Because you asked

Estate and Gift Tax Treatment for Non-Citizens

The laws governing the US estate and gift tax system are complex. They become even more challenging — and require a much higher degree of awareness — when you consider them together with the rules governing non-US citizens. This resource can help you unravel that complexity by answering questions that address the most important estate and gift planning differences between US citizens, US resident aliens and nonresident aliens.

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US estate and gift taxes

1. What are the residency and domiciliary considerations for US estate and gift taxes?

Gifts, bequests and other similar transfers by US citizens and US residents who are not citizens (aka "resident aliens") are subject to estate and gift taxation on a worldwide basis. Those who are not US citizens or resident aliens (i.e., those who are "nonresident aliens" or NRAs) are subject to estate and gift tax only to the extent they are transferring US situs assets. Therefore, the first question for any non-citizen (and their financial professional) is to determine if they are a resident alien for gift and estate tax purposes.

For gift and estate tax purposes, an individual is a resident alien if that person is domiciled in the US at the time of the gift or at the time of their death. The US Treasury Regulations define "domicile" as follows:

"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. Residence without the requisite intention to remain indefinitely will not suffice to constitute domicile, nor will intention to change domicile effect such a change unless accompanied by actual removal."

Because the question of domicile depends on the intention of the individual, there is no bright-line test to determine if an individual has become a US resident alien for gift and estate tax purposes.

However, some of the factors considered when determining domicile include:

- Length of time spent in the US and abroad
- Size, cost and nature of individual's house or other residences — whether owned or rented
- Location of individual's family and close friends
- US visa status
- Location of individual's business interests and voting records
- Declaration of residence in one's wills, trusts, deeds, etc.

Planning note

The rules regarding who is a resident alien for US income tax purposes are quite different than the domicile test described above. For example, non-citizens are considered resident aliens for income tax purposes generally if they have the right to permanently reside in the US (known as the "green card" test) or spend a certain number of days in the US within a three-year period (known as the "substantial presence test"). Consequently, it is possible, although not necessarily common, for a person to be considered a resident alien for US income tax purposes, but not for gift and estate tax purposes.

For the purposes of this resource, all mention of "resident aliens" relates to individuals who meet the domicile test for transfer tax purposes.

2. Who is subject to US estate and gift taxes?

While the details that answer this question are given throughout this guide, here's a basic summary:

- Individuals who are "US persons" (i.e., US citizens and resident aliens) are subject to gift, estate, and generation-skipping transfer taxation on worldwide assets.
- Individuals who are nonresidents are subject to gift, estate, and generation-skipping transfer taxation only on assets deemed located in the US (i.e., "US situs property").

Summary of resident vs. nonresident transfer tax treatment

Resident alien	⟷	Nonresident alien
$12.92M in 2023*	Estate tax exemption	$60,000
$12.92M in 2023*	Gift tax exemption	Annual exclusion gifts only $17k in 2023
US and worldwide property	Property subject to estate tax	US situs property
Yes	Irrevocable Life Insurance Trust (ILIT) needed to exclude death benefit from estate taxes	No

*Exemption is adjusted for inflation and will sunset to $5M adjusted for inflation in 2026

3. Are there special rules for US citizens who reside in US possessions?

Special rules apply to certain persons residing in US possessions–i.e., Puerto Rico, Guam, American Samoa, the Northern Mariana Islands and the US Virgin Islands.

Internal Revenue Code (IRC) §2209 provides that a decedent who is a US citizen and resident of a possession at the time of their death shall be considered a nonresident alien for estate tax purposes, but only if such person acquired US citizenship solely by reason of:

1. being a citizen of the US possession, or
2. being born or residing within such possession.

Example

Cynthia, a citizen of Puerto Rico, died in Puerto Rico on October 1, 2020, while domiciled in Puerto Rico. Cynthia is considered to have acquired her United States citizenship solely by reason of her being a citizen of Puerto Rico, and thus is considered a nonresident alien for the purpose of US estate tax law.

These rules are also applicable for the purposes of determining any gift or generation-skipping transfer tax liability of a person residing in a US possession.

4. What are the gift and estate tax rules for resident aliens?

Resident aliens are generally subject to the same gift and estate tax laws applicable to US citizens — i.e., all property of resident aliens, whether it is in the US or in another country, is subject to US estate and gift tax.

The full applicable credit amount against US estate tax is available to resident aliens, just as with US citizens. Under the Tax Cuts and Jobs Act of 2017, this amount was doubled from $5M to $10M (indexed annually for inflation).[1] For 2023, the exemption amount is $12.92M. In 2026, this is scheduled to decrease to $5M indexed for inflation.

Transfers by resident aliens are also subject to the generation-skipping transfer (GST) tax in the same manner as applicable to US citizens. The 2023 exemption for GST taxes is $12.92M.

Resident aliens can make present interest gifts to anyone in the US who qualifies for the annual gift tax exclusion ($17,000 in 2023). They may also make direct payments of medical and educational expenses without incurring a gift tax.

5. Is there relief from US transfer taxes when a transfer is subject to either gift or estate tax in another country?

All property of resident aliens, whether it is located in the US or in another country, is subject to US estate and gift tax. That being said, if a foreign death tax is owed to another country by a decedent's estate, the US estate can receive a credit for the foreign death tax paid. There is no such credit available against the US gift tax for foreign gift taxes, however, which may lead to multiple gift taxation on gifts of foreign property. Some countries have tax treaties with the US, which can often mitigate or eliminate double taxation with respect to transfer taxes. See question 17 for more information about treaties.

6. What are the estate tax rules for nonresident aliens?

Unlike US citizens and resident aliens, who are subject to estate and gift tax on their worldwide assets, nonresident aliens (NRAs) are subject to estate and gift tax only on assets that are considered US situs property (see the next question for information on what generally constitutes US situs property). In the case of gift tax, only certain US situs property is subject to taxation.

When an NRA has US situs property that is subject to transfer taxes, the exemption against such tax differs from the exemption afforded to US citizens and resident aliens. Nonresident aliens can generally transfer up to $60,000 of assets at death without being subject to US estate tax (the actual credit amount is $13,000, which translates into an exemption amount of $60,000).

This exemption for NRAs was not changed as part of the Tax Cuts and Jobs Act of 2017 and is not scheduled to decrease in 2026.

US situs property

7. What types of property are considered "US situs property" for estate tax purposes for nonresident aliens?

Nonresident aliens (NRAs) are subject to US estate tax only on "US situs property," which is defined in IRC §§2103–2105 and the applicable regulations as generally including, but not being limited to, the following types of assets:

- Real estate and tangible property located in the US
- Stock in a US corporation & mutual funds
- Certain US bank deposits
- Debt obligations of a US person, the US, a state, or any political subdivision thereof, or the District of Columbia
- Certain intangible personal property, if issued by or enforceable against a US resident, domestic corporation, or governmental unit[2]
- A retained interest and/or beneficial interest in a trust-owned property situated in the US (even a foreign trust)
- US life insurance cash surrender value or replacement value of a policy owned by the decedent on the life of another
- Deferred compensation and pension benefits paid by a US employer

Real estate

If US real estate owned by an NRA is subject to a non-recourse mortgage, then only the equity in the residence will be subject to US estate tax, whereas if the residence has a recourse mortgage on it, the full fair market value of the property will be included in the taxable estate.

Equities

If an NRA is a citizen of a country that has an estate tax treaty with the US, then US equities may be exempt from estate tax, and other tax provisions may vary for citizens of that country, depending on the terms of the treaty.

US bank deposits

Personal bank deposits (e.g., cash and certificates of deposit) within the US are normally not considered US situs property under IRC §2105(b), unless such accounts are considered connected to a trade or business in the US operated by the decedent. However, deposits with a domestic branch of a foreign corporation will be considered US situs property if such branch is "engaged in the commercial banking business."[3] Alternatively, deposits with a foreign branch of a domestic corporation or partnership engaged in the banking business generally are not deemed situated in the US (even if they were effectively connected to a US trade or business).[4]

Note that when a bank deposit is held by a US bank that is acting as the trustee or custodian in a fiduciary capacity, that deposit will likely be considered US situs property.[5]

Other cash deposits

Cash deposits with US brokers, money market accounts with US mutual funds and cash in US safe deposit boxes are generally considered US situs property.[6]

Trusts

In general, trust property comprised of US situs property (determined at the time of the transfer or at the death of the NRA) is included in the taxable estate of NRAs only if such property would be included in the taxable estate of a US citizen or resident alien under IRC §§2033–2038. If the assets are owned by an irrevocable trust created by the NRA, then such assets generally will be exempt from US estate tax, although the three-year "look-back" rule does apply to transfers of US situs assets.

8. What types of property are not considered "US situs property" for estate tax purposes for nonresident aliens?

Only US situs property owned by a nonresident alien (NRA) decedent is subject to US estate tax. IRC §2105 and supporting regulations provide a list of property that is generally considered non-US situs property, including, but not limited to:

- Life insurance proceeds on the decedent's life
- Personal bank deposits at a US bank and certain other bank deposits
- Stock in companies incorporated outside the US
- Artwork on loan for an exhibition
- Some US Treasury debt obligations

Proceeds from life insurance on an NRA's life

Amounts received as insurance on the life of an NRA decedent are not subject to US estate taxes at death. However, if an NRA decedent owns a policy on the life of another and that policy is issued by a US company, the policy will likely be includible in the NRA's gross estate as either a debt of a US person under the debt obligation rules or as intangible personal property enforceable against a US corporation.

Planning note

Unlike the proceeds of a life insurance policy owned by a US citizen or resident alien, the proceeds of a policy on the life of a nonresident alien (NRA) generally are not included in the NRA decedent's US gross estate, regardless of who owns the policy. Accordingly, an NRA may own a US policy on their own life directly rather than having to transfer ownership of the policy to an irrevocable trust, as is often done for US citizens and resident aliens.

Nonresident aliens

9. Are nonresident aliens subject to gift tax?

A gift of property by a nonresident alien (NRA) is subject to US gift tax only if the property being transferred is real estate or tangible personal property located within the US. Consequently, gifts of any intangible property (see below) by an NRA, whether or not situated in the US, and regardless of its value, would not be taxable.

Gifts of cash and currency

The IRS and the courts have generally taken the position that US or foreign currency or cash situated within the US at the time of the gift will be treated as a tangible asset.[7] Accordingly, a gift by an NRA in the form of a check drawn against a US bank account or a wire transfer of funds into a US account to a US donee may be treated as a transfer of currency.

However, the IRS has also ruled that a transfer of cash by a check drawn on a foreign bank and payable by a US bank is not subject to gift tax because it is considered an asset outside the US.[8]

Intangible property

Property that is considered intangible personal property is not subject to federal gift tax when given by an NRA, regardless of the property's situs. This includes:

1. shares of stock, and
2. debt obligations, including certain bank accounts and US government bonds[9]

Planning note

Because the gift tax rules regarding intangible property for nonresident aliens are more favorable compared to the estate tax rules, NRAs may want to consider gifting intangible property situated in the US (e.g., stock in a US company) rather than holding these assets until death.

NRAs, continued

NRA assets subject to gift tax

- US or foreign currency or cash situated within the US
- Real estate located in the US
- Other tangible personal property within the US (e.g., cars, artwork, antiques, jewelry, etc.)

Nonresident gift tax flowchart

NRA assets subject to estate tax

- Real estate and tangible property located in the US
- Stock in US corporations & mutual funds
- Certain US bank deposits
- Debt obligations of a US person or US government
- Certain intangible property if issued by or enforceable against a US resident, domestic corporation or government unit
- Retained interest and/or beneficial interest in a trust-owned property situated in the US
- Cash surrender value of a US insurance policy insuring life of another person
- Deferred compensation and pension benefits paid by a US employer

Nonresident estate tax flowchart

Please note that this page reflects a summary of estate and gift taxation affecting NRAs.[10]

10. Are annual exclusion gifts available for nonresident aliens?

Yes. Nonresident aliens (NRAs), just like US citizens and resident aliens (i.e., US persons), may avail themselves of the annual exclusion for gifts of present interests. However, unlike US persons, NRAs are not eligible for any lifetime gift tax exemption amount for gifts in excess of the annual exclusion limit.

For 2023, the annual exclusion gift limit per individual is $17,000. This threshold increases to $175,000 for gifts to a non-citizen spouse.

11. What is a nonresident alien's gift tax reporting obligation and — in turn — the reporting obligations of US citizens and resident aliens who receive gifts from NRAs?

If a nonresident alien (NRA) makes a taxable gift of US real or tangible personal property that exceeds (or does not qualify for) the annual exclusion amount, the gift must be reported on a Gift Tax Return (Form 709) by April 15 of the year following the year in which the gift is made. In addition, the NRA donor would be responsible for paying any gift tax associated with the transfer. If the IRS is unable to collect the required gift tax from the NRA, the onus may be transferred to the recipient of the gift.

For US recipients of gifts and bequests that exceed $100,000 in value, the recipient (including trusts) must report the gift/bequest to the IRS on a Form 3520 no later than the date the recipient's income tax return is due (including extensions) for the same tax year as the gift is made.

In determining whether a US person has received gifts during the taxable year from a foreign donor in excess of $100,000, the US donee must aggregate gifts from foreign persons that the donee knows or has reason to know are related, within the meaning of IRC §643(i)(2)(B). For instance, if an NRA mother and father each give their US son $60,000, the gifts are aggregated, the $100,000 reporting threshold is exceeded, and the son must report both gifts. Once the $100,000 threshold has been met, the donee must separately identify each gift in excess of $5,000.

Form 3520 is merely a reporting obligation; however, the penalty for failure to report could be severe — 5% of the gift value for each month for which the failure to report continues (not to exceed a total of 25%). No penalty will be imposed if the gift recipient can demonstrate their failure to file was due to reasonable cause and not willful neglect. Ignorance of the law is not reasonable cause.

12. Are nonresident aliens subject to the generation-skipping transfer (GST) tax?

A transfer by a nonresident alien (NRA) will be subject to the GST tax only if it is also subject to US estate or gift tax, which occurs only if it consists of US situs property.[11]

NRAs currently have a $12,920,000 exemption for GST taxes, the same as the exemption applicable to US citizens and resident aliens.[12]

Non-US citizen spouse

13. What is the impact of a gift to a spouse who is not a US citizen?

Gifts to a spouse who is not a US citizen (whether or not that spouse resides in the US) do not qualify for the unlimited gift tax marital deduction that is available for gifts to a US citizen spouse.[13] However, a spouse can make a "present interest" gift to a non-citizen spouse that should qualify for a larger annual exclusion amount under IRC §2523(i)(2) (equal to $175,000 in 2023).

14. What is a qualified domestic trust (QDOT) and when is it used?

The unlimited estate tax marital deduction is unavailable to estates where the surviving spouse is not a US citizen. The only exceptions to this rule are: 1) if the surviving spouse becomes a US citizen before the estate tax return is filed, or 2) the property passing to the surviving spouse passes to a QDOT.

Planning note

The deceased individual's citizenship does not affect whether the marital deduction is available; only the citizenship of the spouse who is due to inherit needs to be considered. For example, in a situation where a US citizen is married to a non-citizen spouse, the US citizen's will or trust should contain QDOT provisions to benefit from the marital deduction. In contrast, the non-citizen spouse could leave assets directly or in trust for the benefit of the US citizen spouse and claim a marital deduction without the necessity of a QDOT.

As set forth in IRC §2056A, a trust qualifies as a QDOT if:

- at least one trustee is a US citizen or a US corporation
- it is administered under the jurisdiction of a US state or the District of Columbia
- it satisfies the general marital deduction requirements of US estate tax law (e.g., the qualified terminable interest rule of IRC §2056) and
- an election is filed for treatment as a QDOT on the decedent's estate tax return (Form 706).

While estate tax is not applied to income distributions from the QDOT to the surviving spouse, it DOES apply to distributions of the QDOT principal to the surviving spouse, except when those principal distributions are made on account of hardship.

If a couple are preparing an estate plan and they are planning to become US citizens in the future, they may not need to have QDOT provisions in their living trusts. If they die before they actually become US citizens, their executor can make a post-mortem election to have their marital trusts qualify as QDOTs.

15. When a US citizen is married to a non-US citizen, how is jointly owned property included in the gross estate?

For US citizens, when the first spouse dies, the estate will include only 50% of jointly owned property, regardless of who contributed funds to the property's purchase or maintenance. However, for non-citizen spouses, the entire value of a joint interest will be included in the estate of the first spouse to die, reduced by contributions that the estate can prove were supplied by the surviving spouse. As a result, it may be a good idea to "undo" joint ownership of assets during both spouses' lives, if it is expected that they will have a taxable estate (the annual exclusion for gifts to spouses or the lifetime gift exemption may be used for this purpose).

16. What retirement planning considerations are there when a US citizen is married to a non-US citizen?

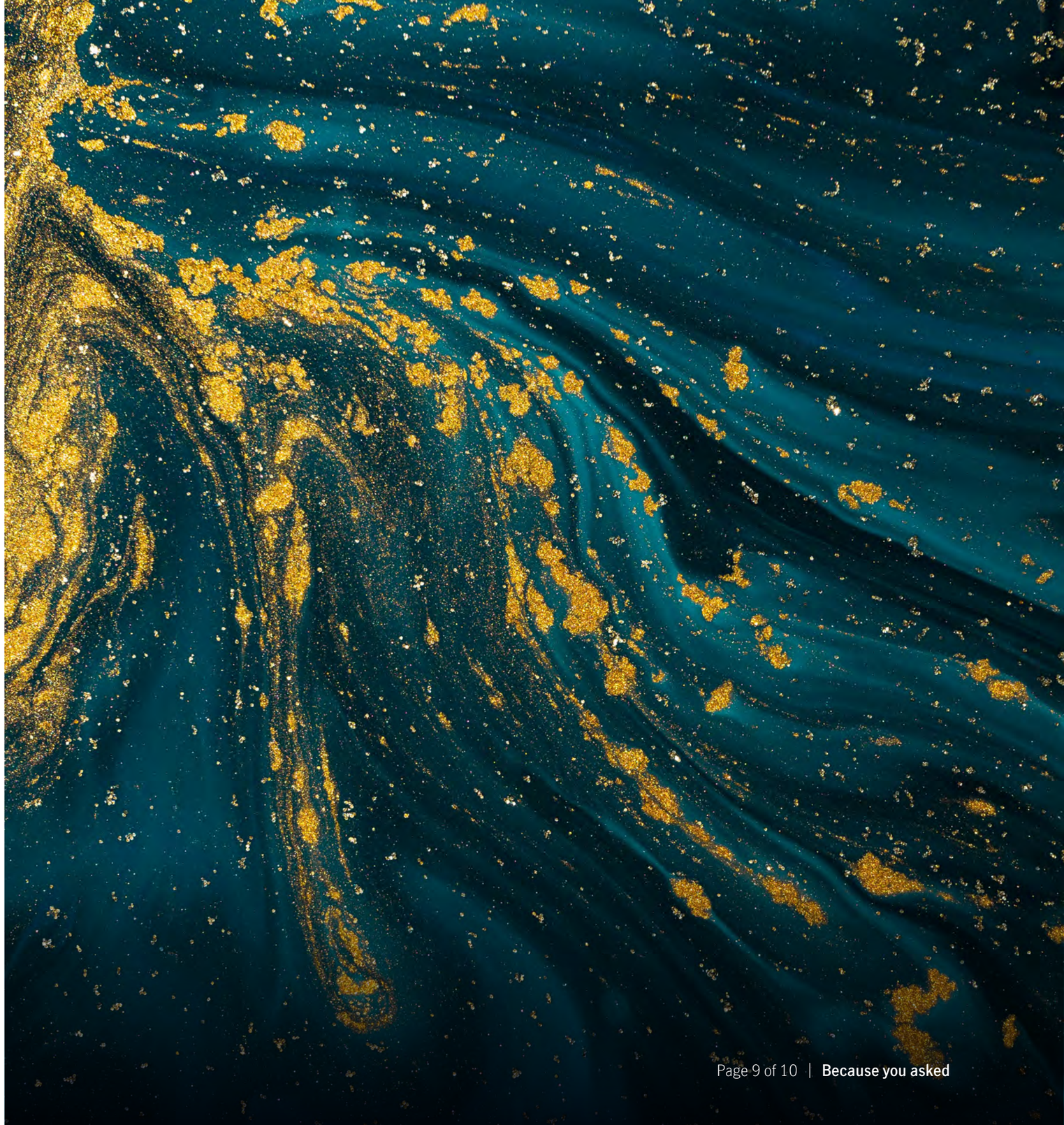
Because assets passing to a non-citizen surviving spouse will receive the marital deduction only if they are included in the QDOT, the best option for a non-citizen surviving spouse who receives qualified plan or IRA assets is often to roll over the plan benefits into an IRA-QDOT. The IRA-QDOT will allow the surviving spouse to continue deferring income tax on the retirement assets that remain in the IRA and receive income from the IRA estate tax free. However, distributions of principal to the surviving spouse will be subject to both estate and income tax, as with a standard QDOT.

US transfer taxes

17. How do treaties with other countries affect US transfer taxes? What countries does the US have treaties with?

US treaties with other countries may allow for a larger gift/estate tax exemption than what is generally available for nonresident aliens (NRAs). For example, Canadian citizens who are NRAs with US situs property receive a prorated estate tax exemption up to approximately $12,920,000 in 2023, based on a ratio of US situs assets to worldwide assets (US/Canadian Tax Protocol, Article XXIXB).

The US has tax treaties with several countries, including Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, the Netherlands, Norway, South Africa, Switzerland and the United Kingdom. NRAs should consult counsel specializing in cross-border planning for more information.



1. Increased gift, estate and GST tax exemptions are scheduled to sunset to $5M (indexed for inflation) after 12/31/2025.
2. Treas. Reg §20.2104-1(a)(4).
3. IRC §2104(c).
4. IRC §2105(b)(2).
5. Rev Rul. 69-596.
6. IRC §2104(c).
7. IRC §2104(c).
8. Treas. Reg. §25.2511-3.
9. PLR 8210055; PLR 200340015.
10. Please note that this chart reflects general treatment based on US federal estate and gift tax laws. A valid treaty between the US and the nation of which the resident is a citizen or resident may modify or alter these rules. Consult your tax professional.
11. Treas. Reg. §26.2663-2.
12. IRC §§2631(c), 2010(c). See also, Treas. Reg. §26.2663-2 (referring to $1M exemption for GST taxes, which mirrored GST exemption for both US citizens and residents when regulation was enacted; presumably intended to track subsequent increases in exemption).
13. IRC §2523.

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Trusts should be drafted by an attorney familiar with such matters in order to consider income and estate tax laws (including the generation-skipping transfer tax). Failure to do so could result in adverse tax treatment of trust proceeds. There can be costs associated with drafting a trust.

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