Planning for Non-US Persons Investing in US Situs Assets After US Tax Reform

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Estate Planning for Non-US Persons

- US situs assets result in estate tax due if value exceeds $60,000
- Non-US structures investing and holding US situs assets, such as real estate or marketable securities, may avoid estate tax
- Non-US corporations are not US-situs assets for US estate tax purposes
- New 21% corporate tax rate makes non-US corporation possible alternative, but be wary of branch profits tax when profits are deemed or actually repatriated
- Non-US partnership structures: proceeds from sale of US situs real estate subject to lower 20% capital gains tax rate but estate tax protection?

US Tax Theories of Partnership Interest Situs

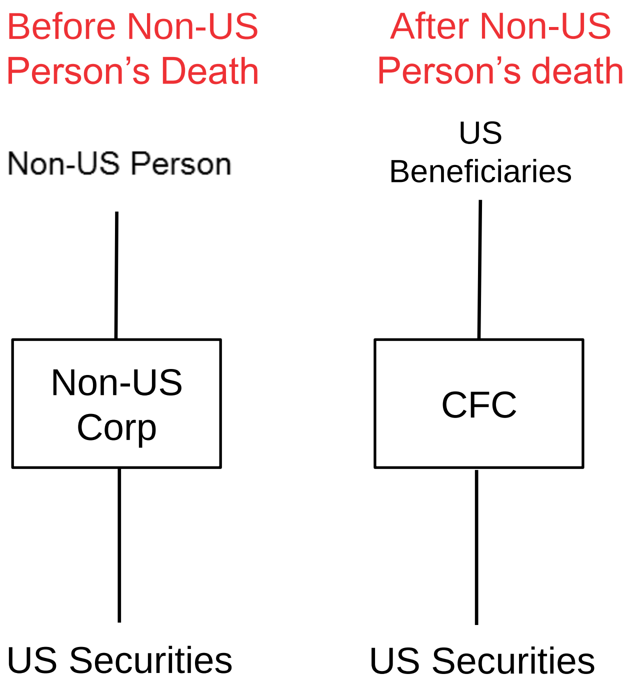
- Trade or business theory
  - Property deemed to be US situs if intangible personal property, if the written evidence is not treated as property itself, and if issued by or enforceable against US resident
  - Partnership is deemed to be a US resident if it is engaged in a US trade or business, regardless of where it is formed
  - Partnership holding US situs real property: US situs asset?
  - Business presence in the US of non-US entity: equity interests are US situs?
- Organizational jurisdiction theory
  - Analogous to corporate entity situs – place of organization
  - Stronger theory than the trade of business theory?
- Domicile of partner theory (“*Mobilia Sequuntur Personam”*)
  - Property has situs at the domicile of its owner
  - US Supreme Court: default common law situs rule for intangible personal property

Corporations May be Preferred Under US Tax Reform

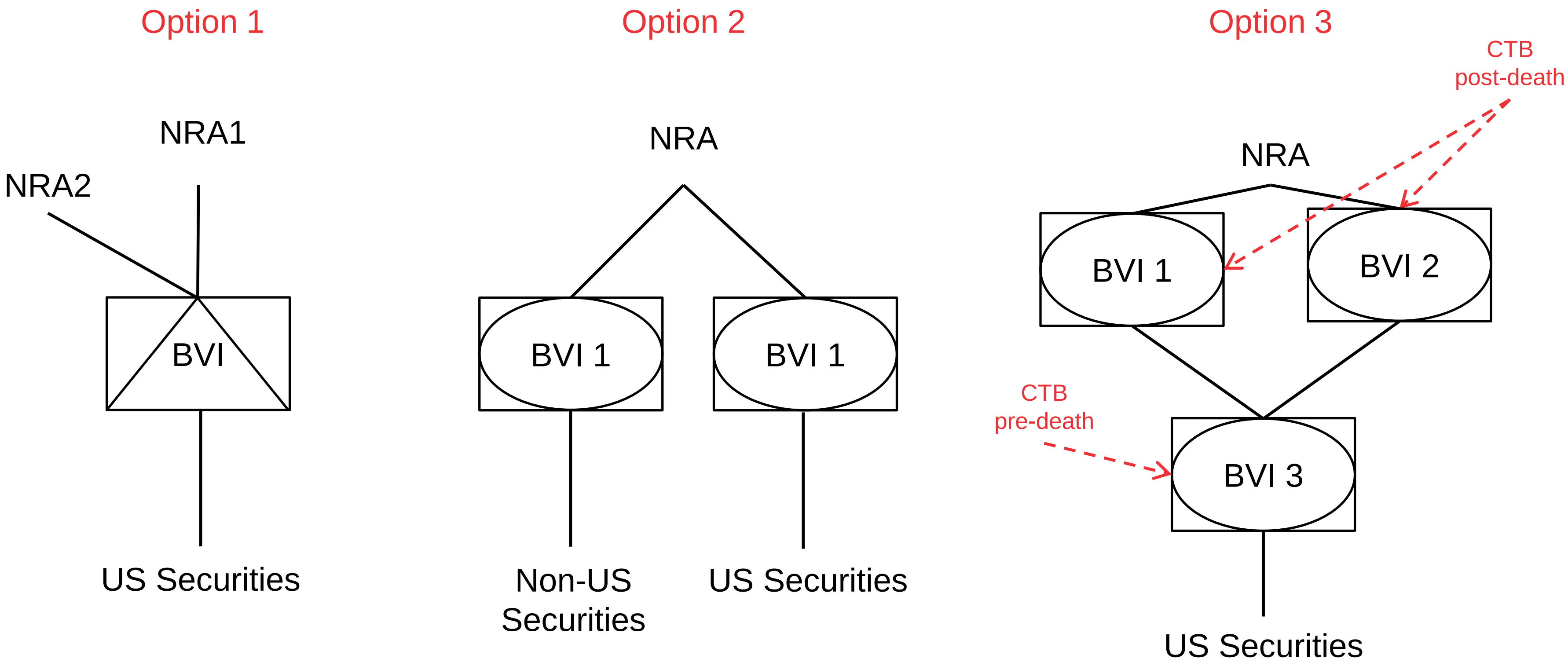
- Top corporate tax rate permanently reduced from 35% to 21%
- US real estate or marketable securities can now be purchased in a foreign corporation (or US corporation under some estate tax treaties)
- Taxpayer can achieve estate tax protection and low rate on sale
- For residential real estate that is not rented out (no profits so no double taxation)
- If interests in foreign corporation will be inherited by US residents: CFC rules
- Upper tier holding companies: no subpart F income, but no step up in basis if lower-tier US corporation holds the property - FIRPTA

Non-US Persons Holding US Securities – Pre Tax Reform

- Scenario: Non-US person wishes to acquire US marketable securities in an investment portfolio, but wishes to avoid US estate tax
- Pre-tax reform a non-US corporation was an ideal choice
- Before repeal of 30-day rule, if beneificiaries of estate were US persons:
  - Check-the-box (CTB) election on foreign corporation within 30 days of non-US settlor's death to avoid CFC status
  - No income inclusion
  - Preserved estate tax protection on settlor's death (since corporation status existed on date of death)
- After repeal of 30-day rule, , if beneificiaries of estate are US persons:
  - CTB election results in income inclusion for US Beneficiaries
- Now what?
  - CTB on non-US corporation pre-death?
  - Manage estate tax exposure
  - What if two shareholders at time of CTB election?
- **Non-US corporatoin still viable option if no US beneficiaries**

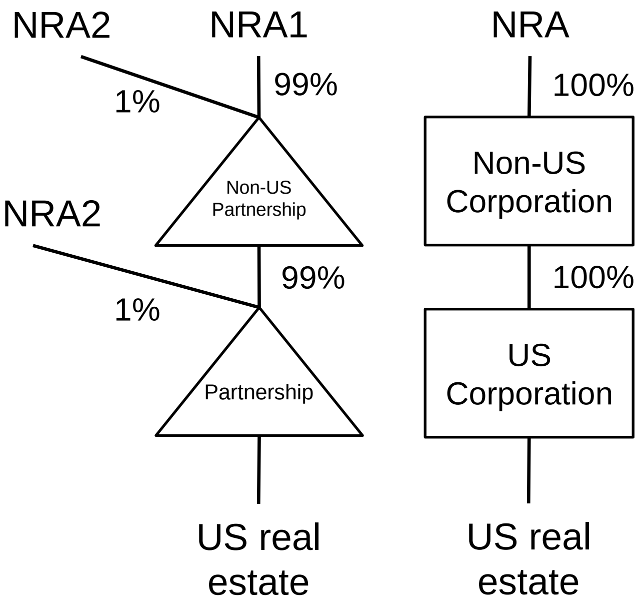


Non-US Persons Holding US Securities – Post Tax Reform



US Real Estate Planning

- Scenario: Non-US person wishes to acquire US real property, but wishes to avoid US estate tax
- If ultimate beneficiaries will be non-US persons, non-US corporation structure is preferable under new tax law
- If ultimate beneficiaries will be US persons, non-US corporation structure will be a CFC after non-US person’s death, so a partnership structure may be preferable.
- Income tax
  - Corporate rate now 21%
  - Could rate go up if Congress changes hands?
- Highest individual rate 37%
  - With pass-through deduction rate could be 29.6%
- Estate tax
  - Statutory certainty on situs for corporate blocker
  - Situs of partnership interest remains unclear, but good argument that it will serve as a blocker for estate tax purposes



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