The United States a new Tax Heaven

The American individuals that are residents or citizens have had the obligation to report their income to the Internal Revenue Service (“IRS”). In addition, they also have to report every foreign account that exceeds $10,000 USD, in order to avoid big penalties.

In 2007, the non compliance with the obligation to report the accounts, lead to humongous penalties imposed to important financial institutions. More than 80 Swiss banks had to pay around $5,000.00 millions of dollar in sanctions. For this reason, the IRS started to create a series of measures to produce amnesty programs that permitted at several individuals to declare their foreign accounts with a less sanctions.

In addition to the measures adopted from the United States government with respect to the report of the foreign accounts, the government also imposed to the foreign finances institutes, the obligation to inform to the IRS, every account that has a capital that exceeds $50,000.00 USD. In case of omission, the penalty will be a 30% and in some cases, the prohibition to acquire certain licenses or to do business in the EEUU.

The Foreign Account Tax Compliance Act, or FACTA, was signed by the president Barack Obama on 2010, as a part of the Hiring Incentives to Restore Employment Act. This law facilitates the foreign governments to report the information to the EE.UU through governmental agreements.

The Organization for Economic Cooperation and Development (“OCDE”) manifested his interest to collaborate with this initiative and to help to identify the tax evaders by creating its own version of FATCA known as the Common Reporting Standard (“CRS”). Member countries of the CRS are compromised to exchange, every year, financial information of their citizens. To date, the member countries are around 100, including Cayman Islands, British Virgin Islands and the Channel Islands. The fact that EEUU is not part of the CRS, means that in absence of a treaty, the EE.UU does not have any obligation to reveal information about the individuals that invest in the EE.EE (either nationals o foreigners) , only if they pay their taxes. This has created a new market for business owners, especially in places like Delaware, Wyoming, Nevada and South Dakota, where a company can be incorporated without information.

This new industry has allowed the EE.UU to be considered part of the tax heaven by the Tax Justice Network ("TJN"). According to the TJN, the EE.UU is now third in the list, only behind of Switzerland and Hong Kong and in front of Singapore, Cayman Islands and Luxembourg.

In an effort to avoid the requirements of the CRS, a lot of individuals left their offshore structures and opened new structures in EE.UU. A foreign person, in certain circumstances, may create an structure in the EE.UU, that allows to maintain his assets confidentially, only if he presents an adequate report and pay his taxes. It is important to clarify that there are legitimate reasons to keep the confidentiality such as, avoidance of extortions and kidnappings of account holders or their family.

The foregoing regulation constitutes a big opportunity to increase the foreign investment in the EE.UU, due to the confidentiality offer to the investors, by keeping reserved their investments to their original country. EE.UU is a potential investment destination with an attractive fiscal system that incentives the economy.

Cook Island Trust

Cav. Piero Salussolia, Esq. and Dott.ssa Angela Cappuzzello (not admitted in Florida)

This article provides legal information, the reader is free to spread it out to anyone who would be interested, as long as the contents will remain the same, as well as the brand of the Firm and its contacts which cannot be modify for any reason.

Protect your own property is now a priority for all who possess considerable economic assets, and international Trust is becoming of the most useful legal instrument to obtaining this shelter. This kind of protection turns out to be extremely important in adverse situations of different nature such as divorce, bankruptcy or simply considered as a future legal shield.

Offshore jurisdictions (the SO-CALLED tax havens) have become increasingly popular and sought for the protection and anonymity that they can offer to those who decide to use the Trust. These jurisdictions include: Panama, the British Virgin Islands, the Cayman Islands, Anguilla, Nevis Islands and the Cook Islands.

Our analysis will be focus on the Trust based in the Cook Islands, and the following reasons why this destination has become the jurisdiction which guarantees greater protection of the property at the global level, not only because of the privacy it provides to its customers, but also for the strict rule of law which protect the legal concept of Trust.

As we explained in the previous article, the Trust is a relationship whereby one party for the benefit of another holds property. A settlor, who transfers property to a trustee, creates a trust. The trustee holds that property for the trust's beneficiaries.

There are two different types of Trust: revocable and irrevocable. (See article no. 69 for details). The Trust made in the Cook Islands can be considered as semirevocable. In fact, at the request of the Settlor you can be arranged some changes to the Trust's operating rules that, however, do not affect the asset protection guaranteed by the same; therefore, you can take advantage of the benefits of both types of Trust.

The Cook Islands have been one of the first jurisdictions to enact a law explicitly to protect the international Trust, which made them the number one choice for owners of large economic capital. Now, according to data provided by the Commission for Financial Control of the Cook Islands, there are about 2,619 Trust present, mainly made up of doctors, builders, accountants, architects, etc.

The current legislation of the Trust sets limits to the possibility of filing complaints about fraudulent transfers of funds. The provision to file a complaint is two years and, in some cases, may even be less than one year.

Then, if the Trust is financed in a period when the Settlor is solvent, then the transfer of funds cannot be questioned.

Furthermore, the existing legislation sets certain conditions before a claimant can be considered creditor and file a complain to the judicial authorities of the Cook Islands. The rationale of this provision is to aggravate the burden of proof, which must be asserted beyond a reasonable doubt.

This is why the laws about the protection of personal data (privacy laws) prohibit the disclosure of banking information, unless there would be the explicit consent by the client. Accordingly, the Settlor is guaranteed that no foreign government can have access to that information. In order to ensure the honesty and integrity of the funds, there are certain guidelines that the Government of the Cook Islands asks for.

For example, the prevision for which the goods/property/funds that are the subject of the Trust may not arise from fraudulent activities, such as drug trafficking or money laundering.

Some of the main elements that characterize the Trust in the Cook Islands are as follows:

• Foreign judgments are not enforceable. Accordingly, if you want to sue the Trust, you should contact an attorney in the Cook Islands and this kind of legal action is subject to rigorous compliance requirements;
• The Settlor can retain control over the Trust and on the same property, if so established;
• The foreign regulations on bankruptcy do not apply;
• Creditors have a two-years period to file legal action against the trust property;
• The law clearly sets what means by fraudulent transfers and elements that must be present to enable them to be relevant in the eyes of the Judicial Authority;
• Minimization of taxes;
• The Trust ensures the preservation of the property against any temptation to waste it by the Trustee unwary heirs or successors in title.

Additionally, another important feature is the possibility for the Trust to include or maintain hidden company actions, without any concern regarding possible consequences of the opportunity to enjoy the financial/economic benefits of maintaining such actions. Moreover, in such cases, it is possible to limit the Settlor ability to supervise and act in the affairs of an hidden company, which allows the protection / conservation of family businesses or other investment companies making risky or speculative investments.

It is interesting note that for tax purposes in the United States, the Internal Revenue Service ("IRS", corresponding to our Inland Revenue), assumes that the Settlor who participates to the funds under the Trust cannot be considered as a separate entity and, for this reason, it bears on him the burden to report those funds in his own tax return form (using Form 1040).

Also, it's important to keep in mind that one thing is the fiscal responsibility of the Settlor in reporting these assets, another is the protection of assets which belong to the Trust (and not the Settlor).

Eventually, as we have seen in our previous articles, there are several options for company structures to deal with. As usual, the most favorable depends on the individual case and the specific objectives pursued; and it is always a good idea to consult a professional to get the right advice, fit for the single case presented.

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Trust

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Stabilization of purchasing power and proper administration of assets at the time of death are some of the most common concerns among individuals with substantial assets.

While our previous article analyzed Panamanian Private Interest Foundations, this article will focus on Trusts and, specifically, on the reasons why said instrument has acquired more and more importance over the years, becoming an alternative to Wills and will analyze how certain types of Trusts may ensure real and effective protection of assets.

A Trust may be created for different purposes, including:

Assets protection: Trusts may be created to protect assets from creditors or for the financial benefit of the person creating the Trust, a surviving spouse, and/or minor or disabled children;
Pension plans: pensions plans are typically set up as a Trust;

Charity;

Wills and estate planning: Trusts frequently appear in Wills;
Privacy protection: Trusts may be created purely for privacy. The terms of a Will are public in certain jurisdictions, while the terms of a Trust are not;
Co-ownership: ownership of property by more than one person is facilitated by a Trust;
Legal retainer: Trusts are often used by Attorneys to hold money on behalf of their clients.
However, the most common purpose when creating a Trust is the administration of decedents' estates and, in this article, we will focus on such Trusts (*i.e.*, Trusts that are used as an alternative, or in conjunction with, Wills).

> ***A Trust is a fiduciary arrangement in which one or more persons hold the Trustor's assets, subject to certain restrictions, to administer and protect them for the benefit of others. Trustors may determine the***

distribution of their property during their lives or after their deaths through the use of a Trust.

Trusts exist mainly in common law jurisdictions (except for the Republic of Panama which, despite being a civil law jurisdiction, adopted the first Trust law in the 1940's and new provisions on Trusts were then enacted by Law no. 1 of January 5th, 1984), but similar instruments existed since Roman times. A Trust indenture may be drafted in many ways and can specify exactly how the assets should be managed, and how, when, and to whom they shall be distributed.

The person who creates the Trust is named Settlor (or Grantor or Trustor), and transfers title to some or all of his/her assets to a Trustee, who then administers the Trust and holds the property for the benefit of others. The person who benefits from the Trust is named Beneficiary.

A Trust can be:

Revocable: also known as a living Trust (or "inter vivos Trust"), is a Trust which allows the Settlor to retain control of the assets during his/her lifetime. It is flexible and can be modified or terminated/dissolved at any time (as long as the Settlor is not incapacitated) should his/her circumstances or intentions change, which makes the revocable Trust ineffective against third parties' claims. The revocable living Trust is the most commonly used type of Trust as it will allow the assets of a decedent to pass outside of probate (the court-supervised administration of a decedent's estate created by state law to transfer assets from the decedent's name to his or her heirs. A personal representative must be appointed to handle the estate administration).
Irrevocable: is as Trust which cannot be altered by the Settlor after it has been established. Therefore, the Settlor will lose control over the assets (which cannot be attacked anymore by his/her creditors) and cannot change any terms or decide to dissolve the Trust.

Thus, *while the revocable Trust may be modified or revoked at the discretion of* *the Settlor, the irrevocable one cannot be modified or revoked (not even by order of a judge), which further ensures the protection of Trust assets against third-party creditors*. Nevertheless, there are cases where (although the Trust is irrevocable) the Settlor may have the power to replace/change the Beneficiaries, without compromising the benefits related to the Trust.

However, the most relevant difference between revocable and irrevocable Trusts relies on their tax treatment. In case of irrevocable Trusts, since the assets have been transferred to the Trust and the Settlor has lost control over them, the assets are not subject to estate taxes; moreover, the Settlor is relieved of the tax liability on the income generated by the Trust assets. Instead, a revocable Trust may help avoid probate (by effecting the transfer of assets during the Settlor’s lifetime to the Trustee) but it is still subject to estate taxes (it is treated like any other asset the Settlor owns). An irrevocable Trust is generally preferred over a revocable one if the Settlor’s primary aim is to reduce the amount subject to estate taxes by effectively removing the Trust assets from his/her estate.

> ***During the Settlor’s lifetime, the Trustee must administer the Trust property with the skill and prudence that any reasonable and careful person would use in conducting his/her own financial affairs. His/her actions must conform to the directions in the Trust agreement.***

The Trustee is the legal owner of the Trust’s property, but has a fiduciary duty to beneficiaries: he/she must be loyal to them, administering the Trust solely for their benefit and to the exclusion of any consideration of personal benefit, profit and/or advantage. In case of revocable Trust, and if the Settlor is unable, the Trustee may also have the power to make decisions about the management of the assets or any investments to be made on behalf of the Settlor.

When establishing a Trust, the individual's assets, such as bank accounts, real estate and investments, must be formally transferred to the Trust. This process is called "funding " the trust and requires changing the ownership of the assets to the Trust. *Assets which are not properly transferred to the Trust may be subject to probate and attached by third party creditors.*

In the event assets are distributed because of the Settlor's bankruptcy or because the condition established in the Trust indenture (in order to proceed with the distribution) is fulfilled, the Trustee has to: collect and evaluate the assets in Trust, identify the beneficiaries and creditors, pay the various taxes and expenses and distribute such assets. Also, he/she has to pay the Trust fees and any other fee that might be required for professional services rendered by attorneys or accountants.

According to the Florida law, creditors have two years from the date of death of the debtor to file their claims.

This means that the Trustee cannot proceed with distribution of Settlor's assets until all creditors have been satisfied. Naturally, two years is a long period that is why some people choose to create their Trust in their Will so to take advantage of the Will regulations, which contemplate a three-month creditor claim period.

To conclude, it is clear that the main advantage of an irrevocable Trust is the total protection that it assures to the Settlor's assets (with this regard, in our next article we will study more in detail how personal assets may be protected with Cook Islands Trusts). On the contrary, the main purpose of a revocable Trust is to avoid probate, so making simpler the transfer of assets to beneficiaries.

Whatever the choice is, it is always advisable to consult with an expert in the field in order to determine if the assets are appropriate for Trust ownership and to have all the necessary elements to make the right decision for each specific case.

This article contains general information and does not replace in any way the *help of a lawyer. We suggest you seek professional help for further information and assistance. The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.*

No 70 Trust

Most common types of entities in the United States

February 2015

When starting a business venture, one of the first decisions to make is to determine what form of business entity to establish. The business structure you choose will have legal and tax implications,

so it is very important to understand at least the basic differences amongst the most common forms of business entities; namely:

Sole Proprietorships (or DBA);
Partnerships;
Corporations;
Limited Liability Companies (LLC);
Cooperatives;
SOLE PROPRIETORSHIPS (or DBA)

A sole proprietorship (also known as DBA, short for “doing business as”) is the simplest and least expensive structure that may be chosen to start a business.

It is an unincorporated entity owned and run by one individual with no distinction between the company and its owner, who is entitled to all profits and has unlimited personal liability for all the company's debts, obligations and losses.

Because the sole proprietor and its business are one and the same, there is no legal separation between him/her and the business, with the consequence that the business itself is not taxed separately. The sole proprietorship's income or loss becomes the individual's income or loss, which means that it must be included in his/her personal tax return.

PARTNERSHIPS

A partnership is a vehicle where two or more people share ownership. Generally, each partner contributes to all aspects of the business, including money, property, labor and skills and will share in the profits and losses of the business.

There are two main forms of partnerships:

1) *General Partnerships*; where liabilities and managerial duties are divided equally among partners. Furthermore, partners are not only liable for their own actions, but also for the decisions made by the other partner(s); and the personal assets of all partners can be used to satisfy the partnership's debts.

2) *Limited Partnerships*; where some partners may have limited liability (to the extent of each partner's investment percentage in the partnership), but will also have limited input with management decisions (the Limited Partners). However, limited partnership must have at least one general partner, which will have unlimited liability.

Regarding taxes, a partnership must file an "annual information return" to report the income, deductions, gains, losses, etc., from the business's operations, but the entity itself does not pay income taxes: it "passes through" any profits or losses to its partners, which will include their share of the partnership's income or loss on their individual tax return.

CORPORATIONS

A corporation is an independent legal entity that is separate from the people – so called "shareholders" – who own and may control and manage it. This means that the corporation itself, not the shareholders who own it, is held legally liable for its actions and the debts incurred, while the shareholders have limited legal and financial liability. Generally, shareholders cannot be sued individually for corporate wrongdoings and their personal assets are protected from the creditors of the corporation (they can generally only be held accountable for the amount of capital committed to invest in the company).

Shareholders elect a Board of Directors which make business decisions and oversee policies, and appoint the Officers (President, Treasurer and Secretary), responsible for the day-to-day operations.

There are two different kinds of Corporations:

1) *"C" Corporations* (in reference to Subchapter "C" of Chapter 1 of the Internal Revenue Code, "IRC", which governs them) are legally considered separate entities from their owners. Income is taxed at the corporate level and it is taxed again when it is distributed to owners as dividends, what is known as "double taxation".

2) *"S" Corporations* (named after subchapter "S" of Chapter 1 of the IRC)

is a special type of corporations created through an Internal Revenue Service ("IRS") tax election. After a corporation has been formed, it may elect "S" Corporation Status by adopting an appropriate resolution and completing and submitting a form to the IRS. In order to qualify for "S" Corporation Status, the corporation must meet the following requirements: be a domestic corporation (located within any state in the US), have only US citizen or US resident shareholders, have no more than 100 shareholders, have only one class of stocks, not be an ineligible corporation (*i.e.*, certain financial institutions, insurance companies and domestic international sales corporations). What makes the "S" Corporation different from the "C" Corporation is that the corporate income is taxed only once, similar to how sole proprietorships and partnerships are taxed. All profits and losses are passed through directly to the shareholders, who report them on their personal tax return, while the business itself is not taxed.

LIMITED LIABILITY COMPANIES (LLC)

The Limited Liability Company, also known as LLC, is a relatively new form of business created in 1977 in Wyoming and now recognized in all 50 states and the District of Columbia.

It can be best described as a hybrid between a corporation and a partnership because it provides the limited liability features of a corporation and the tax efficiencies and operational flexibility of a partnership.

Owners of an LCC are called members and may include individuals and entities (whether domestic or not).

There are two different management structures of a LCC:

1) *Member management*: assume that members participate equally in the management of their business. This is more frequent to find in small LCCs.

2) *Manager management*: in which one or more owners (or even an outsider) is designated to take responsibility for managing the LCC. Only the named managers get to vote on management decisions and act as agents of the LCC.

There is no maximum number of members. Most states also permit "*single member*" LCCs (*i.e.*, those having only one owner).

The peculiarity of this kind of company is that, just like shareholders of a corporation, all LCC owners are protected from personal liability for business debts and claims: only LCC assets are used to pay off business debts, while owners stand to lose only the money that they have invested in the company. However, a LCC doesn't have the corporate formalities (Board meetings, Shareholders meeting, minutes, etc.) or extra levels of management (Shareholders, Directors, Officers), but the easy management of a partnership. Moreover, unlike "C" corporations, LCCs are not taxed as a separate business entity. Instead, business income is "passed through" the business to the members, who report their share of profit – or losses – on their personal tax returns, just like the owners of a partnership would.

COOPERATIVES

A cooperative is a business organization owned by and operated for the benefit of a group of users using its services.

Profits and earnings generated by the cooperative are distributed among the members, also known as user-owners, who contribute equity capital.

Regarding the tax treatment, cooperatives operate as "S" Corporations and receive a "pass-through" designation from the IRS.

Cooperatives are common in the healthcare, retail, agriculture, art, restaurant industries and NYC apartment buildings.

Be aware that this is just a general illustration of the various forms of business existing in the United States. Each of them needs an in-depth analysis, which will be done in the forthcoming articles.

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IUS GENTIUM By: Piero Salussolia P.A.

OFFSHORE VOLUNTARY DISCLOSURE PROGRAM

January 2015

Offshore structures have become one of the preferred business vehicle for investments in the United States due to its discretion and tax advantages although, if erroneously applied, could subject its owner(s) to heavy sanctions and criminal liabilities.

In order to prevent tax evasion and money laundering, the Internal Revenue Service ("IRS") introduced the Offshore Voluntary Disclosure Program ("OVDP"), which has been revised over the years. In June 2014, the IRS announced the latest version of the OVDP. The program was initially created after the U.S. Department of Justice ("DOJ") discovered international tax evasion by U.S. taxpayers using hidden offshore bank accounts.

A renowned case of tax fraud in the U.S. is the Birkenfeld case, in which the DOJ investigated Swiss bank UBS after Bradley Birkenfeld, a former employee, had divulged details of how the bank facilitated U.S. taxpayers to conceal income and assets not reporting them to U.S. authorities. The DOJ entered into a deferred prosecution agreement with UBS imposing a $780 million fine to be paid by the bank, which also agreed to disclose account information for more than 4,500 clients.

Similarly, Credit Suisse had to pay $2.6 billion dollar fine for conspiring to aid tax evasion. To date, there are about 100 Swiss banks negotiating their cases with the DOJ to prevent facing felony tax charges. Equally, Deutsche Bank AG was accused of aiding tax evasion and agreed to pay $554 million to avoid prosecution.

Presently, U.S. taxpayers holding foreign financial accounts must report their interest when the aggregate value of those accountsexceeds $10,000 U.S. dollars at any time during the calendar year, by filing a Report of Foreign Bank and Financial Accounts ("FBAR"); otherwise, they may be subject to civil and/or criminal sanctions.

The OVDP was introduced in 2009 for taxpayers who intentionally failed to report offshore income and failed to file the FBAR. Accordingly, taxpayers who amended their tax returns and filed FBARs for the years 2003 to 2008, had an opportunity to avoid criminal prosecution and were to pay the equivalent of 20% of the highest aggregate value of the unreported offshore accounts during the six-year period as penalty. Later in 2011, the offshore penalty increased from 20% to 25% and the disclosure period was extended from six to eight years (2003 to 2010). In 2012, the penalty increased to 27.5%.

The 2011 reform also included the opt-out procedure where taxpayers could avoid criminal prosecution although remaining subject to all penalties as mitigated by the program; so the taxpayer would opt out the ODVP, so long as the IRS proved the voluntary non-compliance.

The latest changes to the OVDP were announced in June 18, 2014. The new rules are stricter due to the awareness and efforts in preventing tax evasion. Many offshore financial institutions have been requiring U.S. taxpayers to assure they are reporting the offshore income to U.S. authorities.

Due to the publicity surrounding the voluntary disclosure initiatives, U.S. taxpayers with offshore financial accounts should know of their duty to report the income; accordingly, undeclared offshore income would be treated as a willful non-compliance with U.S. tax law. For delinquent FBARs, a 50% penalty will be applied when a financial institution (where the taxpayer has or had an account) has been publicly identified as being under investigation or as cooperating with an investigation.

In 2012, the IRS also created streamlined offshore procedures for U.S. taxpayers living abroad or dual citizens with delinquent tax returns. They were required to file the returns for the previous three years and to file FBARs for a six year-period, along with the penalty fee. Low compliance risk taxpayers (*i.e.*, less that $1,500 in tax due each year) were not subject to penalties or follow-up actions. Nonetheless, the risk level could increased based on the following factors:

There were indications of tax planning or avoidance;
There was material economic activity in the U.S.;
Any of the tax returns claimed a refund;
The taxpayer did not report the income in the country of residence;
The taxpayer was under investigation by the IRS;
FBAR penalties had been previously imposed;
The taxpayer had a financial interest over any financial account located outside his or her country of residence;
There was U.S. source income.
In the 2014 reform, this procedure was maintained and modified. Now procedures are available to both U.S. individual taxpayers residing in and outside the U.S. who certify that the failure resulted from non-willful conduct. Accordingly, taxpayers may follow Streamlined Foreign Offshore Procedures (“SFOP”), or Streamlined Domestic Offshore Procedures (“SDOP”). Eligibility for one or other procedure depends on whether the taxpayer, for the three most recent years for which the tax return is due, did not have a U.S. abode and was physically abroad for at least 330 full days, or is not a U.S. citizen or legal permanent resident. In such case, the SFOP apply.

To comply with the SFOP, the taxpayer must submit a delinquent tax return or amend the one previously filed, for each of the most recent 3 years for which the U.S. tax return is due. Additionally, the taxpayer must submit delinquent FBARs for each of the most recent 6 years for which the FBAR due date has passed, along with payment of all tax due and all applicable statutory interest with respect to each of the late payment amounts. Taxpayer will be exempt from late fees.

Additionally, the taxpayer will have to certify the submission of all the FBARs and that failure to file tax returns, report income, pay tax, and file information returns, resulted from non-willful conduct.

To comply with the SDOP the requirements are similar but the offshore penalty is equal to 5% of the highest aggregate balance of the foreign financial assets for each of the years in the covered tax return period.

As explained, it is mandatory to know and understand the foregoing rules since the authorities are putting a big effort to collect from delinquent taxpayers and the ignorance of the law is no longer an excuse.

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This article was written with effort and dedication in order to provide valuable information on diverse topics. Please feel free to share this information with your colleagues and friend so long as you do not modify or alter its contents and our contact information.

DEFERRED EXCHANGE REGULATIONS UNDER SECTION 1031 OF THE INTERNAL REVENUE CODE

With the purpose of stimulating the economy, the Internal Revenue Service ("IRS") aimed to encourage the commerce of Real Estate ("R.E.") through Section 1031 of the Internal Revenue Code ("IRC"). This Section allows R.E. investors to defer the capital gain tax when selling a property and reinvesting the proceeds in like-kind property held for productive use in a trade or business, or held for investment. Capital gain is generally calculated on the difference between the purchase price of the R.E. plus purchase expenses improvement and remodeling costs minus amortizations and net selling proceeds.

Advantages of Section 1031 are, amongst others, that the seller can dispose of the property deferring income tax liability, allowing the investor to increase the purchasing power of money and to maximize the return on the investment.

Please note that Section 1031 does not apply to exchange of stocks, bonds, notes, securities, or interests in the assets of a partnership or LLC.

According to Section 1031, an investor will have to comply with the following requirements:

- The relinquished property (*i.e.*, property the investor is selling) and the replacement property must be located in the U.S.;
- Within 45 days of closing, the investor must provide a qualified intermediary (or exchange facilitator) with a list, identifying potential replacement properties;
- Within 180 days of the sale of the exchanged property, the investor must complete the exchange with at least one of the listed properties;
- The investor must take title to the replacement property in the same legal name of the relinquished property;
- The value of the replacement property must be similar or higher to the value of the relinquished property;
- The investor must reinvest all the cash proceeds from the sale in the replacement property, any cash received is subject to taxation. As a very simplified example, if the investor purchased a property for $2,000,000.00 and later reinvests in a $1,500,000.00 property, the $500,000.00 balance would be subject to federal capital gain tax at a maximum rate of 20%. The chart below shows the applicable rates depending on the amount of gain

TAXABLE INCOME	TAX RATE
$72,500 or less	0%
$72,501 – $450,000	15%
$450,001 and over	20%

It is worth noting that some states impose state capital gain tax, which would add to the maximum federal rate of 20%.

Furthermore, the identified replacement property must follow one of three rules:

- The Three-Property Rule: The investor may identify up to three different properties as possible replacements, without consideration of the market value. This rule applies to 95% of the transactions;
- 200% Rule: The investor may identify different replacement properties, so long as the total value of all the potential replacement properties does not exceed 200% of the market value of the relinquished property;
- 95% Exemption: The investor may identify any number of replacement properties, so long as the replacement property's value represents at least 95% of the aggregate value of all the identified properties.

Through the exchange process, the investor will always carry over the relinquished property's basis to the replacement property (*i.e.*, the value of the relinquished property, plus improvements, minus amortization). However, heirs of the taxpayer will receive the property at its market value as long as all applicable estate taxes have been paid. Later, when the property is sold, only the amount resulting from the difference between the new purchase price and the fair market value at the time of the taxpayer's death will be subject to taxation.

In sum, R.E. in the U.S. has different tax benefits that not only stimulate the economy, but also allow investors to maintain stability in the purchasing power of money.

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Investments in the United States – Part II

December 2014

Real Estate ("R.E.") investments in the United States ("U.S.") and their tax implications are subject to various factors that determine the investment's viability and efficiency according to the investor’s necessity.

This article will focus on Personal Investment in relation to state and local capital gain tax, ordinary income tax, and federal estate tax.

As it was explained in *Investments in the United States, Part I*, all ordinary income and capital gain may be subject to state and local tax, which rate varies from state to state. There are some states that do not asses a tax on personal income, such as Florida. Nonetheless, Florida has a 5.5% corporate income tax (as will be discussed in the forthcoming articles).

Besides Florida, Alaska, Nevada, South Dakota, Texas, Washington and Wyoming do not have a personal income tax. While New Hampshire and Tennessee impose a tax only on interest and dividend income, all other states have some sort of personal income tax. The state with the highest tax rate is California at 13.3%, and one with the lowest rate is North Dakota at 3.22%. In addition, some states, like New York, allow cities and/or counties to impose taxes. Accordingly, New York City levies a local income tax of 3.88%, which combined with New York State tax of 8.82%, reaches a total of 12.7%.

(See below a list of some cities that levy a separate individual income tax).

<u>Chart 1</u>

CITY	LOCAL TAX	STATE TAX	STATE AND LOCAL TAX
Indianapolis, IN	1,62%	3.4%	5.02%
Baltimore, MD	3.2%	5.5%	8.7%
Montgomery, MO	3.2%	5.5%	8.7%
Detroit, MI	2.5%	4.35%	6.85%
New York City, NY	3.88%	8.82%	12.7%

It is worth noting that gifts of intangible personal property, *e.g.*, U.S. stocks and bonds, are exempt from U.S. gift tax for NRAs, as opposed to estate taxation –as previously described.Foreign nationals not U.S. residents or Non-Resident Aliens (“NRAs”) not domiciled in the U.S. are also subject to federal estate taxation with respect to certain U.S.-situated assets. These assets include: (1) R.E. in the U.S. at the date of death; (2) tangible personal property (*e.g.*, motor vehicles, artwork, watercrafts, animals, precious gems and metals) physically located in the U.S. at the date of death; and (3) intangible personal property such as securities of U.S. companies, personal and U.S. corporate debt securities (except for securities that generate portfolio interest which is an interest on an obligation issued by a U.S. person where the beneficial is a foreign person who is not a 10% shareholder in the issuer at the time the interest is received), patents, trademarks, and copyrights.

As of 2014, the highest tax rate on Estate Tax is 40% (see the chart below with the applicable rates).

<u>Chart 2</u>

TAXABLE ESTATE	TENTATIVE TAX EQUALS	PLUS	OF AMOUNT OVER
0 – $10,000	$0	18%	$0
$10,000 – $20,000	$1,800	20%	$10,000
$20,000 – $40,000	3,800	22%	$20,000
$40,000 – $60,000	$8,200	24%	$40,000
$60,000 – $80,000	$13,000	26%	$60,000
$80,000 – 100.000	$18,200	28%	$80,000
$100,00 – $150,000	$23,800	30%	$100,000
$150,000 – $250,000	$38,800	32%	$150,000
$250,000 – $500,000	$70,800	34%	$250,000
$500,000 – $750,000	$155,800	37%	$500,000
$750,000 – $1,000,000	$248,300	39%	$750,000
$1,000,000	$345,800	40%	$1,000,000

A NRA estate is allowed to claim a credit of $13,000, which excludes the first $60,000 of property from U.S. taxation, as opposed to the estate tax exemption of $5,340,000 (in 2014) available for U.S. citizens and resident aliens.

The U.S. has entered into several estate tax treaties which allows NRAs to avoid double taxation. In the event that a NRA (being a citizen of, or domiciled in, the treaty country) dies owning taxable U.S. situated assets, the NRA estate may claim available credits and deductions.

As described, personal investments in the U.S. are subject to different tax rules. Accordingly, it is mandatory to examine the investor’s goals and objectives because there are scenarios where a personal investment can result more advantageous than an investment through a company. As an illustration, the maximum capital gain tax rate for individuals is 20% as opposed to an almost 40% federal and state combined rate for Florida corporations, as it will be discussed in the forthcoming articles.

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Investments in the United States – Part I

November 2014

Foreign investment in the United States ("U.S.") is generally considered advantageous due to the stability of its economic system and a tax structure that, although complex, facilitates foreign investment. The U.S. has a legal system where every state within its territory coexists with the federal system of government. Accordingly, when investing in the U.S., there are key factors (*e.g.*, geographic location; type of investment; local, state, and federal tax issues; corporate and estate taxes) that must be taken into consideration, which will be discussed in this and forthcoming articles.

This is the first of four articles that will provide a general overview of different investment structures, specifically on real estate ("R.E.") investments in the U.S. and their tax implications. It will analyze such investment structures in the following four scenarios:

1. Personal Investment (Federal taxation);
2. Personal Investment (State and Estate taxation);
3. Investment through a domestic company;
4. Investment through a foreign entity and "Tandem Structures."

Generally, and not considering R.E. Property Taxes and local taxation where applicable, there are four basic types of taxes imposed on the holding and disposition of a R.E. investment in the U.S.:

Income Tax;
Withholding T ax on Fixed, Determinable, Annual, or Periodic income;
Capital Gain Tax;

Estate Tax.

Application of Income Tax depends on whether a non-U.S. citizen will be considered a tax resident alien or non-resident alien. A non-citizen is considered a U.S. resident alien, for tax purposes, if lawfully admitted as a legal permanent resident (green card holder), or if the non-citizen meets the substantial presence test as required by the Internal Revenue Code of 1986 ("I.R.C."), and its amendments.

The substantial presence test requires an individual to be present in the U.S. for at least 31 days during a calendar year, and 183 cumulative days during a 3-year period (including the current year and the two preceding years). The 183-day requirement is determined according to the following formula: an individual is treated as present in the U.S. if physically present in the country all days in the current year; 1/3 of the days present in the preceding year; and 1/6 of the days present in the second preceding year. The following example illustrates the application of the Substantial Presence Test:

Chart 1

	PRESENCE DAYS	FORMULA	RESIDENCY DAYS
Current year	120	100%	120
1st Prev. year	150	33.33%	50
2nd Prev. year	120	16.66%	20
Total			190

In the example described in Chart 1, the non-U.S. citizen will be considered a tax resident alien because the individual cumulated more than 183 days all together in the 3-year period.

Resident aliens are generally subject to income taxation on their worldwide income in the same way as U.S. citizens. Nonetheless, resident aliens may claim a foreign tax credit in order to avoid double taxation.

In turn, non-resident aliens' income, subject to U.S. income tax, is divided into two categories depending on whether or not the income is effectively connected with a trade or business in the U.S. In the first category, if engaged or considered to be engaged in a trade or business in the U.S. during a fiscal year, the non-resident alien ("NRA") will be treated as a taxpayer subject to the same rates that apply to U.S. citizens and residents.

The chart below illustrates the tax rates applicable to joint tax returns for married couples.

Chart 2

NET INCOME	RATE
$17,850 or less	*10%*

$17,851 – $72,500	*15%*
$72,501 – $146,400	*25%*
$146,401 – $223,050	*28%*
$223,051 – $398,350	*33%*
$398,351 – $450,000	*35%*
$450,001 and above	*39.6%*

In this case, the net income (gross income minus allowable deductions) is determined and a Form 1040NR, U.S. Nonresident Alien Income Tax Return, is required to be filed. NRAs must apply and obtain an Individual Taxpayer Identification Number ("ITIN") with the Internal Revenue Service ("IRS"). The application must include a copy of the NRA's passport certified by the issuing agency.

In the second category, NRAs' income that is not effectively connected with a trade or business in the U.S., will be subject to a flat tax of 30% or a lower treaty rate (if applicable) of the gross amount of U.S. source fixed or determinable, annual or periodical income ("FDAPI"). Deductions are not allowed and the NRA does not have to file a tax return.

It may be worth nothing that this 30% tax rule may apply to real property rental income when a NRA taxpayer chooses not to treat that income as effectively connected with a trade or business. In such case, the tenant is responsible to withhold the tax from the rental income and remit it to the IRS. If the NRA chooses to treat the real property rental income as effectively connected to a trade or business in the U.S. during the fiscal year then, the IRC allows deductions to be claimed against the gross income (*e.g.*, condominium expenses, property tax, utilities, repair costs, furniture depreciation, amortization of property) and the NRA would be taxed at the graduated rates that apply to U.S. citizens and resident aliens.

A NRA is subject to long-term capital gains tax rates in the same way as a U.S. citizen, as the chart below illustrates (this rate is lower than that of Chart 2).

Chart 3

CAPITAL GAIN INCOME	RATE
$72,500 *or less*	0%
$72,501 – $450,000	15%
$450,001 *and above*	20%

Capital gain profit generated from the sale of real estate (or any other assets held for investment purposes) is calculated on the difference between the purchase price, purchase expenses, selling price, selling expenses, and improvement and remodeling costs.

Be aware that any capital gain or rent may also be subject to state tax. This issue will be discussed in Part II of these series of articles.

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Florida Revised Limited Liability Company Act

October 2014

On June 14, 2013 Governor Scott signed into law Chapter 605 of the Florida Statutes, the Florida Revised Limited Liability Company Act (the “Act”).

The Act will be effective for every LLC formed or registered to do business in Florida on or after January 1, 2014. All LLCs in existence before that date can continue to operate under the provisions of the existing law unless they elect to be governed by the new act until December 31, 2014. After that date, ALL LLCs formed or registered in Florida will be subject to the new law.

The Act is a “*default statute*” just like the existing law. A notable example is that, if not addressed in the operating agreement, the default rules provide that distributions are to be made to members on a per capita basis – *i.e.*, in equal shares, without regard to capital contributions or ownership percentages.

Furthermore the Act expands the list of non-waivable default rules that cannot be overridden by the operating agreement: *e.g.*, a member is allowed to have the non-waivable right to dissociate from an LLC and the dissociated member will only have the rights of an un-admitted transferee (with certain exceptions). However the Act gives LLCs a cause of action for "*wrongful dissociation*"; meaning than an LLC may be entitled to damages if a member dissociates in any manner defined as wrongful, including contrary to an express provision of the operating agreement.

A notable improvement will now permit, for the first time, LLCs to file statement of authority to delineate the authority of a member, manager and/or officer.

Also for the first time, companies based outside the United States that want to domesticate as Florida LLCs will be allowed to do so while keeping their status of foreign entity.

The new act permits interest exchanges and also eliminates the term "*managing-member*", it explicitly addresses direct actions by members against the LLC as well as actions against other members and managers, to enforce a member's rights and protect a member interests.

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A close tax haven for U.S. Citizen

July 2014

Under a local constitution approved by the Congress of the United State ("U.S.") in 1952, Puerto Rico ("PR") is a self-governing, unincorporated territory of the United States

with local autonomy and power. Because of this status PR is treated for tax purposes as separate from all the United States.

Starting from 2006, PR has been experiencing a recession for 8 consecutive years. Struggling to emerge from the economic slump on January 2012, Puerto Rican government signed the "*Individual Investors Act*" ("Act 22") as well as the "*Exportation of Services Act*" ("Act 20").

Act 22 completely eliminated tax on capital gains, interest and dividends for U.S. Citizen that, by living on the island for at least 183 days a year, become PR residents. Section 937 of the U.S. Internal Revenue Code ("US IRC") provides that in order for an individual to qualify as a Bona Fide Resident of Puerto Rico under US-IRC Section 933 ("Bona Fide PR Resident"), he/she must meet all of the following three tests: Presence Test, Tax Home Test, and Closer Connection[1].

As a general rule, U.S. Citizen, even if they reside abroad, are taxed by U.S. Internal Revenue Service ("IRS") on their worldwide income. For example, if a U.S. Citizen resides in a country, which does not impose long-term capital gains taxes, he/she will still have to pay a capital gain tax of 15% or 20% depending on the applicable U.S. tax rate. However, when a U.S. Citizen moves to PR falls under a very peculiar section of the IRS, which trumps Federal Law: US IRC §933 exempts residents of Puerto Rico from federal income tax on that part of their income that has its source in Puerto Rico. Thus, Puerto Rican’s residents pay federal income tax only on income they receive from the United States or other non-Puerto Rican sources.

As per the combination of the U.S. IRS provisions and the dispositions of Act 22, once an American becomes a new resident of PR – where relinquishment of the American Citizenship is not required – he can legally pay zero capital gains tax and no more federal tax on income received from sources within Puerto Rico. Obviously, that’s why Act 22 is also known like the law that turned PR in a tax haven for U.S. Citizens.

Act 22 tax incentives can be summarized as follows:

PR’s tax rate, during the exemption period, for qualified individual’s income from dividends and interests is 0%, moreover, a qualified individual is also exempt, under U.S. IRS section 933, from U.S. federal income taxes if the revenue generated is considered PR source income. However, interests and dividends deriving from U.S. source are subject to U.S. income taxation;
After a qualified individual becomes a resident of PR, during the tax exemption period, income from long-term capitals gains is exempt from PR’s income taxes. A qualified individual’s long-term capital gains for investment done, prior to becoming a resident of Puerto Rico, are subject to a 10% tax rate if realized within 10 years of residency or 5% if realized after the 10 years of residency.

Type of Income	Puerto Rico’s Tax rates
Dividend and Interests if not from U.S>	0%
Long-Term capital gains for new Residents	0%
Long-Term capital gains for investments started prior to Residency, realized within 10 years of Residency	10%
Long-Term capital gains for investments started prior to Residency, realized after 10 years of Residency	5%

The tax breaks provided by Act 22 are an evident PR’s attempt to attract new money to regenerate the territory’s economy; accordingly tax breaks apply only to new residents, they are available to individuals who have not been residents of Puerto Rico within the last 15 years and who become residents of Puerto Rico on or before December 31, 2035.

To benefit from the Act 22, the new resident must apply with the Office of Industrial Tax Exemption (OITE) of PR and obtain a tax exemption decree, which will be signed by the Secretary of the Department of Economic Development and Commerce of Puerto Rico and provide full detail of tax rates and conditions mandated by the Act. The Tax Exemption Decree will constitute a contract with the Puerto Rico Government. Once the individual investor obtains the tax exemption decree, the benefits granted will be secured during the term of the decree, irrespective of any change may incur in the applicable PR tax laws. The tax exemption granted under the Individuals Investors Act will expire on December 31, 2035.

The Puerto Rican government also enacted the “*Exportation of Services Act*”, Act 20, which is focused on encouraging local service providers to expand their businesses by offering their services to clients located outside the Island. Also, it aims to convince foreign services providers to move their businesses to Puerto Rico.

Act 20 provides benefits for services rendered from PR to outside markets and states which activities are eligible to receive the Act benefits. Among the others, eligible activities are: research and development; advertising an public relations; consulting services for any trade or business; professional services as legal, tax and account services.

The eligible activity must not have a nexus with PR – which means that the activity must not be related to the conduct of a trade, business or other services in PR – to qualify for the Act benefits.

Act 20 seeks to attract business trough the following profitable tax incentives, which apply to all new Puerto Rican businesses under a Tax Exemption Decree:

– a 4% flat income tax rate on income generated from export services;

– a 100% tax exemption of earning and profit distributions on income generated from export services;

– Exemption from US Federal tax on Puerto Rico source income, considering that under the US Internal Revenue Code, the country source of service income is the jurisdiction where the service is performed, income earned by performing a service *entirely* in Puerto Rico is Puerto Rico-sourced income. Under US Internal Revenue Code Sections 933 and 861, if the person performing the service (whether an individual or an entity) is a Puerto Rican resident working in Puerto Rico, the income is exempt from US tax. Puerto Rican entities are considered foreign corporations for US tax purposes. Therefore in order to benefit from Act 20, the PR’s business must avoid doing anything in the USA that contributes to producing the service.

Other important benefits of Act 20:

– The flat income tax rate may drop from 4% to 3% if more than 90% of a company’s gross income is derived from exporting services *and* the Puerto Rican government deems such services “strategic,” which generally means that rendering such services from Puerto Rico is in “the Island’s best economic and social interest”;

– Some entities may receive a 100% property tax exemption for the initial five years of operation. After the five-year period, a 90% tax exemption will apply for the remainder of the Act 20 decree. This benefit is mostly granted only to call centers, shared service centers, or companies that move their headquarters to Puerto Rico;

– 60% tax exemption on Municipality taxes.

The PR government has the sole discretion to grant or withhold Act 20 status; the OITE will perform a due diligence on the company and its management. Considering the above, is very important that the application satisfies all written and unwritten requirements, which can be summarized as follows:

– Explaining in details the nature of the business,

– Providing basic revenue and profit growth projections for three years;

– Generating at least three payroll jobs in PR with plan of growth.

Considering the above, if you think about moving to PR, you also have to know that the maximum income tax rate, on the salary you receive for services rendered in PR, is 33% – which applies on the net taxable income over $61,500 – plus Federal Insurance Contributions tax (FICA) and other payroll taxes.

To qualify for these business tax incentives, you need to form a Puerto Rican entity. You will be required to have a salary of 1/3 of the entity’s net profits, up to a maximum salary of $250,000. Thus, new services providers will have to pay income tax on the $250,000 salary (using a graduated rate of up to 33%) and 4% tax on income over $250,000. For example, on a 1 million of business profits, you will have a tax bill of around $105,000 – $75,000 (assuming that the graduate rate to be applied at the 250,000 salary is 30%) plus $30,000 (which represents the 4% of 750,000)= $105,000.00 – or about 10%. Considering the above, you will really benefit of the tax incentive if your business generates at least $250,000 in annual profits, as income above this threshold is subject to only a 4% income tax.

If you receive a salary from a U.S. Company for services rendered outside of Puerto Rico, as a US citizen, you will be subject to federal income taxes as well as Puerto Rico income taxes. However, as a Puerto Rico resident, you are entitled to a tax credit for the federal taxes. PR tax on dividends and interests income is 0% but, if interest and dividend are coming from a US company, such incomes are still subject US income taxation.

As well as for Act 22, to benefit from Act 20 the service provider needs to submit an application with OITE and obtain a tax exemption decree, which will be considered a contract between the Puerto Rican Government and the service provider. The Act's benefits will be secured during the term of the decree, irrespective of any change may incur in the applicable PR tax laws. The decree shall have a term of 20 years; whit a possible 10-year extension provided certain conditions are satisfied.

The tax incentives of Acts 20 and 22 represent a unique opportunity for U.S. taxpayers to conduct business with a substantial lower tax burden than in the U.S. mainland. However, in order to avoid losing the tax benefits and paying substantial penalties, we strongly recommend to understand and follow not only tax rules governing the PR's tax program but also those rules contained in the US IRC which are designed to ensure that individuals relocating to PR do so within the Congressional approved standards applicable to territorial and international taxation.

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With the cooperation of Orlando J. Rodriguez Esq.

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[1] 26 U.S. Code § 937 – Bona fide resident

For purposes of this subpart, section 865 (g)(3), section 876, section 881 (b), paragraphs (2) and (3) of section 901 (b), section 957(c), section 3401 (a)(8)(C), and section 7654 (a), except as provided in regulations, the term "bona fide resident" means a person—

(1) who is present for at least 183 days during the taxable year in Guam, American Samoa, the Northern Mariana Islands, Puerto Rico, or the Virgin Islands, as the case may be, and

(2) who does not have a tax home (determined under the principles of section 911 (d)(3) without regard to the second sentence thereof) outside such specified possession during the taxable year and does not have a closer

connection (determined under the principles of section 7701 (b)(3)(B)(ii)) to the United States or a foreign country than to such specified possession.