001 rates on the estate of any nonresident alien who within ten years prior to his death lost United States citizenship to avoid United States income, estate or gift taxes. § 2108 gives the President power to impose § 2001 rates on the United States property of a nonresident alien if the country of which the alien is a citizen imposes discriminatory death taxes on citizens of the United States resident in that country.

99. "Nonresident alien" will be used in lieu of "nonresident not a citizen," as used in the Internal Revenue Code.

100. I.R.C. § 2103. I.R.C. § 7701(a)(9) and Treas. Reg. § 20.0-1(b) define the term "United States" in the geographical sense as only the states and the District of Columbia.

101. Treas. Reg. § 20.2104-1(c) (1980) provides that any situs rule described in the Code may be modified by a death tax convention with a foreign country.

102. I.R.C. §§ 2104, 2105; Treas. Regs. §§ 20.2104-1, 20.2105-1 (1980).

103. I.R.C. § 2103 incorporates § 2031 to determine the gross estate of every nonresident alien decedent. Therefore, the estate of a nonresident alien may include the value of all property: (1) To the extent of the decedent's interest at the time of his death (§ 2033); (2) To the extent of any interest of the surviving spouse existing at the time of the decedent's death as dower or curtesy or similar interest (§ 2034); (3) To the extent the decedent transferred gratuitously within three years of death (§ 2035); (4) To the extent of any interest the decedent transferred gratuitously retaining for life or for any period not ascertainable without reference to his death, income or related interests (§ 2036); (5) To the extent of any interest decedent gratuitously transferred during his life in such a way as to take effect after his death, if he has retained the proscribed reversionary interest (§ 2037); (6) To the extent of any interest the decedent has transferred gratuitously which is subject to change by him alone or with another at death (§ 2038); (7) That is an annuity or other payment receivable by any beneficiary by reason of surviving the decedent (§ 2039); (8) That is held jointly with another who had survivorship rights with the decedent (§ 2040); (9) That is or was subject to a general power of appointment in the decedent (§ 2041); and (10) Proceeds of life insurance on the decedent's life (§ 2042); The applicability of this section is foreclosed by § 2015(a).

104. I.R.C. §§ 2104, 2105.

In addition, death-duty treaties may also provide guidelines.[105] Finally, property not specifically provided for may have its situs determined by case law.[106]

B. *Situs of Property Owned by the Nonresident Alien*

Under the Internal Revenue Code and the United States' estate tax treaties,[107] certain assets owned by a nonresident alien are considered "property within the United States"[108] subject to estate tax, while others are considered "property without the United States"[109] and exempt from tax. These rules help alleviate the problem of determining situs by establishing guidelines.[110]

Property within the United States includes certain stock holdings, debt obligations, and revocable transfers.[111] Corporate stock owned[112] by a nonresident alien is deemed property within the United States only if issued by a domestic corporation,[113] regardless

---

105. Rev. Rul. 54-407, 1954-2 C.B. 657 (applying the United States-Canada Death Tax Convention). As to persons who are nationals of countries with whom the United States has entered into estate tax conventions or domiciled therein, reference must be made not only to the Code but to portions of such applicable conventions. Where the convention fixes situs as to a particular type of property such situs is decisive, provided the particular decedent is covered by the convention. *See* MERTENS, *supra* note 2, at § 41.15.

106. *See, e.g.*, Delaney v. Murchie, 177 F.2d 444 (1st Cir. 1949).

107. *See* notes 159-60 *infra*, and accompanying text.

108. I.R.C. § 2104.

109. I.R.C. § 2105.

110. Under earlier provisions, stocks in a foreign corporation had to be included as property within the United States if the certificates were located in the United States. Burnet v. Brooks, 288 U.S. 378 (1933). *See generally* Hammerman, *Foreign Situs Trusts—Defining the Undefined*, in 3 LANDMARK PAPERS ON ESTATE PLANNING, WILLS, ESTATES AND TRUSTS 1410 (1968).

111. I.R.C. § 2104(a)-(c).

112. I.R.C. § 2104(a) prescribing the situs of stock is limited in its scope to stock "owned and held" by the decedent. Interpreting this requirement, Comm'r v. Nevius, 76 F.2d 109 (2d Cir. 1935) found that one may "own and hold" stock even though his interest is equitable rather than legal. Thus, a nonresident owning a life interest in a nonresident trust, which held stock in a domestic corporation, was deemed to own and hold the shares herself for the purpose of inclusion of the value of such equitable interest in the decedent's estate subject to United States estate tax. *Id.* at 111. *But cf.* City Bank Farmers Trust Co. v. United States, 149 F. Supp. 186 (Ct.Cl. 1957) in which the court stated that the term "owned and held" requires more than mere beneficial ownership, and one does not "own and hold" shares of stock where he has no possession, or right to possession, or any of the indicia of ownership, and he has no right, present or future, to get them back.

113. I.R.C. § 7701(a)(4) defines domestic corporation as one organized in the United States or under the law of the United States or of any state.

of the location of the certificates.[114] This provision encourages the use of United States banks and trust companies as depositories for nonresident aliens.

Debt obligations include those issued by a United States person,[115] the United States, a State or any political subdivision thereof, or the District of Columbia. The estate taxation pattern of debt obligations follows the federal income tax laws.[116] Therefore, if the interest is exempt from the nonresident's income tax, the debt obligation will not be considered property within the United States for estate tax purposes.[117]

Any property which the decedent has transferred within three years of death, or other types of lifetime transfers that are not recognized as fully effective during life for federal estate taxes, are deemed to be situated in the United States.[118] This provision applies if the property is so situated either at the time of the transfer or at the time of the decedent's death,[119] and produces interesting results involving both tangible and intangible personal property. For example, a nonresident alien could create an inter vivos trust[120] with foreign corporate stock which the trustee subsequently sells. If the fiduciary then purchases property having a situs in the United States, this new property would be included in the nonresident alien's estate even though the property originally transferred would not have been included.[121]

Other types of property are not taxed although physically situated in the United States. This category includes proceeds of life

---

114. *See* United States Estate Tax Return Form 706NA, instructions, at 3 (rev. June 1977). A 1,000-share certificate of I.B.M. stock registered in the name of a nonresident alien decedent is equally taxable whether held in a custody account of a United States bank or in a Swiss bank safe deposit box. *See* Navarro, *supra* note 23, at 486.

115. I.R.C. § 7701(a)(30) defines "United States person."

116. I.R.C. § 861(a)(1).

117. I.R.C. § 2104(c). Debt obligations are treated as property within the United States irrespective of whether the written evidence of the debt is treated as being the property itself. Treas. Reg. § 20.2104-1(a)(7) (1980). Currency is not considered a debt obligation for these purposes.

118. I.R.C. § 2104(b).

119. Treas. Reg. § 20.2104-1(b) (1980).

120. For purposes of this example, an inter vivos trust would be one normally taxable under I.R.C. §§ 2035-2038.

121. This appears to be the case under I.R.C. § 2104(b) regardless of whether the grantor of the trust had no power to direct investments of the trust. Form of ownership is controlled by foreign law. *See* Sanchez v. Bowers, 70 F.2d 715, 717 (2d Cir. 1934).

insurance, certain bank deposits, and works of art on loan for exhibition.[122] The business advantages to insurance companies and banks are clear. A nonresident can accept a lower yield from his investments in banks or insurance companies because those earnings will not be subject to tax at his death.[123]

Insurance deemed to be property without the United States can take the form of term or whole life policies.[124] It is therefore possible that the value of insurance on the life of a United States citizen or resident who survives the nonresident alien owner of the policy will be included in the alien's estate.[125] In addition, insurance owned on the life of another alien who survives him may also be brought back into the nonresident alien's estate.[126] Because the regulations speak in terms of insurance received on the decedent's life,[127] any other insurance owned by the nonresident could be taxable.[128]

Certain bank deposits, interest from which is treated as sources outside the United States for income tax purposes,[129] are considered property without the United States.[130] These deposits are generally held by persons carrying on the banking business or are amounts held by insurance companies.[131] Deposits with foreign branches of domestic banking institutions are also deemed property without the United States.[132] Thus, insurance proceeds and bank deposits, nor-

---

122. I.R.C. § 2105(a)-(c).

123. The advantages to banks and insurance companies are similar to those granted municipalities that issue bonds. The tax-free nature of the coupons allows municipalities to pay less interest than their corporate counterparts. *See generally* S. HOMER & M. LIEBOWITZ, INSIDE THE YIELD BOOK (1972).

124. I.R.C. § 2105(a) refers to amounts receivable as insurance without further definition.

125. *Cf.* Estate of DuPont v. Comm'r, 18 T.C. 1134 (1955), *aff'd*, 233 F.2d 210 (3d Cir. 1955), *cert. denied*, 352 U.S. 878 (1956), where the court concluded that a regulation making no reference to insurance on the life of another was not designed to offer a definitive solution to a valuation problem.

126. This situation could easily occur if the nonresident alien owns a policy on the life of the spouse who predeceases him. This estate planning tool, effective for United States citizens could prove costly to a nonresident. *See generally* MacKay, *Life Insurance in the Estate Plan*, in 1 LANDMARK PAPERS ON ESTATE PLANNING, WILLS, ESTATES AND TRUSTS, 176 (1968).

127. Treas. Reg. § 20.2105-1(g) (1980).

128. I.R.C. § 2105(a).

129. I.R.C. § 861(a)(1)(A).

130. I.R.C. § 2105(b).

131. As defined in I.R.C. § 861(c).

132. I.R.C. § 2105(b)(2). Special funds deposited by a nonresident alien in a United States bank or trust company in a fiduciary capacity do not qualify for exclusion. Rev. Rul. 69-596, 1969-2 C.B. 179. In addition, cash in a safe deposit box does not qualify for exclusion either. Rev. Rul. 55-143, 1955-1 C.B. 465.

mally taxable in the estate of an American citizen or resident, escape taxation when a nonresident alien is involved.[133]

Works of art are deemed property without the United States if such works are either imported into the United States solely for exhibition purposes[134] or loaned for such purposes to a public gallery or museum.[135] They are treated in this manner at the time of the death of the owner if they are on exhibition or en route to or from display.[136] When this provision was originally enacted in 1950,[137] the exclusion covered only artistic works loaned to the trustees of the National Art Gallery but it has since been broadened to include non-profit public galleries and museums.[138]

These situs rules may be modified for various purposes under provisions of a death tax convention with a foreign country.[139] The most controversial situs problem regarding estates of nonresident aliens is that of chattels.[140] Personal property situs is not determined by its mere physical presence at a given place on the date of death.[141] The Congressional intent in this area is not clearly indicated by the Code,[142] so the courts have had to apply concepts analogous to the notion of personal domicile.[143] In order to determine the domicile of a chattel, two elements seem to be important: permanence and intent. In *New York Central Railroad v. Miller*,[144] the Supreme Court had to decide whether a state could tax the railroad cars of the state's own corporations, although the cars were temporarily taken outside the state. Justice Holmes found the state of origin remained the permanent situs of personal property notwithstanding its occasional excursion to foreign parts.[145] In *Delaney v. Murchie*,[146] jewelry and

133. I.R.C. §§ 2033, 2042.
134. I.R.C. § 2105(c)(1).
135. I.R.C. § 2105(c)(2).
136. I.R.C. § 2105(c)(3).
137. Work of Art Loan Act, 26 U.S.C. § 863 (1970).
138. I.R.C. § 2105(c)(2) requires that no part of the net earnings of the public gallery or museum inures to the benefit of any private stockholder or individual.
139. Treas. Reg. § 20.2104-1(c) (1980).
140. Treas. Reg. § 20.2105-1(a)(2) (1980) defines property without the United States as tangible property located outside the United States.
141. Delaney v. Murchie, 177 F.2d 444, 448 (1st Cir. 1949).
142. Treas. Reg. § 20.2105-1(a)(2) (1980) refers to tangible personal property located outside of the United States but no reference is made to tangible personal property located inside the United States.
143. *See* New York Central R.R. v. Miller, 202 U.S. 584, 597 (1906).
144. *Id.*
145. *Id.* at 597. For a discussion of determining the situs of other tangible items, *see* City Bank Co. v. Schnader, 293 U.S. 112, 120 (1934), and cases cited therein.
146. Delaney v. Murchie, 177 F.2d 444 (1st Cir. 1949).

other personal effects in the United States in the possession of a transient nonresident alien who died in Florida were held to be not situated in the United States.[147] These same elements are highlighted in the estate tax regulations defining domicile.[148] Therefore, facts tending to prove these elements will weigh heavily in the determination of domicile.

C. *Deductions and Credits from the Gross Estate*

The federal estate tax is imposed after the gross estate is allowed certain deductions[149] and credits.[150] In order to take advantage of the deductions, the return filed for the estate of the nonresident alien decedent must also report the value of the gross estate outside of the United States.[151] Certain aliens, whose countries of origin impose foreign exchange restrictions, would much rather forego the deductions because of their reluctance to disclose worldwide assets to the United States.[152] These aliens are particularly fearful of possible exchange of information between the United States and their country of origin.[153]

The tax imposed on estates of nonresident aliens is credited with amounts for state death taxes, gift taxes and taxes on prior transfers.[154] The overall amount paid by a nonresident alien with a large estate, deprived of a marital deduction, is greater than the tax paid by the estate of a citizen or resident, even though the nonresident rates are lower.[155] It is thus difficult to generalize on the matter of

---

147. *Id.* at 450.
148. Treas. Reg. § 20.0-1(b)(1) (1980).
149. I.R.C. § 2106(a)(1) applies the provisions of § 2053 (expenses, etc.) and § 2054 (losses) to nonresident aliens' estates. However, the amount of the deductions that is allowed is the part of such deductions which bears the same relationship to the full amount of such deductions as the value of the part of the gross estate situated within the United States bears to the value of the "entire gross estate wherever situated." Treas. Reg. § 20.2106-2(a)(2) (1980). The charitable deductions allowed under I.R.C. § 2106(a)(2) closely parallel the deduction allowed estates of citizens and residents under I.R.C. § 2055, except that deductions are allowed only if the corporations are organized in the United States. However, I.R.C. § 2106 does not allow for a marital deduction to the estate of a nonresident alien.
150. I.R.C. § 2102(a).
151. I.R.C. § 2106(b).
152. This is a problem for aliens from countries that impose foreign exchange restrictions where local law considers investments outside the country a crime. *See* Kanter, *supra* note 20, at 426.
153. "One of the basic objectives of the estate tax treaty program is to develop a system of international fiscal cooperation to prevent fraud and tax evasion." *Id.*
154. I.R.C. § 2102(a).
155. *See* Rosenberg, *supra* note 78, at 363.

whether estates of nonresident decedents pay more or less taxes than their United States counterparts.

III. Estate Tax Treaties

The United States has an interest in minimizing double taxation at death of its citizens investing and living abroad.[156] International double taxation may discourage private investment abroad by imposing an unfair and discriminatory burden on employees of multinational businesses who die while on temporary foreign assignments. The same is true in the case of foreign investors.[157] Such reduction of double taxation is one of the principal objectives[158] for entering into tax treaties. The treaties, in return, reduce possible dual taxation for the estates of nonresident aliens with assets in the United States.

A. *The Internal Revenue Code and Tax Treaties*

Article VI of the United States Constitution gives treaties and Acts of Congress equal force. In *Reid v. Covert,*[159] the Supreme Court reaffirmed this principle.[160] A treaty ratified after a statute will therefore supersede any inconsistent provisions of the statute, and a statute enacted after a treaty will prevail over the treaty.[161] In the latter situation, however, the legistative intent to nullify by stat-

---

156. *See* Titlow, *International Double Taxation and the United States,* 46 Taxes 135, 137 (1968). "United States interest in the bilateral approach to the elimination of international double taxation grew from the participation of American economic institutions in European reconstruction following World War I."

157. *See* Kanter, *supra* note 20, at 402. "While it is patent that the incentive to invest is more sharply curtailed by double taxation of income than double taxation of estates, the impact of the latter is sufficiently great to affect in an undesirable way the incentive to invest in and hold foreign property."

158. Other objectives include: preventing tax harassment; eliminating tax evasion by mutual administrative assistance and granting tax incentives. *See generally* Owens, *Role of U.S. Income Tax Treaties in Relieving Double Taxation,* Proceedings of the 1962 Institute on Private Investments Abroad and Foreign Trade 109 (1962); King, *Fiscal Cooperation in Tax Treaties,* 26 Taxes 889 (1948).

159. 354 U.S. 1 (1957).

160. *Id.* at 18, n. 34.

161. *Id.*

> By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other . . . . [I]f the two are inconsistent, the one last in date will control the other.

Id.

ute a prior treaty obligation would have to be clearly expressed either in the amending statute or its legislative history.[162] For example, the Revenue Act of 1962 provided that in the event of any conflict between the Act and the terms of any tax convention, the Revenue Act would govern.[163] The Treasury Department informed the House-Senate Conference Committee that the only conflict between the 1962 Act and the treaties was with the Greek Estate Tax Treaty,[164] and the pertinent provision of the Greek treaty was later renegotiated.[165]

Treaties generally stipulate that their provisions shall not be construed to restrict in any manner an exemption, deduction, credit or other allowance accorded by the laws of one of the contracting countries in the determination of the tax imposed by that country.[166] This reaffirms the principle that a taxpayer should be in no less advantageous a position under the treaty than he would have been had the treaty never come into existence.[167] Accordingly, the taxpayer is given the option of using either the Code or the treaty, whichever yields the more favorable result from the taxpayer's perspective.[168]

---

162. Cook v. United States, 288 U.S. 102, 120 (1933); *see generally* RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 144(1)(b), 148 [Comment] (1965). *See also* Lindstone, *Liberal Construction of Tax Treaties*, 47 CORNELL L.Q. 529, 531 (1962); Beemer, *Revenue Act of 1962 and United States Treaty Obligations*, 20 TAX. L. REV. 125, 127 (1964). *But cf.* Watson v. Hoey, 59 F. Supp. 197 (S.D.N.Y. 1943), where Revenue Act of 1932 denied nonresidents benefits granted by the Hay-Pauncefote Treaty.

163. Revenue Act of 1962 (§ 31-Part 1).

164. *Hearings on H.R. 10650 Before the Senate Committee on Finance*, 87th Cong., 2d Sess. 104 (1962).

165. Protocol to the United States Estate Tax Treaty with Greece Modifying and Supplementing the Convention of February 20, 1950, for the Avoidance of Double Estate Taxation, 18 U.S.T. 2853, T.I.A.S. No. 6375, 632 U.N.T.S. 315 (*signed* February 12, 1964).

166. *See, e.g.*, United States Income Tax Treaty with Belgium art. XX(1) (1948), 2 International Tax Treaties of All Nations No.168 (Oceana Pub. 1976) [hereinafter Oceana]; United States Income Tax Treaty with Switzerland art. XVIII(2) (1951), 3 Oceana No. 295; United States Income Tax Treaty with Finland art. XXI(2) (1952), 3 Oceana No. 307.

167. For example, the treatment of compensation for personal services earned by Americans in France is more liberal under French law than under the United States Income Tax Treaty with France. However, France agreed that art. 6 of the Protocol preserved to such United States persons the favorable treatment granted by French law. *Hearings on S. Exec. Doc. A. Before a Subcommittee of the Senate Foreign Relations Committee*, 80th Cong., 1st Sess. 153-154 (1947).

168. *See Hearings on S. Exec. Doc. E. Before a Subcommittee of the Senate Foreign Relations Committee*, 89th Cong., 1st Sess. 48-49 (1965).

B. *Interpretation of Tax Treaties*

Unlike the provisions of the Internal Revenue Code, a treaty is the result of negotiation with a foreign country with different internal laws. The problem of arriving at an interpretation of any term common to both countries is much greater than the problem of interpreting a comparable term in the Code.[169] Estate tax treaties sometimes expressly state that the treaty refers to the contracting nations' internal law in force on the date of the signing of the treaty. This provision is followed by a clause stating that if these laws are appreciably modified, the two countries will consult together for the purpose of adapting the provisions of the treaty to such changes.[170]

The case of *Johansson v. United States*[171] is a useful example of an interpretation of this type of treaty provision. The Fifth Circuit, disregarding a Swiss administrative finding that the taxpayer was a resident of Switzerland, found that he could not be considered a resident of that country under either Swiss or American law.[172]

The courts of the respective States which are party to a tax treaty should seek to interpret the provisions of the treaty in a consistent manner.[173] Due to the possibility of ambiguous or uncertain interpretation, a tax treaty should spell out in detail concepts that have different meanings under the laws of each country. For example, the United States has a definition of domicile different from that of residence,[174] whereas domicile is a concept generally unknown under European law.[175] The estate tax treaties with the Netherlands[176] and the United Kingdom[177] attempt to solve this problem, but other estate tax treaties allow domicile to be defined by each country.[178]

---

169. *See generally* RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 149-158 (1965).

170. *See, e.g.*, United States Estate Tax Treaty with Greece, art. I(2), 5 U.S.T. 12, T.I.A.S. No. 2901 (1950).

171. 336 F.2d 809 (5th Cir. 1964).

172. *Id.* at 812.

173. Donroy, Ltd. v. United States, 301 F.2d 200, 207 (9th Cir. 1962). *Accord*, Maximov v. United States, 373 U.S. 49 (1963).

174. *See supra* notes 12, 14.

175. *Technical Explanation by Treasury Department, Convention between the United States and the Netherlands*, 2 TAX TREATIES (CCH) ¶ 5896.

176. Convention between the United States and the Netherlands to avoid double taxation. 22 U.S.T. 247, T.I.A.S. No. 7061 (1969) (hereinafter cited as Netherlands).

177. Treaty between the United States and the United Kingdom to avoid double taxation, 60 Stat. 1391, T.I.A.S. No. 1547 (1945).

178. *See generally* Sumption, *Residence*, 3 BRIT. TAX. REV. 155 (1973).

C. *The Domicile Uncertainty*

There are currently thirteen death tax treaties in force between the United States and other nations.[179] Eleven of the treaties came into force before 1961. There are treaties with the following countries: Australia,[180] Canada,[181] Finland,[182] France,[183] Greece,[184] Ireland,[185] Italy,[186] Japan,[187] Norway,[188] the Republic of South Africa,[189] and Switzerland.[190] If both parties to the treaty claim the decedent as a domiciliary, relief from double taxation may be achieved by allowing certain credits.[191] The newer treaties,[192] after

179. An estate tax convention between the United States and Belgium was signed on May 27, 1954. However, the treaty is not yet in force [citation not available]. In addition to the present thirteen estate tax treaties, the United States is involved in negotiations with Germany, Denmark, Luxembourg, and Austria. At the present time there are 29 income tax treaties in force with the following countries: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Poland, Romania, Sweden, Switzerland, Trinidad, and Tobago, Union of South Africa, U.S.S.R., and United Kingdom. *See generally* LANGER, *supra* note 1. There are also special income tax treaties in effect for the nations of "Belgium Overseas," "United Kingdom Overseas," and the Netherlands Antilles. *Id.*

180. Convention between the United States and Australia for The Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on the Estates of Deceased Persons (hereinafter Death Tax Convention) 5 U.S.T. 92, T.I.A.S. No. 2903 (1953).

181. Death Tax Convention between the United States and Canada, 13 U.S.T. 382, T.I.A.S. No. 4995 (1961).

182. Death Tax Convention between the United States and Finland, 3 U.S.T. 4464, T.I.A.S. No. 2595 (1952).

183. Death Tax Convention between the United States and France, 64 Stat. (3)(B)(3), T.I.A.S. No. 1982 (1948).

184. Death Tax Convention between the United States and Greece, 5 U.S.T. 12, T.I.A.S. No. 2901 (1950).

185. Death Tax Convention between the United States and Ireland, 2 U.S.T. 2294, T.I.A.S. No. 2355 (1949).

186. Death Tax Convention between the United States and Italy, 7 U.S.T. 2977, T.I.A.S. No. 3678 (1955).

187. Death Tax Convention between the United States and Japan, 6 U.S.T. 113, T.I.A.S. No. 3175 (1954).

188. Death Tax Convention between the United States and Norway, 2 U.S.T. 2353, T.I.A.S. No. 3258 (1949).

189. Death Tax Convention between the United States and the Republic of South Africa, 3 U.S.T. 3792, T.I.A.S. No. 2509 (1947).

190. Death Tax Convention between the United States and Switzerland, 3 U.S.T. 3972, T.I.A.S. No. 2533 (1951).

191. These are the primary and secondary credits. The country imposing a tax based on domicile or citizenship must allow a credit to the extent of the tax imposed on the situs of the property by another country. The secondary credit involves cases of either dual domicile or one state imposing taxes based on citizenship and another based on domicile. *See, e.g.*, United States Estate Tax Treaty with France art. 5 (1) and (2), *supra* note 183, United States Estate Tax Treaty with Norway art. 5 (1) and (2), *supra* note 188.

192. The United States Estate Tax Treaty with the Netherlands, *supra* note 176,

looking to the laws of each country for the determination of domicile, provide for certain tests to insure the decedent is domiciled in only one country.[193]

For example, the United States Estate Tax Convention with the Netherlands makes this determination by stating that persons residing in either country fewer than seven out of the ten years preceding death will be domiciled in the country of citizenship.[194] This rule applies for business, professional, education, training, tourism, or similar purposes so long as there is no clear intention to remain indefinitely.[195] If both nations consider the decedent domiciled in their jurisdictions under their own law, and the seven-year domiciliary rule does not apply, there is a series of tests which are generally used to determine the person's sole legal domicile.[196] The first such test provides that the decedent shall be deemed to have been domiciled in the state in which he made his permanent home for five years or more immediately preceding his death.[197] If he did not make his permanent home for five years or more in either the United States or the Netherlands, his domicile will be in the state with which his "personal relations" were closest.[198] If this cannot be determined, his domicile will be the state of which he was a citizen.[199] If he was

---

was entered into in 1969 and the new United States Estate Tax Treaty with the United Kingdom was entered into in 1978 (though it is not yet in force).

193. *See, e.g.*, United States Estate Tax Treaty with the Netherlands art. 4, *supra* note 176, and the United States Estate Tax Treaty with the United Kingdom art. IV.

194. *See* United States Estate Tax Convention with the Netherlands art. 4(2)(a), *supra* note 176.

195. *See* Netherlands art. 4(2)(b), *supra* note 176. Under Netherlands law domicile is based on the decedent's abode; intent being less relevant to a determination of domicile. For the purpose of this Article, it is presumed that the decedent did not have such a clear intention unless all evidence considered together is clear and convincing to the contrary. *Memorandum Regarding the Convention and Protocol of July 15, 1969, with the Netherlands for Avoidance of Double Taxation of Estates and Inheritances, Report of the Department of State*, 2 TAX TREATIES (CCH) ¶ 5895 [hereinafter cited as *Memorandum Netherlands Treaty*].

196. Netherlands art. 4(3), *supra* note 176. The purpose of the tests is to fix one and only one domicile. The 7-year domiciliary rule will cover most citizens of one country temporarily residing in the other country. The additional tests will be relevant in few cases, such as where the decedent was a citizen of both countries or of neither country, or where a citizen of one country who was resident in the other country for more than 7 out of 10 years did so without clear intention to remain there indefinitely. *See Memorandum Netherlands Treaty* at ¶ 5895, *supra* note 195.

197. *See* Netherlands art. 4(3)(a), *supra* note 176.

198. *See* Netherlands art. 4(3)(b). *Id.* The tests used in this treaty are based on OECD rules. *See* notes 206-209 *infra*, and accompanying text. The OECD Model uses "personal and economic relations" rather than "personal relations." *See Memorandum Netherlands Treaty* at ¶ 5895, *supra* note 195.

199. *See* Netherlands art. 4(3)(c), *supra* note 176.

a citizen of both states or neither of them, domicile will be determined by mutual agreement.[200]

In addition, a citizen of either the United States or the Netherlands who was domiciled in the other country for seven or more years will have the country of origin yield priority of taxation through the credit mechanism.[201] However, this doctrine does not relate to property other than real estate[202] or business assets situated in the country of citizenship.[203] If the decedent was a citizen of both countries, the country of which he was not a domiciliary will grant a credit for the tax of the country in which he was domiciled.[204]

The Estate Tax Convention between the United States and the Netherlands reflects efforts to conform with the Model Double Taxation Convention on Estates and Inheritances published in 1966 by the Organization for Economic Cooperation and Development (OECD).[205] This model does not contain the numbers-of-years-of-residence rule, but instead applies the tests of permanent home,[206] centre of vital interests,[207] habitual abode,[208] and citizenship.[209]

The United States Department of the Treasury has recently issued its own model estate and gift tax treaty.[210] The domicile question is therein determined by using tests similar to those of the OECD Model[211] together with the seven-of-ten-years rule found in the Convention between the United States and the Netherlands.[212]

---

200. *See* Netherlands art. 4(3)(d). *Id.*
201. *See* Netherlands art. 11(1).
202. *See* Netherlands art. 6(2).
203. *See* Netherlands art. 7.
204. *See* Netherlands art. 11(2)(b).
205. *See* note 198 *supra*. The Organization for Economic Co-operation and Development (OECD) was set up under a Convention signed in Paris on December 14, 1960. The members are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. *See* REPORT OF THE OECD COMMITTEE ON FISCAL AFFAIRS, MODEL DOUBLE TAXATION CONVENTION ON INCOME AND ON CAPITAL 3 (1977).
206. OECD Model Estate Tax Convention, 1 TAX TREATIES (CCH) ¶ 152 art. 4(2)(a) [hereinafter cited as OECD Model].
207. *Id.*
208. OECD Model at ¶ 152 art. 4(2)(b).
209. OECD Model at ¶ 152 art. 4(2)(c).
210. Treasury Department's Model Estate and Gift Tax Treaty, 1 TAX TREATIES (CCH) ¶ 154. The first model was issued in May of 1977. It was subsequently amended in July of 1979 to conform to the Tax Reform Act of 1976.
211. *Id.* at ¶ 154 art. 4(2).
212. *Id.* at ¶ 154 art. 4(3).

The new United Kingdom treaty also uses this number-of-years-of-residence rule[213] in addition to the OECD tests for the determination of fiscal domicile.[214]

The newer treaties indicate that leaving the determination of domicile to the laws of each signatory is unsatisfactory. It is unlikely American courts will apply these newer concepts of domicile to the old treaties because the judiciary will look to the treaty itself which refers to the local law.[215] Citizens of countries that have no treaties with the United States and found to be domiciled in the United States could be exposed to estate tax rates at their death that exceed the value of the estate.[216] Those Americans dying with investments in countries with old treaties, and the citizens of those countries who are domiciled in the United States, will have to depend on the system of credits to alleviate dual taxation. Only United Kingdom or Netherlands nationals domiciled in the United States, or citizens of the United States with investments in those countries, will be relieved from dual taxation.

D. *Mitigating the Domicile Uncertainty*

The resolution of the issue of domicile is a primary consideration to avoid dual taxation. The key to improving this domicile uncertainty lies in local law. Because the United States is one of few countries imposing taxes based on citizenship, an American citizen domiciled in a foreign country will surely face dual taxation, whereas a foreigner domiciled in the United States may not. This could be eliminated by allowing American citizens to become nonresidents for tax purposes without renouncing their citizenship.[217] For example, an American citizen moving abroad would file a final income tax return as a resident. He would then pay tax on all his capital appreciation, either

---

213. United States Estate Tax Treaty with the United Kingdom art. IV(1).

214. *Id.*, art. IV(4).

215. *See* Johansson v. United States, 336 F.2d 809 (5th Cir. 1964), *supra* note 171, and accompanying text.

216. Currently, the top estate tax bracket is 70%. I.R.C. § 2001(c). If another country's death tax rates were similarly high, the imposition of tax by each country on the same property could clearly be confiscatory. *See* Kanter, *supra* note 20, at 402, n. 5.

217. Because the United States imposes taxes based on citizenship, the only method available to an American to avoid all taxation is to renounce the American citizenship. However, I.R.C. § 2017 provides that anyone dying within ten years of such renunciation, if done for tax purposes, will pay estate taxes as if he continued to be a citizen.

realized or unrealized.[218] Those assets would then be subject to United States income and estate taxes in the same manner that assets of nonresident aliens are subject to tax.[219] That is, at death they could be subject to tax if they own property which is found to be within the United States. This method would require only minor revisions to the Internal Revenue Code.[220]

In addition, a foreign citizen deemed to be domiciled in the United States at his death would pay federal estate taxes on his worldwide assets.[221] In order to make the determination of domicile, the present Regulations defining who is a domiciliary would have to be changed.[222] Assuming an intention to remain in a certain place, rules such as the ones in the OECD Model Estate Tax Treaty and in the Treasury Model could help narrow an otherwise vague definition.[223] For example, residence in the United States seven out of ten years preceding death should create a rebuttable presumption[224] of domicile,[225] particularly where the decedent has paid federal in-

---

218. Realized appreciation on assets covered under I.R.C. § 1221 (defining capital assets) or § 1231 (certain property used in trade or business and involuntary conversions) is subject to tax as a capital gain or capital loss. I.R.C. § 1202 allows a 60% deduction from income of any capital gain realized. There is no reason why the proposed gain on the unrealized appreciation of the assets of an American citizen becoming a nonresident has to be allowed such a tax benefit. Because there is no sale or exchange of any of these assets, such unrealized appreciation would be taxed as ordinary income subject to progressive rates.

219. The estates of nonresident American citizens could be subject to estate tax henceforth under Subchapter B of Chapter 11 of the Code, just like other nonresident aliens.

220. The existing provisions for estate and income taxation of nonresidents could remain the same. A special provision for the taxation of the unrealized appreciation would be the major change required.

221. I.R.C.§§ 2101-2106 could remain the way they presently are; § 2107 (expatriation to avoid tax will no longer be necessary); and § 2108 giving the President powers to change certain taxes could also remain the same. Note, however, that there is recent legislation taxing foreign investors on all capital gains from sales of United States real property. In addition, purchasers of United States real estate from foreign individuals would be required to withhold tax at source. *See* Address by M.J. Langer, International Fiscal Association, Miami, Florida (July 12, 1979).

222. *See* Treas. Reg. § 20.0-1(b)(1) (1980).

223. *See* notes 205-10 *supra*, and accompanying text.

224. The Supreme Court has in the past invalidated classifications that create irrebuttable presumptions where they result in a denial of due process of law. *See, e.g.*, United States Dept. of Agriculture v. Murry, 413 U.S. 508 (1973) in which the Court struck down a food stamp act provision which disqualified a large class of households without individualized determination as to their need. *See generally* Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974). "The recent Supreme Court cases have held that if it is not 'necessarily or universally true in fact' that the basic fact implies the presumed fact, then the statute's irrebuttable presumption denies due process of law." *Id.* at 1534.

225. *See* Netherlands art. 4(3)(a), *supra* note 176.

come taxes during those years.[226] In order to rebut this presumption, a preponderance of the evidence[227] must demonstrate the decedent's intent to return to another domicile. If the decedent resided in the United States less than seven out of the ten years preceding death, factors such as permanent home and business interests would be considered to make the determination.[228] This scheme would permit making actual determinations allowing flexibility, while incorporating certainty into the legal systems.

These suggestions would not totally eliminate dual taxation. It is therefore most important to continue augmenting the network of estate tax treaties, particularly with those countries in which Americans invest.[229] A treaty does not have to leave the determination of domicile to local law. It can attempt to integrate the domestic laws of domicile of both signatories.

IV. CONCLUSION

America's fundamental economic strength and its political stability have become overriding reasons for foreigners to purchase property in the United States.[230] At the same time, Americans continue to invest large sums of capital abroad in order to diversify holdings and hedge risks.[231] In addition, an increasing number of wealthy foreigners are not only investing in the United States but are also moving into states such as Texas and Florida.[232]

It is only fair that those nonresident aliens who benefit from the economy pay their fair share of United States taxes. If a nonresident dies domiciled in the United States, all his assets should be subject to our taxes.

It appears certain that the United States will need foreign capital to help finance its growth into the twenty-first century. Notwithstand-

---

226. I.R.C. § 861 defines what income earned by the nonresident will be income from sources within the United States. A nonresident paying United States income taxes is involved in a trade or business or in investment activity in the United States. These activities create a stronger presumption of permanence.

227. *See, e.g.*, In re Schomer's Will, 23 Misc. 2d 282, 284, 197 N.Y.S.2d 945, 947 (1960).

228. *See* notes 210-14 *supra*, and accompanying text.

229. *See* Titlow, *supra* note 156, at 135.

230. *Pieces of America*, Wall St. J., Sept. 26, 1979, at 1, col. 1.

231. By the end of 1973, American investors accounted for 107 billion dollars of foreign direct investment abroad while 18 billion dollars in foreign direct investment flowed into the United States. *See* Note, *Foreign Direct Investment, supra* note 9, at 150.

232. *See supra* note 230.

ing this situation, the key issue which cannot be ignored is at what level this activity should be permitted. If the need for foreign investment were very great, the United States could afford to become a tax haven for those who contribute to the economy. Our present laws permit foreigners to escape any estate tax at death, as shown in the Appendix, by insuring they are not domiciled in the United States. No other nation in the world treats foreign investors as well as the United States. If the United States has the best to offer, there is no need to give it away.[233]

APPENDIX

The following examples outline possible problems when nonimmigrants die in the United States with American assets. Example A features a wealthy nonimmigrant from a Latin American country with which the United States has no estate tax treaty. Example B is a wealthy citizen of a country that imposes taxes based on citizenship and who comes to the United States with a G-4 visa. Example C is a wealthy citizen of a country that has no estate tax treaty with the United States. These examples show the tax problems involved when they are deemed to be United States domiciliaries and the possible savings that can be derived from proper planning.

Example A—Mr. Juan Perez is a citizen of Argentina, as are his wife and their two minor children. Mr. Perez is a university professor in Buenos Aires. He and his family came to the United States with class J visas, which carry a specific intent not to abandon the foreign domicile. Their assets in Argentina consist of real estate valued at approximately $1,000,000 U.S. and some personal property valued at $25,000 U.S.

Mr. and Mrs. Perez live in University City, U.S.A. in a rented home and after one year have accumulated $15,000 in a joint savings account at the local bank. Unfortunately, Mr. Perez meets an untimely death while in the United States.

---

233. If the closing lines of E. Lazarus' *The New Colossus* would be written in 1980, perhaps the Statute of Liberty would not be asking for the tired, poor, huddled masses. It may read instead:

> Give me your marks, your yen,
> Your unused capital seeking high return
> The excess profits of your oil cartel
> Send these, the floating tax-tossed funds to me,
> I post "For Sale" upon the golden door !

(Ms. M. Campbell, Law Student, College of Law—University of Florida).

If Mr. Perez was considered a citizen or a resident of the United States for federal estate tax purposes, his estate tax would be computed by adding up his worldwide assets:

$1,000,000	Real estate in Argentina
25,000	Personal property in Argentina
15,000	Bank account in the U.S.
$1,040,000	Total estate

Assuming both the real estate and the personal property were left to the wife, as a United States citizen or resident, the estate would be entitled to a marital deduction of one-half the value of the estate passing to the wife as well as a credit for any death taxes paid to Argentina on the property located there, subject to certain limits. Because there is no estate tax treaty with Argentina, it is possible that Argentina would not give credit to his estate for any United States estate taxes paid.

However, Mr. Perez is a holder of a class J visa. It appears from the *Elkins* decision that holders of class J visas may not run the risk of dying domiciled in the United States. Congress has specifically provided that in the case of class J visas, persons holding it have no intent of abandoning the residence in the foreign country. If Mr. Perez is not domiciled in the United States, the Argentinian assets would not be included in his estate for United States tax purposes. Savings accounts in American banks are considered by the Code to be property without the United States. Therefore, no tax would be due at Mr. Perez' death to the United States authorities regardless of the balance in the savings account.

Example B—Mr. Ian Ngahelm, a Norweigian citizen, has accepted a position at the Washington, D.C. branch of the International Bank for Reconstruction and Development. He obtains a G-4 visa for himself and for his two children, ages 15 and 16. Because Mr. Ngahelm intends to remain in the United States indefinitely, he purchases a home for $150,000 U.S. and moves the family possessions to this country. Mr. Ngahelm owns no real property in Norway. The balance of his estate consists of a portfolio of Norweigian securities valued at approximately $1,500,000 U.S., a Swiss bank account with approximately $150,000 U.S., and a Swiss safe deposit box with the family jewels valued at $500,000 U.S. Mr. Ngahelm also has life insurance policies on his life, of which he is the owner, totaling $250,000 U.S. and a savings account in a New York bank with a $150,000 U.S. balance.

After settling down in the United States, Mr. Ngahelm sells approximately $750,000 U.S. of his Norweigian securities and purchases United States stocks and bonds. He remains in the United States for 15 years, visiting Norway infrequently, and then dies in Maryland.

Norway imposes a death tax on the basis of citizenship of decedents regardless of where they are domiciled. The Estate Tax Treaty between the United States and Norway provides that the question of domicile is determined in accordance with the law in force in that State. It appears from *Elkins* that Mr. Ngahelm could die domiciled in the United States. Assuming values have remained the same, his estate consists of the following:

$ 150,000	U.S. real estate
750,000	U.S. securities
750,000	Foreign securities
150,000	U.S. bank account
150,000	Swiss bank account
500,000	Jewelry in Switzerland
250,000	Life insurance policy in U.S.
50,000	Personal property in U.S.
$2,750,000	Total estate

If Mr. Ngahelm is domiciled in the United States, all the property is included in his estate for tax purposes. The same will probably be true with respect to his Norweigian estate or inheritance tax. The treaty will apportion the tax between both countries through the credit mechanism. If he had not been domiciled in the United States, only the property considered property within the United States will be subject to tax.

Example C—Assume the same facts as in Example B, except that a Mr. Deutsch was born in Dusseldorf, Germany. The United States has no estate tax treaty with Germany at the present time. If Mr. Deutsch is deemed to be domiciled in the United States at his death, the entire $2,750,000 would be subject to tax. Possibly Germany would also impose a tax but the absence of a treaty may subject the assets to dual taxation.

If he were not domiciled in the United States at his death, the situs rules would be determined by the applicable provisions of the Code, because there is no treaty. The real estate in the United States, the United States securities, and the personal property located in the United States would probably all be subject to tax. It is un-

likely any of the other assets would be subject to United States estate tax. The estate subject to United States taxes would be:

$150,000	U.S. real estate
750,000	U.S. securities
50,000	Personal property in U.S.
$950,000	Total assets

Even if Mr. Deutsch had been married, these assets would not be allowed a marital deduction, or an orphan's deduction. The balance of his assets of $1,800,000 would not be subject to United States estate tax. His country of origin would impose taxes based on its laws and it may or may not allow a deduction for United States taxes paid.

Proper planning prior to coming to the United States could save a nonresident alien substantial estate taxes should he die here. The first area to examine is the type of visa involved. Visas that do not carry the presumption of the retention of a foreign domicile should be avoided if possible. The alien should avoid any indicia of the United States being his permanent home. The assets held by the nonresident should be structured so that most of them are property without the United States at his death. For example, United States real estate and securities should be purchased and held by a foreign corporation. It is possible to coordinate estate tax savings with income tax savings by using corporations from countries with favorable income tax treaties. In this manner the United States real estate and portfolio holdings are converted at the nonresident's death into foreign stock deemed property without the United States by the Code.

Through the application of these methods, someone like Mr. Deutsch could reduce the value of assets subject to United States estate tax from $950,000 to $50,000. The latter amount would probably be taxed because personal property is difficult to "shelter." The United States estate tax rate structure permits the first $60,000 of assets owned by the nonresident to pay no tax. Therefore, if a foreign corporation holds Mr. Deutsch's real estate and American stocks and bonds at his death, he should escape all United States estate taxes.