

VIII. 非定居美国的外国公民的遗产税

VIII. Estate Taxation of a Non-Resident Alien

Law Firm of Mark Merric, LLC

4155 E. Jewell Ave., Suite 500

Denver, CO 80222

(303) 800-4369; (303) 261-8374

Mark@InternationalCounselor.com

www.InternationalCounselor.com

罗战 — 美国法学博士，美国律师，美国税法硕士，美国注册会计师

罗战先生除了是一名律师，注册会计师之外，还在美国丹佛大学法学院任兼职教授。他的观点被包括《福布斯》，《投资人新闻》，《街》《丹佛商业期刊》，《石油天然气投资人》，《苏瀑商业期刊》在内的著名期刊杂志引用过。在成为律师以前，罗战在美国四大会计事务所任职。罗战先生目前任罗战律师事务所的合伙人。

罗战先生每年都在全美范围内的研讨会上公开演讲多次，他受邀演讲过的组织机构包括：

- Regis Campfield's Notre Dame 税收和遗产规划研究所(2007)和(2009)
- Lonnie McGee 南加州税法及遗产规划论坛(2006)，(2007)，(2009-2011)
- 芝加哥律师协会 (2004)，(2007-2010).

罗战先生还在《美国遗产规划杂志》，《美国实用遗产规划期刊》，以及《史蒂夫•雷姆博格信息服务速递》(Leimberg LISI)上分别发表了系列文章。同时他也和其他作者联合出版过以下著作：

- 《资产保护规划指导》，CCH 出版；
- 《资产保护战略》，美国律师协会出版；
- 《资产保护战略二》，美国律师协会出版

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Mark Merric, JD, MT, CPA In addition to being an attorney, Mark Merric holds a Masters of Taxation and he is a Certified Public Accountant, as well as an Adjunct Professor at the University of Denver's, Law School Graduate Tax Program. He has been quoted in Forbes, Investor's News, On the Street, the Denver Business Journal, Oil and Gas Investor, and the Sioux Falls Business Journal. Mr. Merric is an international speaker presenting at over 400 seminars, and he has published over 70 national articles. Mr. Merric is the manager of the Law Firm of Mark Merric, LLC and a manager for the Alliance of International Legal Counselor, LLC. Prior to practicing as an attorney, Mark Merric developed a strong business background working for a Final Four Accounting Firm.

Mr. is honored to have spoken multiple times at the following distinguished estate planning seminars:

- Regis Campfield's Notre Dame Tax and Estate Planning Institute;
- Lonnie McGee's Southern California Tax and Estate Planning Forum; and the
- Chicago Bar Association.

He is also a co-author of the following three treatises:

- The Asset Protection Planning Guide: A State-of-the-Art Approach to Integrated Estate Planning, Commerce Clearing House (CCH) treatise, first edition;
- Asset Protection Strategies, American Bar Association (two chapters); and
- Asset Protection Strategies Volume II, American Bar Association published Apr. 2005 (MM responsible for 1/5 of the text).

Disclaimer

The law is constantly changing at an unprecedented pace. Also, each client's separate fact situation must be carefully examined before applying any principals of law. Furthermore, this outline is not intended to be a substitute for the practitioner's own research into this area of law and how the law applies to a client's specific situation. Therefore, the author takes no responsibility how the areas of law covered by this outline apply to the reader or the reader's clients. Finally, to ensure compliance with requirements imposed by the IRS Circular 230, we hereby inform you that any U. S. tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any matter addressed herein.

Procedures for Engagement

We would be more than happy to assist you with your request, however, let me first explain our procedures for engagement of our firm.

Our firm provides advice in estate planning, international taxation, business structures and transactions, and asset protection planning. *Seldom, if ever*, are there any "simple or quick questions in these fields. Almost all questions in these areas require a review of the relevant legal documents, organizational structure, past planning, as well as the client's objectives. Further, due to the liability issues involved combined with our time commitment, we do not answer technical questions, hypothetical questions, questions on outlines or articles unless we are engaged in writing. Our minimum engagement fee is \$1,000. However, we do offer wholesale pricing for accountants and attorneys that engage us directly.

For more details regarding engaging our firm go to:

<http://www.internationalcounselor.com> then click on the "Accountants/Attorneys" Tab.

Please note that we do not accept international taxation of foreign retirement plan type of work. Should you have individual foreign retirement plan type of work, the following person was recommended to us:

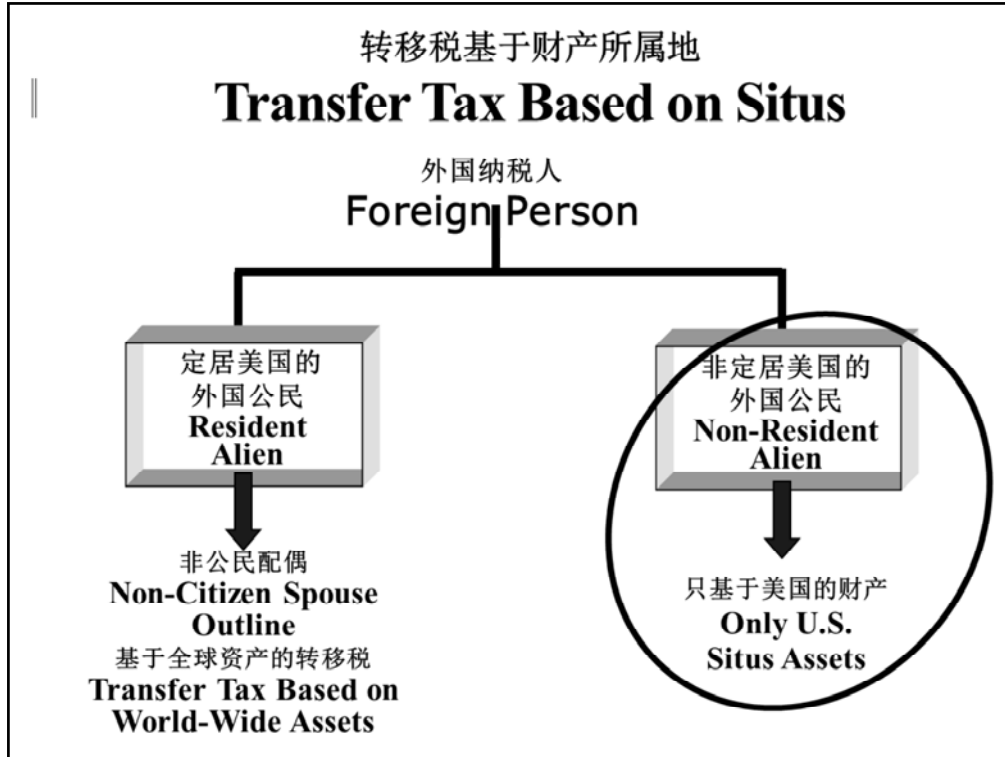
Mr. Amiram J. Givon
(650) 428-3900
agivon@gcalaw.com

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A. Transfer Based on Situs

While a resident alien pays transfer tax based on his or her world-wide assets, a non-resident alien is subject to transfer tax only on U.S. situs assets. As noted in the Non-Citizen Spouse outline, a foreign person's classification for U.S. transfer tax purposes is based on the foreign person's domicile. Domicile is an intent test, based on all the facts and circumstances. A nonresident alien includes persons living outside of the United States as well as individuals that are living in the United States who are not domiciled in the US.

A. 基于财产所属地的转移税

定居美国的外国公民的财产转移税是基于他（她）的全球财产的，而非定居美国的外国公民的财产转移税是基于他（她）的美国财产的。在非公民配偶的章节中，我们提到了外国纳税人在美国转移税意义上的分类是根据该外国纳税人的法律居住地决定的。而法律居住地是基于所有的事实情况判断的，非定居美国的外国公民包括居住在美国之外的公民，还有住在美国但法律居住地不在美国的公民。

相同和不同之处

What's The Same or Different?

美国公民 U.S. Citizen

1. 全球资产
World Wide Assets
2. 525万美元免税额
\$5.25 Million Exemption Amount
3. 525万美元隔代转移税免税额
\$5.25 Million GSTT
4. 可抵扣所有费用
100% of Debts

非定居美国的外国公民 Non-Resident Alien

1. 美国资产
U.S. Situs Assets
2. 6万美元免税额
\$60,000 Exemption Amount
3. 525万美元隔代转移税免税额
\$5.25 Million GSTT
4. 只能抵扣美国资产占全球资产百分比的费用
% Debt based on U.S. Assets

B. Comparison of U.S. Citizen to a Non-Resident Alien

1. U.S. Situs Property

Under IRC § 2103 only property situated in the US is taxed in the non-resident alien's estate, not worldwide assets. When referring to property "situated in the U.S.," the common term of "U.S. situs" assets is generally used.

2. Exemption Amounts

While a U.S. citizen and resident alien may have an applicable exclusion of \$5.25 million (indexed), a non-resident alien is limited to a \$60,000 applicable exclusion (no indexing). After the \$60,000 amount is reached, the estate tax rate starts at 26 percent and goes up to 45 percent. For example, a US citizen or resident domiciled in the US with an estate of \$500,000 will be allowed to pass the entire estate tax free; but a nonresident alien not domiciled in the US with an estate of similar value will pay \$142,800 in estate taxes.

3. GSTT Amount

Ironically, a nonresident alien receives a \$5.25 million generation skippint transfer tax exemption. Treas. Reg §. 26.2263-2(d).

4. U.S. Debts

Regarding U.S. situs assets that are included in a non-resident alien's estate, only a percentage of any debt (including funeral expenses and expenses of administration) is deductible against the U.S. estate. The percentage is computed by taking U.S. situs property and dividing by world-wide property.

B. 美国公民和非定居美国的外国公民的比较

1. 美国所属地的财产

在美国税法法典第 2103 章节下，非定居美国的外国公民的遗产中只有属于美国的财产需要缴税遗产税。对此通常使用的术语为“美国所属地”。

2. 遗产税免税额度

美国公民和定居美国的外国公民可以有 525 万美元的遗产税免税额（每年根据消费者物价指数调整），而非定居美国的外国公民则可以有 6 万美元的遗产税免税额（不根据消费者物价指数调整）。当这 6 万美元的免税额达到之后，剩下的遗产需要按照 26%到 45%缴纳遗产税。举例来说，如果一个美国公民或者法律居住地在美国的居民有 50 万美元的遗产，那么所有的遗产都能够免于遗产税，而一个法律居住地不在美国的非定居美国的外国公民如果有相同的资产，那么他（她）将需要支付 14.28 万美元的遗产税。

3. 隔代转移税的免税额度

但有趣的是，非定居美国的外国公民也有 525 万美元的隔代转移免税额。参见财政法规 §. 26.2263-2(d).

4. 美国费用支出

对于非定居美国的外国公民的美国遗产，只有一部分的费用（包括葬礼费用和管理费用）是可以抵扣税前遗产额的，这个比例是美国的财产占据所有财产的比例。

相同和不同之处

What's The Same or Different?

美国公民

U.S. Citizen

5. 无限制抵扣赠予配偶的财产

Unlimited Marital Deduction

6. 每年1.4万美元免税赠予额

\$14,000 Annual Gift

IRC § 2503(b)

非定居美国的外国公民

Non-Resident Alien

5. 不能抵扣赠予配偶的财产,但有“合格的国内信托(QDOT)”

No marital deduction, however - QDOT

6. 每年免税赠予额

Annual gift exclusion, IRC § 2503(b)

- 14.3万美元额度赠予非公民配偶
Non citizen spouse increased to \$143,000 indexed

- 不是信托 **Not to a trust**

- 1.4万美元额度赠予其他人
\$14,000 Gift to others

5. Unlimited Marital Deduction

A U.S. Citizen receives an unlimited marital deduction for gifts to a spouse. There is no unlimited marital deduction for non-citizen spouses. However, a non-citizen spouse may receive property in a Qualified Domestic QDOT and delay taxation until the second death. The taxation of a QDOT is discussed.

6. Annual Gift Amount

A U.S. citizen may gift \$14,000 per person each year to whomever, the U.S. person chooses to do so. Generally, a person only gifts to members of his or her immediate family. A non-resident alien may also gift \$14,000 of U.S. situs property per year to whomever they choose to do so. However, this annual amount is increased to \$143,000 (indexed 2013) for gifts to a non-citizen spouse. IRC § 2523(i).

While the annual amount is increased to \$143,000, only \$14,000 may be made on behalf of a non-citizen spouse to an irrevocable trust. This is because a gift to a spouse must also qualify for the marital deduction. Treas. Reg. § 25.2523(1)-1(c). However, it is only the amount that is over the standard \$14,000 annual 2503(b) exclusion (i.e. \$143,000 - \$14,000 [indexed]= \$129,000) that qualifies for the marital deduction. 136 Cong. Rec. H7147 (daily ed. Aug 3, 1990) (statement of Rep. Rostenkowski introducing H.R. 5454). To qualify for the marital deduction, a gift to a spouse cannot be to something known as a “non-deductible terminable interest.” A gift to an irrevocable trust is almost always classified as a non-deductible terminable interest.

5. 无限制夫妻赠予抵扣

美国公民可以对配偶做任何数额的赠予从而减少自己的遗产价值，但非美国公民则不能够使用这样的无限制夫妻赠予抵扣。不过，非美国公民能够利用“合格的美国信托”来接受配偶的财产，从而将遗产税推延至下一个受益人过世的时候缴纳。关于这个“合格的美国信托”的征税方式会在之后讨论。

6. 每年免税赠予额

美国公民每年可以从自己的财产中免税赠予 1.4 万美元给任何人，但一般人们只赠予给直系亲属。非定居美国的外国公民每年也可以从自己的美国财产中免税赠予 1.4 万美元给任何人，如果是赠予给非美国公民配偶，那么可以达到 14.3 万美元（2013 年额度）。参见美国税法法典§ 2523(i).

尽管对于非美国公民配偶的这个赠予额增加到了 14.3 万美元，但其中只有 1.4 万美元的赠予额是可以代表该非美国公民的配偶转到不可撤销的信托的，这是因为赠予给配偶的礼物同时也必须符合夫妻间无限制赠予抵扣的要求。参见财政法规§ 25.2523(1)-1(c). 但这只是针对超出了 1.4 万美元的年度免税赠予额的部分。要符合夫妻间无限制赠予抵扣的要求，赠予给配偶的礼物不可以是“不可抵扣的可终止的权益”，例如赠予给“不可撤销的信托”的礼物就属于这样一种类型。

相同和不同之处

What's The Same or Different?

美国公民
U.S. Citizen

非定居美国的外国公民
Non-Resident Alien

7. 分开赠予

Gift Splitting

7. 不能分开赠予

No Gift Splitting

8. 不能联合报税

No Joint Return

8. 不能联合报税

No Joint Return

9. 委托人信托制度

Grantor Trust Rules

9. 委托人信托制度不适用

**Grantor Trust Rules
Do Not Apply**

7. Gift Splitting

Only a citizen and resident alien may elect to gift split. IRC § 2513(a)(1). Therefore, this election is not available to a non-resident alien.

8. Joint Returns

Only if both spouses are citizens or resident aliens are they able to file joint returns. If one is a citizen or resident alien, there is a special election IRC § 6013(g) where the non-resident alien may elect to be taxed on world-wide income and also file a joint return.

9. Grantor Trust Rules

If a non-resident alien settles a trust, IRC § 672(f) prevents the trust from being classified as a grantor trust unless (1) the non-resident alien settlor may revoke the trust; or (2) all income and principal may only be paid to the non-resident alien and his or her spouse during their lives. For this reason, the use advanced estate planning tools such as the IDIT and GRAT are generally not possible.

7. 分开赠予

只有美国公民和定居美国的外国公民可以选择将赠予额分摊到夫妻两个人，从而利用每人每年的免税赠予额。参见美国税法法典§ 2513(a)(1)。但非定居美国的外国公民不能使用这个赠予选择。

8. 联合报税

只有当夫妻两个人都是公民或者定居美国的外国公民时才能够联合报税。如果有一方是非定居美国的外国公民，那么根据税法法典条例§6013(g)，他（她）可以选择按照全球收入来报税，这样他们就可以联合报税了。

9. 委托人信托制度

如果一个非定居美国的外国公民创建了一个信托，那么按照税法法典条例§ 672(f)，这个信托不属于委托人信托，除非（1）该创建人可以驳回信托；或者（2）所有的收入和本金都只能够在该创建人及其配偶的有生之年支付给他们。基于这个原因，有一些较高端的遗产规划方法，例如模糊授予信托和赠予人保留年金信托就不适用了。

财产所属地

Situs of Property

■ 有形财产（美国来源）

Tangible (U.S. Source)



房地产

Real Estate

市场价格不减去贷款额

FMV not reduced by Loan



春天时光

Le Printemps 1873

法国画家皮埃尔-奥古斯特库特

Pierre Auguste Cot

纽约大都会艺术博物馆

Metropolitan Museum of Art, NY

C. Situs of Property

Since only property that is deemed to have a US situs is included in the non-resident alien's taxable estate, it is important to determine how property is classified for US situs purposes. The classification system is similar to the source of income tests used for income tax purposes. For gift tax purposes, there are two major classification categories: tangible and intangible property. For gift tax purposes, tangible property has a U.S. situs, but intangible property does not. Likewise, for estate tax purposes, tangible property and several types of intangible property have a U.S. situs.

1. Tangible Property (Real Estate and Personal)

Real estate and tangible personal property located in the US is taxable for estate and gift tax purposes. Real estate and tangible personal property outside of the US is not US situs property. Tangible personal property includes: furniture, art, collectibles, and cash.

U.S. real estate owned individually is U.S. Source property. Treas. Reg. § 20.2104-1(a)(1). Be careful to note however, the value of the real estate is not reduced by any mortgage it is subject to.

C. 财产所属地



对于非定居美国的外国公民的可征税遗产，只有美国所属地的部分会被归入，因此判断哪些财产属于美国所属地很重要。这个分类的制度体系和判断美国所得税的收入来源地是很相似的。对于赠予税，主要有两大财产类别：有形资产和无形资产。遗产税也有类似的分类。对于遗产税，有形资产和个别类型的无形资产属于美国所属地财产。

1. 有形资产（房地产和个人资产）

在美国的房地产和个人有形资产属于美国遗产税和赠予税的征税范围内。不在美国的房地产和个人有形资产不属于美国所属地财产。其中个人有形资产包括：家具、艺术品、收藏品和现金。

个人所有的美国房地产属于美国的财产，参见财政法规 § 20.2104-1(a)(1)。需要注意的是房产的价值不是减去贷款之后的价值。

财产所在地
Situs of Property

现金 Cash		非美国财产 Not U.S.
年金 Annuities - 发行公司所在地 Situs of the issuing company		
知识产权 Intellectual Property - 主要的档案建立所在地 Where the primary filing was completed		

2. Intangible Property

Intangible property located in the US is generally taxable for estate tax purposes only. The situs of intangible property depends upon the exact nature of the property.

a. Cash

Cash held in bank accounts of US banks is intangible, and it will be deemed to be US situs, only if it is connected with a US trade or business. Rev. Rul. 82-193; Rev. Rul. 54-623 and IRC § 2105(b)(1) bank deposit interest exception.

b. Annuities

Annuities regardless of the underlying investments are US situs property if issued by a US company.

c. Copyrights, Patents, and Trademarks

The Treasury Regulations hold that a copyright is foreign source if it is not enforceable against a U.S. person. This old definition in the Treasury Regulations is of little help because of all the international treaties on copyrights, patents, and trademarks. Some help is provided if the U.S. has an estate tax treaty with another country. Absent such treaty, some authors use the primary place of filing as a general rule to determine situs.

1. 无形资产

位于美国的无形资产一般是来说只属于遗产税的征税范围，无形资产的所属地取决于资产的本质。

a. 现金

美国银行账户的现金属于无形资产，并且只有当现金和美国的贸易经营活动有关时才属于美国所属地资产。参见美国税收裁定 82-193, 54-623 和美国税法典条例§ 2105(b)(1)银行存款利息例外条例。

b. 年金

美国公司发行的年金都属于美国所属地财产，无论相关的投资是否是美国所属地财产。

c. 版权、专利和商标

财政法规规定对美国公民不具有约束力的版权属于外国来源版权，但由于目前国际税收协定在版权、专利和商标方面的条例，这个老的规定已经基本起不了作用了。如果美国和另一个国家有遗产税方面的税收协定，那么可能会有一些条例可以帮助判断。在没有这些税收协定的前提下，一些作者会主要根据版权的申请地点来决定版权的所属地。

财产所在地

Situs of Property

d. 共同基金 **Mutual Funds**

- 美国共同基金-所在地为美国（美国私信裁定 9748004）

U.S. Mutual Fund (RIC) – U.S. Situs (PLR 9748004)

- 外国共同基金-所在地为外国

Foreign Mutual Fund (PFIC) – should be foreign situs

- 基金为外国合伙企业时根据相关资产判断（美国私信裁定 9748004）

Foreign Partnership the underlying assets (PLR 9748004)

- 结果不同于税收裁定55-701

Inconsistent with Rev. Rul. 55-701



d. *Mutual Funds*

U.S. mutual funds are generally organized as a regulated investment company. A regulated investment company must be a domestic corporation. IRC § 2105(d) applies a look through rule. To the extent of bank deposits, debt obligations, or foreign stock, the mutual fund is treated as sited outside the U.S. On the other hand, an offshore mutual fund is also many times classified as a corporation (i.e. a PFIC). In this case, situs should be outside the U.S. On the other hand, if the offshore mutual fund is classified as a partnership, the Service may look to the underlying assets of the partnership. PLR 9748004. Looking to the underlying assets of the partnership seems inconsistent with Rev. Rul. 55-163 discussed on the following page.

d. 共同基金

美国的共同基金通常是一些受管制的投资公司。一个受管制的投资公司必须是美国的公司。美国税法法典§ 2105(d)提供了一个“透视法”税收制度(即根据基金下的每一项财产来判断)。共同基金下的银行存款、贷款、外国股票都属于外国来源财产。而离岸共同基金很多情况下都被归为是公司性质（“被动的外国投资公司”），这样一来，它的所在地应该是国外。但如果共同基金被归为合伙企业性质，那么税务局会根据合伙企业的财产来决定。参见美国私信裁定 9748004。这个裁定方法和美国税收裁定 55-163 的规定（见下一页分析）并不太一致。

财产所在地

Situs of Property

合伙企业 **Partnership**

合伙企业营业地点

Where the partnership does
business (Rev. Rul. 55-701)



股票 **Stock**

公司成立地点

Where the entity is
incorporated (IRC § 2104(a))



e. *Partnership or LLC Interests*

Partnership and LLC interests are US situs if the entity is conducting a trade or business in the United States. In other words, the Service does not look through to the underlying assets of the partnership. Rather, the decision is at the entity level – where the partnership does business. Rev. Rul. 55-701. Unfortunately, for situs a partnership does not use a place of formation rule like a corporation below. This creates some unclear planning issues that are discussed later in this outline.

f. *Stock*

Stock (equity) in a corporation organized in the United States is U.S. situs property. IRC § 2104(a); Treas. Reg. § 20.2104-1(a)(5).

e. 合伙企业和有限责任公司的权益

如果合伙企业和有限责任公司是在美国经营业务，那么它们的权益属于美国财产。也就是说，税务局不会根据实体的相关财产所在地来决定。并且，这个经营所在地是看企业层面的。参见美国税收裁定 55-701.由于合伙企业的这个所在地判定和公司所属地的判定不同，不是根据它的成立地点来决定的，它引起了一些不明确的规划问题，这些问题将会在之后做讨论。

f. 股票

美国成立的公司的股票（公司权益）属于美国财产。参见美国税法典条例§ 2104(a)和美国财政法规 § 20.2104-1(a)(5).

财产所属地

Situs of Property

债务工具 **Debt Instruments**

投资组合利息免税
Portfolio Exclusion
(IRC § 2105(b)(3))



保险单 **Insurance Policies**

不属于美国财产
Situs outside U.S.
(IRC § 2105(a))



g. Debt Instruments

Debt issued by U.S. persons or entities have a U.S. situs. Conversely, similar to the income taxation for a non-resident alien, debt instruments that are classified as portfolio interest are exempt for estate tax purposes. IRC § 2105(b)(3).

h. Insurance Policies

Insurance policies on the decedent non-resident alien's life are not US situs property. IRC § 2105(a); Treas. Reg. § 20.2015-1(g). This is true regardless of whether the insurance policy is a whole life policy, a universal life policy, or a variable life policy.

g. 债务工具

由美国个人或法律实体发行的债务属于美国财产。和非定居美国的外国公民的所得税制度很相似的是，被列为组合投资利息的债务工具免于遗产税。参见美国税法典§ 2105(b)(3)。

h. 保单

非定居美国的外国公民的寿险的保单不属于美国财产，无论是终身寿险还是万能寿险还是可变寿险保单。参见美国税法典§ 2105(a)和财政法规 § 20.2015-1(g)。



D. U.S. Situs Assets For Estate Purposes

The above pie chart divides U.S. assets and foreign assets (non-U.S. assets).

D. 遗产税上的美国所属地财产

以上的饼图将财产分为了美国财产和外国财产（非美国）。

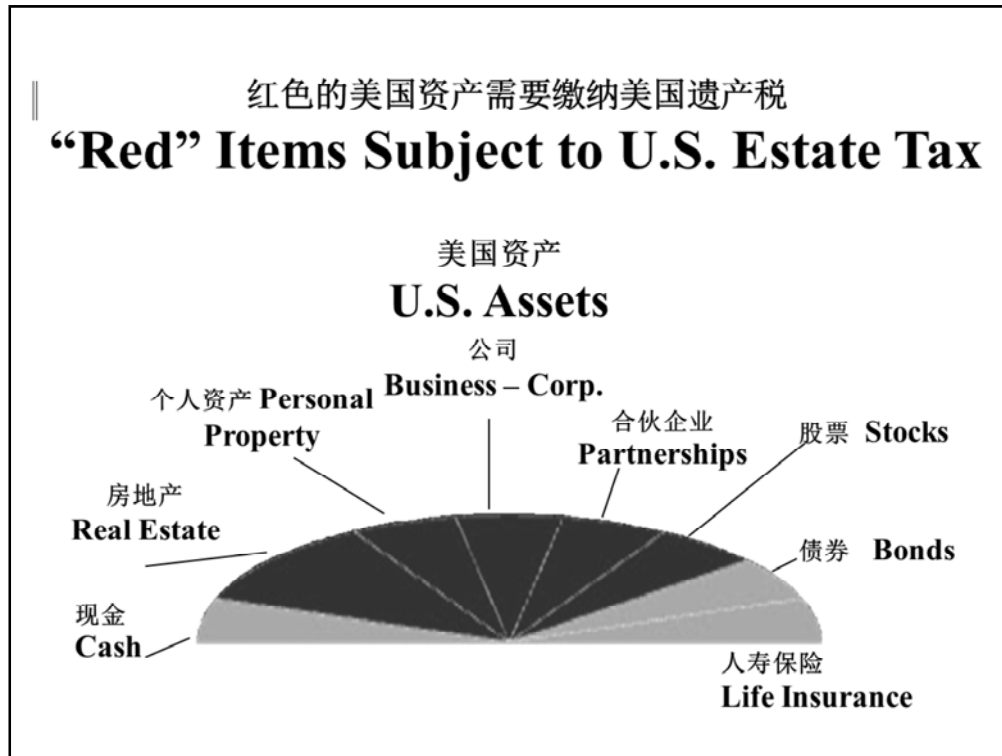


1. Chinese and Non-U.S. Assets

A Chinese person (i.e. non-resident alien) only pays estate tax on his or her U.S. situs assets. Therefore, there is no estate tax on the Chinese person's Chinese and Non-U.S. assets.

1. 中国财产和非美国财产

中国纳税人（非定居美国的外国公民）只需对美国所属地的财产支付遗产税，也就是说，对于中国财产和其他非美国的财产都不需要支付美国的遗产税。



2. U.S. Situs For U.S. Estate Tax

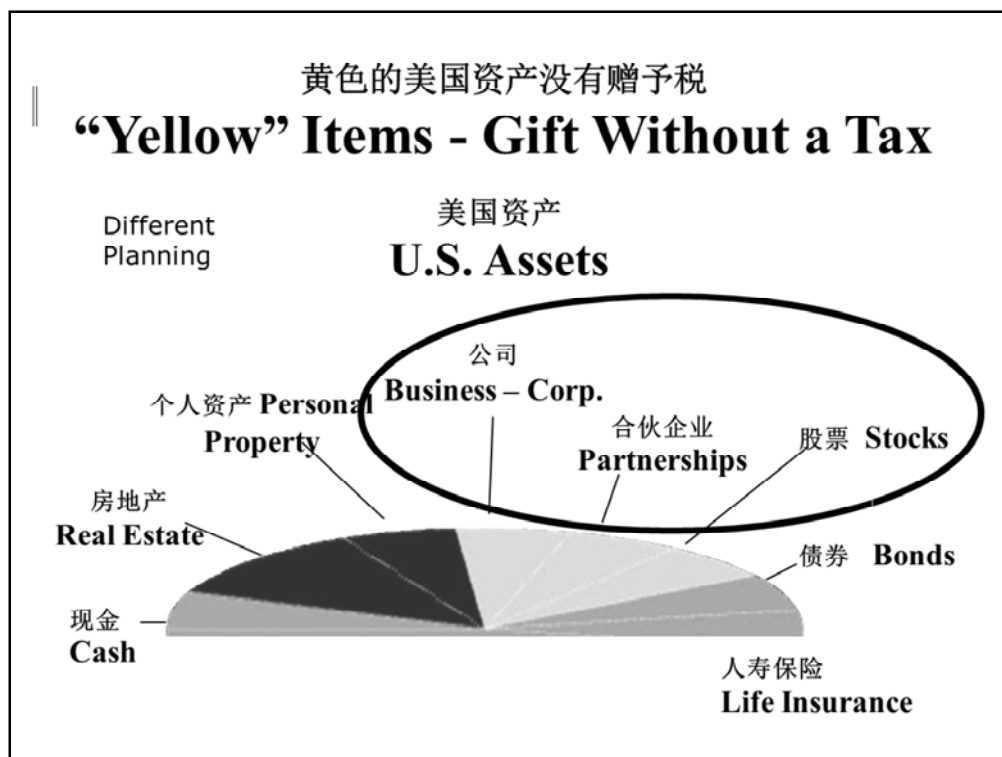
Just because an asset is located in the U.S. does not mean that it is a “U.S. situs” asset subject to U.S. estate tax. As noted in the discussion of situs of assets, unless cash is involved in a trade or business, it is not a U.S. situs asset. Bonds generally will not be a U.S. situs asset because of the portfolio interest exemption for estate planning. Also, life insurance on the life of a non-resident alien is sited outside of the U.S.

Conversely, the items in red (or in black on a printed outline) are U.S. situs assets and subject to U.S. estate tax. U.S. situs assets would include U.S. real property, personal property located in the U.S., U.S. business interests, U.S. partnerships, and U.S. stocks.

2. 美国遗产税上的美国财产

财产位于美国并不意味着它就是美国遗产税意义上的“美国财产”了。如我们在财产的所属地里面讨论过的，只要现金和贸易经营无关，它就不属于美国财产。债券由于组合投资利息免于遗产税的原因一般也不属于美国财产。另外，受保对象为非定居美国的外国公民的人寿保险也不属于美国财产。

用红色标记出的财产是美国财产，需要缴纳美国遗产税。美国所属地的财产包括了美国的房地产，位于美国的个人财产，美国公司权益，美国合伙企业权益和美国股票。



3. Gifts of Intangibles Without a Gift Tax

Generally, intangible assets may be freely transferred to anyone without incurring a gift tax. IRC § 2501(a)(2). So while most bonds and life insurance are exempt from gift and estate tax; U.S. annuities, U.S. copyrights, U.S. partnership interests, and U.S. stocks may be transferred to anyone (domestic or a foreign person) without incurring a gift tax.

For example, if Bill Gates were a non-resident alien for tax purposes, all of his ownership in Microsoft (\$40 billion) could be gifted to his children without any gift tax whatsoever. Furthermore, none of the stock gifted would be included in Bill Gate's estate when he died.

The non-resident alien's ability to transfer U.S. intangible assets free of any U.S. gift tax creates an incredible estate planning advantage when compared to a U.S. citizen or resident alien. U.S. intangibles may be gifted without limitation with transfers directly to children and spouses.

3. 避免赠予税地赠予无形资产

一般来说，无形资产可以在免于赠予税的情况下自由地被赠予给任何人。参见美国税法典§ 2501(a)(2)。因此，尽管大部分的债券和人寿保险都免于赠予税和遗产税，美国的年金，版权，合伙企业权益和美国股票也可以自由地转移给任何一个人（美国或外国人）而免于赠予税。

举例来说，如果比尔盖茨是一个税法上的非定居美国的外国公民，那么他所有的微软公司的股票（大约 400 亿美元）都能够被赠予给他的子女而无需缴纳任何赠予税。也没有任何被赠予的股票需要被列入他过世之后的可征税遗产。

非定居美国的外国公民的这种能够免税赠予美国无形资产的税法制度为他们的遗产规划提供了一个美国公民和定居美国的外国公民所无法企及的优势。美国无形资产的这种免税赠予是没有数额限制的，外国公民可以直接转给子女和配偶。

合格的美国信托 QDOT

- 非定居美国的外国公民还可以利用合格的美国信托

A non-resident alien may also utilize a QDOT

- 然而，财产仍然要被归入在世配偶的遗产

However, the property is still included in the surviving spouse's estate

E. QDOT

1. Deferral of Tax to the Death of the Surviving Spouse

Similar to a non-citizen spouse, a non-resident alien may also utilize a QDOT. However, it should be noted that the U.S. sourced property will still be included in the surviving spouse's estate. In this respect, a QDOT only defers tax until the death of the surviving spouse.

2. Gifting to the Surviving Spouse

A non-resident alien may gift up to \$143,000 (indexed 2013) of U.S. source assets to a non-citizen spouse without incurring any U.S. gift tax. Remember for gift tax purposes, only U.S. real estate and tangible personal property is sourced as U.S. property.

E. 合格的美国信托

1. 将遗产税延迟到配偶过世之时

和非美国公民的配偶制度相似的是，非定居美国的外国公民也可以利用“合格的美国信托”来做遗产规划。但是需要注意的是，美国所属地的财产仍然会被归入配偶的遗产，因此，这种合格的美国信托本质上只是将遗产税推迟到了配偶过世的时候缴纳。

2. 将财产赠予给配偶

非定居美国的外国公民还可以将美国财产赠予非美国公民配偶达到 14.3 万美元（2013 年免税额）的财产而免于美国赠予税。之前已提到过，对于赠予税，只有美国房地产和个人有形财产才属于美国财产。

||

赠予美国财产或者保留

Gift the U.S. Asset or Holding on to It

- 赠予美国无形财产

Gift U.S. Intangible Property

- 保留美国财产直到过世

Hold on to U.S. Property Until Death

- 财产归入遗产，除非利用法律实体改变所属地

Included in estate – unless “Wrapper” to change situs

- 外国公司 **Foreign corporation**
- 外国合伙企业 **Master foreign partnership**

F. Gifting the U.S. Asset or Holding Onto It

A client may freely gift intangible assets to his spouse or children without any U.S. gift tax. However, many clients will prefer to hold onto an asset until they pass away.

If a client does wish to hold onto U.S. real estate, tangible personal property, U.S. annuities, U.S. partnerships, and U.S. stocks until death, he or she may still be able to escape some or all of the estate tax by using a foreign entity to change the situs from U.S. to foreign situs.

F. 赠予美国财产或者保留在自己的遗产中

虽然符合条件的纳税人可以免税地将无形资产赠予给配偶或子女，但是很多人常常更愿意将财产保留在自己的遗产中直到过世。

如果纳税人希望保留美国房地产、个人有形财产、美国的年金、美国合伙企业和美国股票，直到过世，那么他（她）仍然可以通过使用外国实体来改变美国财产的所属地，从而免于部分甚至所有的遗产税。

在过世前赠予资产

Gift Asset Before Death

美国公司 **U.S. Business – Corp.**

美国合伙企业 **U.S. Partnership**

美国股票 **U.S. Stocks**



G. Gifting U.S. Intangible Assets

As previously noted, a Chinese person (i.e. non-resident alien) may gift intangible assets without incurring any U.S. gift tax. Intangible assets include U.S. business interests in an entity form, U.S. partnership interests, U.S. stocks, as well as U.S. debt instruments.

G. 赠予美国无形财产

之前已提到过，中国纳税人（非定居美国的外国公民）可以将无形资产免税地赠予给任何人。无形资产包括了美国任何形式的法律实体的权益，美国合伙企业权益，美国公司股票，还有美国债务工具。



H. Conversion of a Tangible Asset to an Intangible

Real estate is a tangible asset. However, a partnership interest or a membership interest is an intangible asset. Intangible assets may be gifted without incurring a gift tax. Therefore, if real estate is transferred into either a partnership or limited liability company, has the interest that will be transferred been converted into an intangible asset? Most likely, this is what will occur. Timing becomes critical with this type of plan. If real estate is transferred to an FLP and immediately gifted to the non-resident alien's children, the Service may challenge the transaction under the substance over the form doctrine.

H. 将有形资产转变为无形资产

房地产是有形资产，但是合伙企业权益或股东权益是无形资产。无形资产可以被免税地相互赠予。因此，如果将房地产转到一个合伙企业或者一个有限责任公司里，那么这能够将房地产权益转变成无形资产吗？大部分情况下，答案是肯定的。但是规划的时间点是很关键的。如果房地产转到了一个外国有限合伙企业里，然后合伙企业权益马上被赠予给该外国公民的子女，那么美国税务局很可能会不同意这种处理方式，进一步追述按照这个交易的本质而不是它的形式来处理。

利用外国法律实体改变财产的美国所属地

Changing Situs With a Foreign Entity



第二种遗产规划方法

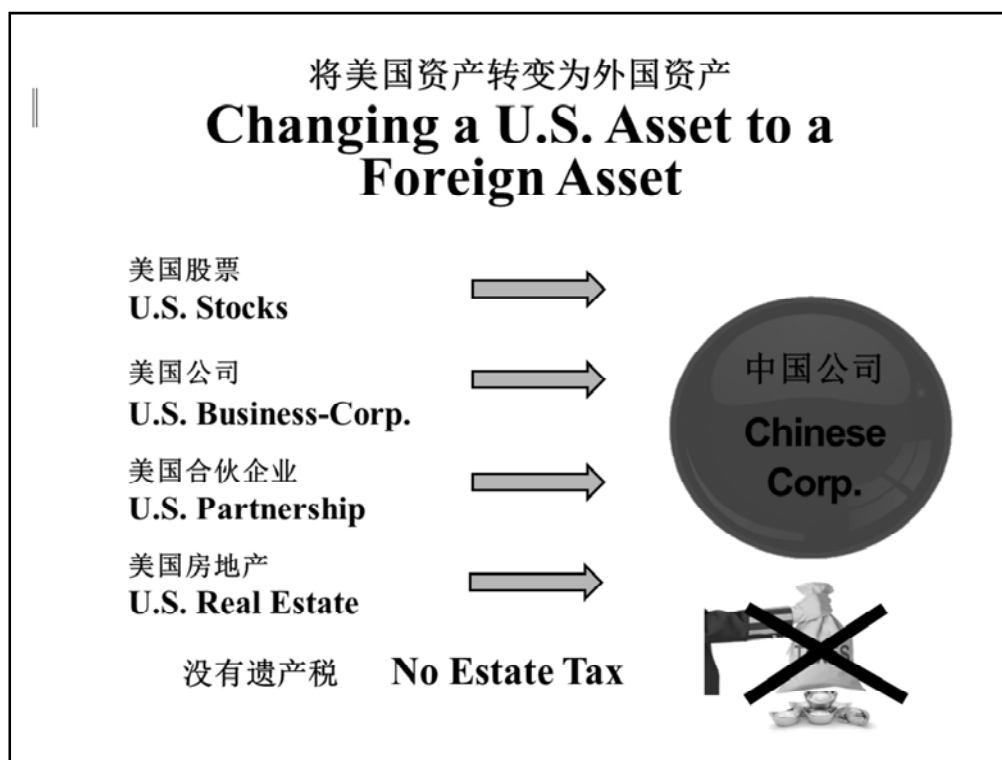
Second Method of Estate Planning

I. Changing the Situs With a Foreign Entity

The first method of estate planning was merely gifting intangibles to a spouse or child. The second method of estate planning involves changing the situs from U.S. situs to foreign situs by using a foreign entity. Some may refer to such a process as placing a foreign “wrapper” (analogy to a candy wrapper) over the U.S. property.

I. 利用外国实体改变外国财产所属地

第一个遗产规划的方法是将无形资产赠予给配偶或子女，第二个方法是利用外国法律实体将美国资产转变成外国资产。这种方法有时被称为美国财产的“外国包装”。



1. Foreign Corporation to Change Situs

As previously noted, a corporation's situs is determined based on where the entity is incorporated. IRC § 2104(a). Therefore, a foreign corporation's situs would not be the U.S. For this reason, most international estate planners take the position that a foreign corporation may serve as a wrapper and hold U.S. real estate, U.S. copyrights, U.S. partnership interests, or U.S. stock. Upon the death of the non-resident alien, he or she would own the stock in a foreign situs corporation that would not be subject to U.S. estate tax.

For the most part, the above technique is by far the most common method of estate planning and has been very successful. However, when the foreign corporation was merely a holding company of U.S. securities, the Court of Claims held the assets were included in the non-resident alien's estate. *Henry Fillman v. U.S.*, 355 F.2d 633 (Ct. Cl. 1966).

1. 利用外国公司改变财产所属地

之前提到了，一个公司的所属地是根据公司成立地点决定的。参见美国税法典§ 2104(a)。因此，外国公司的所属地不是美国。大部分的国际遗产税规划者都会利用这一点将美国房地产、美国版权、美国合伙企业权益或者美国股票放到一个外国公司里，之后当非定居美国的外国公民过世时，由于这些在外国公司名下的财产属于外国财产，因此就不需要缴纳美国的遗产税了。

这个方法是目前为止遗产税规划方面最为常用也最为成功的一种方法，但是，当外国公司是一个只拥有美国证券的控股公司时，美国法庭会将这些财产重新归到外国公民的遗产中。参见案例 *Henry Fillman v. U.S.*, 355 F.2d 633 (Ct. Cl. 1966)。

对于房地产也是一个好方法吗？

Is this a Good Idea for Real Estate?



好处：对美国的房产不需要缴纳美国的遗产税

Advantage: U.S. real estate not subject to U.S. estate tax

坏处：相应的美国收入所得税将提高20%

Disadvantage: taxed at a 20% higher U.S. income tax rate

a. Is This a Good Idea For U.S. Real Estate

i. Held Individually

If real estate is sold individually by a non-resident alien, gain is treated as effectively connected to a U.S. trade or business. IRC § 897. In this respect, the gain is reported as a Section 1231 or capital gain.

ii. Foreign Corporation

A foreign corporation is always classified as a “C” corporation, subject to a higher U.S. income tax rate. Typically, this rate is 20% higher than the individual capital gain rate.

a. 将美国房地产放到外国公司也是一个好方法吗？

i. 个人持有

如果非定居美国的外国公民出售房地产，收益将按照和美国贸易经营相关的有效关联收入来缴税，参见美国税法典§ 897。也就是说，收益将按照美国税法典 1231 章收益或资本收益来申报。

ii. 外国公司持有

外国公司总是属于美国一般公司，需要按照更高的税率缴纳所得税，一般来说，比个人资本收益税率高出 20%。

美国所得税问题


U.S. Income Tax Problem

- 当美国购买者购买公司所有的房产时
When U.S. Purchaser buys building from the corp.
 - 美国公司所得税=40%
U.S. corporate income tax = 40%
 - 而中国公民或者中国合伙企业所有的房产出售时的资本收益税只有20%
If building held by Chinese person or owned by Chinese foreign partnership, capital gain tax is 20%
 - 因此，用中国公司购买美国房产增加了20%的公司所得税
Therefore, the Chinese corporation increases the U.S. income tax by 20%


A purchaser of real estate will almost always want to buy the building owned by a foreign corporation, not the foreign corporation stock. The foreign corporation is classified as a C corporation for U.S. tax purposes. When it sells the building, the highest corporate rate is 39.6% federal plus, which is approximately 40%. Conversely, the capital gain rate if the building was owned individually or by a foreign partnership is 20%. Therefore, the use of a foreign corporation increases the U.S. income tax when the building sells by approximately 20%.


房产的购买者一般来说都会选择购买房产本身，而不是执有房产的外国公司的股票。外国公司在美国税法上属于一般公司，当公司出售房产时，公司要按照最高的联邦公司税率 39.6%左右缴税。对比之下，个人出售时或者外国合伙企业出售时，只需缴纳税率为 20%的资本收益税。因此，利用外国公司来执有房地产只会增加出售房产时的美国所得税，增加幅度大约为如前所述的 20%。

美国所得税问题
U.S. Tax Issues




美国遗产税40%
U.S. Estate Tax 40%





增加美国收入所得税20%
>U.S. Income Tax 20%



b. U.S. Tax Issues

If a Chinese person (i.e. nonresident alien) owns U.S. real estate individually, he or she is subject to a 40% estate tax. Conversely, there should be no estate tax if the Chinese person transfers the U.S. real estate to a foreign corporation. Conversely, the foreign corporation creates an income tax issue where if the children or spouse sell the U.S. real estate after the parent's death, there is an increased 20% U.S. income tax.

On the other hand, if the Chinese person had owned the U.S. real estate individually and sold it before death, there is not increased corporation income tax. The cash from the sale may be transferred to China, and there would be no U.S. estate tax when the Chinese person passed away.

b. 相关美国税法问题

中国纳税人持有美国房产时，所需缴纳的遗产税为 40%，当房产被转到外国公司以后将不再需要缴纳遗产税。但利用外国公司会产生一个所得税的问题，即当纳税人的配偶或子女在其过世之后通过外国公司出售房产时，所需缴纳的美国所得税将会提高 20%。

另一方面，如果中国纳税人以个人名义持有美国房地产并在过世之前出售，那么公司所得税的问题就不会产生。销售的现金收益可以被转回中国，这样在纳税人过世时就无需缴纳相应的美国遗产税了。

利用外国合伙企业来改变资产的国籍

Foreign Partnership to Change Situs



中国公司是中国资产，因为在中国注册成立
Chinese corporation is a Chinese asset because it is
incorporated in China

中国合伙企业的国籍判定方法不同
Unfortunately, a Chinese partnership does not have the
same rule

营业所在地决定了是否为美国资产
Place of the Partnership's Business determines whether U.S.

2. Foreign Partnership Wrapper to Change Situs

As previously discussed, situs of a foreign corporation is based where the corporation was incorporated. A foreign partnership does not follow the same rule as a foreign corporation. Situs for a foreign partnership is based on where the partnership conducts business. Rev. Rul. 55-701. The revenue ruling indicates that a “look through” rule is not applied when determining the situs of a foreign partnership. In this regard, situs is an entity test.

2. 利用外国合伙企业来改变财产所属地

之前已提过，外国合伙企业的所属地和外国公司所属地的判断制度不同，不是根据成立地点决定的，而是根据合伙企业经营业务所在地决定。参见美国税收裁定 55-701. 税收裁定规定了在判断外国合伙企业所属地的时候，“透视准则”（即根据合伙企业资产判断）不适用，因此该所属地判断是一个合伙企业层面的测试。

只有一处美国房产时的问题

Single U.S. Rental Won't Work



该合伙企业的营业所在地为美国
**Place of the Partnership's
Business is U.S.**



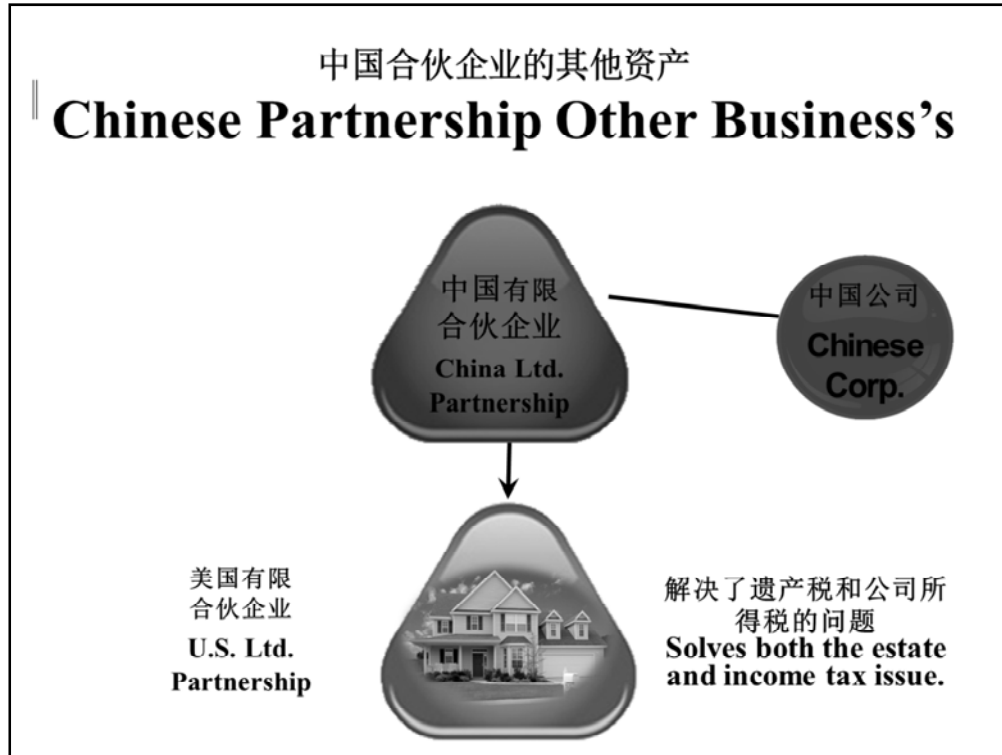
唯一的美国出租房产
One U.S. rental

a. Underlying Assets Are Only U.S. Situs Real Estate

At first glance, one might wish to take the position that if management of the business is conducted from abroad, the situs of the foreign partnership is outside the U.S. However, what happens if management is abroad, but all the underlying assets of the foreign partnership are U.S. real estate interests? If this is the case, the stronger argument appears to be that, the business of the partnership is actually conducted in the U.S.

a. 相关的资产只有美国的房地产的情况

当一个外国合伙企业的经营管理是在国外时，人们的第一判断是这是一个外国合伙企业。但是当外国合伙企业的经营管理在国外，但资产只有美国的房地产的时候，它将被判定为是在美国经营业务，因此将变成一个美国合伙企业，即美国财产。



b. Master Foreign Partnership

On the other hand, if the underlying assets of the foreign partnership contain assets from different jurisdictions, the foreign partnership may be sometimes referred to as a “master foreign partnership.” If more than one-half of the assets of the master foreign partnership represent assets that are outside the U.S., one may consider taking the position that the situs of the partnership is outside the U.S. If situs of the partnership is outside the U.S., the estate tax would be completely avoided. Furthermore, unlike the “foreign corporation wrapper” around U.S. real estate, the master foreign partnership would not convert capital gain to ordinary income as a tradeoff.

b. 外国合伙企业

另一方面，如果外国合伙企业含有属于其他管辖地区的资产，那么这样的外国合伙企业有时被称为“业主外国合伙企业”。如果合伙企业中有超过一般的资产都是外国资产，那么纳税人可以将该合伙企业界定为外国合伙企业。如果合伙企业的所属地为外国，那么在遗产税上它是完全免税的。另外，和利用外国公司改变美国房产所属地的结果不同的是，业主外国合伙企业的资本收益不会被转变成普通收益缴税。