INTERNATIONAL TAX PLANNING AND IMMIGRATION CONSIDERATIONS

By Richard W. Hamlin

It should be no surprise to Guam business owners that the United States income tax system is specifically designed to prevent evasion of tax liability, whether arising through use of offshore corporations, trusts or other international vehicles. Certain alien investors and long-term visitors are, however, surprised to inadvertently trigger the application of these same rigorous offshore vehicle provisions, wreaking havoc on their established foreign business and estate planning strategies. Unfortunately, the prospect of new and expansive tax liability is often not given due contemplation by Guam organizations courting new foreign investment, leading to later shocks and failed deals.

While double-taxation may be mitigated to some extent by tax treaties, U.S. residents are generally subject to U.S. tax provisions on all worldwide income and transfers. For example, the transfer of stock in a foreign corporation to a foreign relative may accrue U.S. gift tax liability for a U.S resident transferor, even if such transfers are not taxed in the parties' home country. Accordingly, it is wise for a foreign business owner to implement certain estate strategies prior to triggering U.S. residency and associated U.S. taxes.

For the extent of the validity of their "green card," all lawful permanent residents are U.S. residents for tax purposes, and subject to worldwide U.S. taxation. E-2 Treaty Investor visas are often preferred over EB-5 investment green cards precisely because they do not necessarily trigger residency for tax purposes, as successful EB-5 investments do. E-2 manager representatives may also be sent in lieu of exposing the underlying investor to additional U.S. tax liability.

All non-immigrants, including E-2 visa holders, may still trigger U.S. tax residency

Richard W. Hamlin

if they are physically present in Guam at least 31 cumulative days in a year. Under the "substantial presence test" of I.R.C. §7701(b), U.S. visitors of shorter duration may also trigger U.S. tax liability based upon a weighted calculation of their visits from the previous two years. To escape this outcome it is particularly important that non-immigrants be able to show a "closer connection" to a foreign tax home, and avoid establishing a U.S. "domicile."

While the U.S. tax system may appear burdensome for Guam businesses seeking active foreign investors, proper planning can make the prospect more inviting. Where offshore operations form part of the business model, foreign investment may actually reduce tax liability for U.S. shareholders through avoidance of the "controlled foreign corporation" classification of I.R.C. §957(a) and associated "phantom income" problems of the U.S. anti-deferral regime. In certain instances, immigrant investors may enjoy the benefits of a $250,000, I.R.C. §121 tax exclusion for sale of their principal residence, while their alien spouse remains living in the foreign home as life beneficiary of an appropriately crafted irrevocable trust. The opportunities and pitfalls of foreign investment are as unique and plentiful as the prospective participants.

It is true that the U.S. tax system presents a new challenge to immigrants, and without adequate preparation it is likely to expose a foreign investor to tax liability of unanticipated breadth and depth. However, the most deleterious outcomes can certainly be avoided through early counsel, and often an investor's dependent family may reside and work in the U.S. independent of the underlying investor, avoiding the encompassing U.S. tax liability for the principal. Guam businesses seeking to leverage foreign investment should consult with a qualified immigration and business attorney early in the process, before the specter of worldwide U.S. tax liability sours the deal.

Richard W. Hamlin is a Guam and Florida licensed attorney practicing business and immigration law. He can be contacted at rwhamlin@guamimmigration.com or (671) 989-7677.

...the prospect of new and expansive tax liability is often not given due contemplation by Guam organizations courting new foreign investment, leading to later shocks and failed deals.

- Richard W. Hamlin