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Part 1: US–Australia tax and estate planning: "big picture" considerations

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Estate planning for clients with US and Australian connections is complex and requires consideration of Australian and US federal and state income; estate, gift and inheritance tax considerations; as well as citizenship, residency and domicile. Factors such as prior year compliance, variously structured inter vivos trusts, incomplete gifts and claw back provisions, along with the need to accurately identify, value and preserve the estate while ensuring efficient distribution in each jurisdiction, create a complex maze that practitioners need to be aware of and manage.

> "… but in this world, nothing can be said to be certain, except death and taxes."[1]

Introduction

In this article, the author discusses the "big picture" tax and estate planning considerations relevant to clients with ties to the United States (US) and Australia. This article is an update to the article published in this journal in 2020. Part 1 delves into key tax considerations relevant to most Australians with ties to the US, and aims to provide a practical guide to estate planning in this arena for practitioners.[2] Select issues with US and Australian trusts are addressed in Part 2 (to be published in a future issue of the journal).

Based on the most recent statistics, there were 101,309 US-born citizens living in Australia,[3] and 97,250 Australian-born nationals living in the US.[4] Often, these expats have, or acquire, sizeable assets, and business, family and financial interests in both countries. Typically, they are:

- dual citizens living in either country;
- US citizens now living in Australia;
- US citizens/green card holders married to Australian citizens and who may be living in either country;
- an Australian citizen and resident who was born in the US or born in Australia to a US citizen parent (an "accidental Americans");
- Australians who have arrived in the US on the E-3 "specialty occupation" visa only available to Australians;[5]
- an Australian citizen living in Australia (a "non-resident alien" of the US or "NRA") who has invested in US assets (commonly, tech stocks and/or real estate);
- a US citizen living in the US who has invested in Australian assets; or
- families whose members live and operate businesses in both countries and hold multiple citizenships.

Such scenarios typically require bespoke estate planning, considering the specific legal requirements of each jurisdiction for the creation and execution of valid wills, and/or bypassing probate; cross-border income, estate and inheritance tax planning; and appropriate succession planning and the structuring of privately controlled investment and business vehicles. Structures and estate planning strategies that may work well in one country require closer scrutiny in the other.

This article introduces:

- in Part A: estate planning, tax, insurance and structuring considerations specific to such clients; and
- in Part B: distinct strategies that can be implemented to successfully address these considerations.

Unless otherwise stated, all references to monetary values are to US dollar amounts, and references to the IRC are to the US *Internal Revenue Code 1986*.

Part A. US–Australia international estate planning: why is it so complex?

The complexity of estate planning in the US–Australia context is predicated by several factors, each of which needs to be considered when developing an appropriate estate planning structure—these factors are *in addition* to the usual considerations of a client's marital and financial circumstances, and the needs of their beneficiaries:

1. An estate can be subject to tax as the US imposes federal estate, gift and other "transfer" taxes on US domiciles, citizens and lawful permanent residents ("green card" holders), and the ability to utilise applicable exemptions with respect to such taxes may be constrained by citizenship and necessitate additional planning. In contrast, Australia's version of an estate or "death" tax is limited to distributions of superannuation proceeds to a non-dependent beneficiary.[6]
2. US citizens and green card holders are presently taxed on worldwide income regardless of where they live, and have ongoing Internal Revenue Service (IRS) disclosure obligations with respect to foreign accounts, financial assets, investments and controlled trusts, and corporations (these obligations may change in the future