Doing Business Guide

United States

1st Edition

Marks Paneth LLP

An independent member of
Morison International

About This Booklet

This booklet has been produced by Marks Paneth LLP to provide an introduction to foreign investors on the various aspects of doing business in the US.

Its main purpose is to provide a broad overview of the various things that should be taken into account by organisations considering setting up business in the US.

The information provided is not exhaustive and – as underlying legislation and regulations are subject to frequent changes – we recommend that anyone considering doing business in the US or looking to the area as an opportunity for expansion should seek professional advice before making any business or investment decisions.

www.markspaneth.com

Marks Paneth LLP
685 Third Avenue
New York, NY 10017
United States

Paul Bercovici, Principal
T: +1 212 201 2297
F: +1 212 201 2298
E: pbercovici@markspaneth.com

James M. Robbins, Principal
T: +1 212 503 8971
F: +1 212 503 8972
E: jrobbins@markspaneth.com

While every effort has been made to ensure the accuracy of the information contained in this booklet, no responsibility is accepted for its accuracy or completeness.

Contents

Introduction

The United States (US) has historically been a prime investment location for foreigners. The US imposes few, if any, restrictions on foreign investment in the US, including foreign investment in US real property. The public and private sectors in the US are very receptive to foreign investment. Studies conducted by the United Nations have consistently determined that the US is a preferred country for direct investments made by foreign investors. Certain businesses, such as shipping, might require a stated percentage of US ownership.

As a general rule, the federal government treats domestic and foreign investors equally. In addition, the federal government offers a number of tax incentives to domestic and foreign persons doing business in the US and many state and local governments offer a wide variety of incentives, such as tax credits, to domestic and foreign investors to do business in their particular jurisdiction.

The US is the largest and most dynamic economy in the world. The US boasts a workforce that is highly educated, highly skilled, technologically savvy and productive. The business environment is not overly burdened by excess regulation. The US economy continues to evolve from an industrial economy into one that is more service-based.

The federal government of the US comprises three branches: legislative, executive and judicial. The legislative branch consists of the Senate and the House of Representatives. The executive branch is headed by the president and his/her cabinet. The federal judicial branch is composed of various levels of courts.

Overview of US Taxation System

The US has one of the most complex tax systems in the world. Income taxes are imposed by the federal government and by most of the states. In addition, certain cities and localities impose an income tax. The US system is a 'pay as you go' system. US tax law requires employers to withhold and remit income taxes and social security taxes from the wages of employees, and corporations are required to pay income taxes on a quarterly basis.

As a general rule, persons (individuals and corporations) that are residents of the US are subject to federal income tax on their worldwide income. Nonresidents, on the other hand, are subject to US federal income tax only on their US-source income. US residents who pay foreign income tax on income earned outside the US are generally entitled to claim relief, in the form of a foreign tax credit or deduction, for such foreign income taxes paid. In most cases, it is more advantageous to claim a credit rather than a deduction for foreign income taxes paid on foreign-source income.

A number of other taxes are also imposed at the federal level, including estate tax, gift tax, generation-skipping transfer tax and social security taxes. The US does not currently impose a value-added tax (VAT) at the federal level, but there has been increased discussion in the recent past regarding the imposition of a federal VAT.

Forms of Doing Business in the US

The principal forms of doing business in the US are:

- Sole proprietorship
- Partnership
- Limited liability company
- Joint venture
- Branch
- Corporation.

New business entities are created under the laws of one of the 50 states or the District of Columbia. For the most part, business formation in the US is not difficult. Businesses can be created without regard to the citizenship or residency of the owners of the business. Many different tax and non-tax factors come into play in determining what is the best vehicle through which to carry on business in the US. Some of these factors include:

- The availability of limited liability protection for owners
- The costs of establishing and maintaining the particular vehicle for carrying on business
- Management and control issues
- Ease with which ownership can be transferred
- Capital and credit requirements
- Commercial and/or regulatory requirements
- Tax considerations.

Sole proprietorship

Sole proprietorships are established and owned by a single individual. As a general rule, no formal requirements need to be met in order to establish a sole proprietorship. Carrying on business through a sole proprietorship is generally only appropriate for smaller business enterprises. The sole proprietor is taxed on the income of the sole proprietorship and is personally liable for the debts and obligations of the business.

Partnerships

Partnerships are formed by agreement between two or more partners. Partnerships, like limited liability companies, are 'flow-through' or 'fiscally transparent' entities for US federal income tax purposes. Partnerships are required to file annual tax information returns, but the income or loss of a partnership flows through to its partners. All states permit the formation of general and limited partnerships, and some states also permit the formation of limited liability partnerships. Limited liability partnerships are often used as a vehicle for carrying on professions such as legal and accounting practices. All partners in a general partnership are personally liable for the debts and obligations of the partnership, whereas the legal liability of a limited partner is generally limited to the amount of the limited partner's capital account with the partnership.

Limited liability companies

Limited liability companies (LLCs) are created under the laws of one of the 50 states or the District of Columbia. Domestic limited liability companies are 'hybrid' entities, in that they provide limited liability protection to their members, but are 'flow-through' or 'fiscally transparent' entities for US federal income tax purposes. The default classification for a limited liability company that has only one member is a 'disregarded entity' for US federal income tax purposes. The default classification for limited liability companies that have more than one member is as a partnership for US federal income tax purposes. In either case, the limited liability company is treated as a 'flow-through' or 'fiscally transparent' entity for US federal income tax purposes. That is, the income earned by a limited liability company flows through to the members of the limited liability company to be taxed in the hands of the members.

Joint ventures

A joint venture can be organized through a corporation, partnership or limited liability company and is typically organized for a specific purpose or project. The joint venture agreement generally covers issues such as the joint contributions of property or services, the purpose and duration of the joint venture, the formula for sharing profits and losses, and the transferability of ownership interests.

Branches

There are no formal federal requirements for a foreign person to establish a branch in the US. US branches of foreign business enterprises may be required to obtain certain permits in order to conduct certain types of business operations in particular localities. The branch may have to register with those states in which it does business and obtain a federal tax identification number.

Corporations

The corporate form is the entity type most often chosen by foreign persons for doing business in the US. Corporations are created under the laws of one of the 50 states or the District of Columbia. Corporations are often incorporated in the state where their primary operations are located. The process of creating a corporation in the US is generally straightforward and inexpensive. Under certain conditions, corporations can elect to be treated as 'flow-through' or 'fiscally transparent' entities for federal income tax purposes. Such corporations are referred to as 'S' corporations.

Foreign Investment in the US

Foreign investors are generally subject to US federal income tax under one of two different tax regimes. Foreign investors who are not actively engaged in the conduct of a US trade or business ('passive' investors) are subject to US federal withholding tax on 'fixed or determinable, annual or periodical' (FDAP) income that they receive from US sources. On the other hand, foreign investors who carry on a trade or business in the US are generally subject to US federal income tax at the applicable graduated income tax rates.

Fixed or determinable, annual or periodical income

FDAP income is generally passive investment income and includes income such as dividends, interest, rents and royalties. The domestic federal withholding rate on FDAP income is 30%. However, the 30% domestic withholding rate on FDAP income may be reduced under the provisions of an applicable income tax treaty entered into between the US and the foreign business enterprise's country of residence.

Under US tax principles, interest and dividend income received by a non-resident payee are considered US-source income if the payer of the income is resident in the US. Rents are US-source income if the rental producing property is located in the US. Similarly, royalties paid for the use of intellectual property are US-source income if the intellectual property is used in the US.

Non-resident recipients of US-source income are able to establish their right to treaty-reduced withholding rates by submitting certain Internal Revenue Service (IRS) forms to the payer of the income. Payers of the income are generally entitled to rely on such withholding forms to withhold at an applicable treaty reduced rate. A foreign person who claims the benefit of a tax treaty should disclose such fact on its US income tax return.

Foreign Business Enterprises Doing Business in the US

A foreign business enterprise that is contemplating doing business in the US is well advised to implement an appropriate structure for their US business operations well in advance of actually commencing such operations. The basic alternatives for structuring their US business operations are:

- A branch operation
- A wholly owned US subsidiary.

In certain cases, foreign investors may choose to operate their US business operations through a partnership or limited liability company, but the following discussion will focus on the basic choice between a US branch and a wholly owned US subsidiary. There are significant tax and non-tax advantages and disadvantages to doing business in the US through a branch or through a wholly owned US subsidiary.

Foreign business enterprise doing business in the US through a branch

Foreign corporations that do not incorporate a US subsidiary corporation will generally conduct business operations in the US through a branch. For US federal income tax purposes, a foreign corporation is any corporation that is not a domestic corporation. A domestic corporation is any corporation that is created or organized in the US. As a general rule, non-resident corporations 'engaged in a trade or business within the US' are subject to US federal income tax, at graduated rates, on their taxable income that is 'effectively connected' with the conduct of that trade or business. The term 'trade or business within the US' is not specifically defined in the Internal Revenue Code (IRC) or Treasury Regulations.

As a general rule, the threshold for US business activities constituting a US 'trade or business' is low. The determination of whether a particular foreign person is carrying on a 'trade or business within the US' depends on the particular facts and circumstances. The general test for determining whether a particular foreign person is carrying on a 'trade or business within the US' is whether the foreign person continuously and regularly transacts a substantial portion of its ordinary business within the US during a substantial portion of the tax year. The term 'effectively connected' is defined in Section 864(c) of the IRC. Where a foreign corporation is engaged in a 'trade or business' within the US, generally all sales, services or manufacturing income from US sources is 'effectively connected income'. Generally, income from foreign sources is not treated as 'effectively connected income', and is therefore not taxable in the US.

Depending on the laws of the particular country, losses incurred by a US branch may be available to offset profits earned by the foreign parent in carrying on non-US branch related business activities. This is often cited as the primary tax advantage to doing business in the US through a branch operation, particularly in the first few years of operation when branch operations typically generate losses. Care should be taken to limit other activities of the foreign corporation from US and state taxation.

The primary non-tax disadvantage to carrying on business in the US through a branch operation is that the activities of the US branch may subject the foreign parent to direct legal claims and liability for the acts and business of the branch. This one non-tax factor is often determinative in a foreign person's decision to conduct business operations in the US through a wholly owned subsidiary rather than a branch. Another significant non-tax disadvantage to carrying on business in the US through a branch operation is that the books and records of the foreign parent may be subject to inspection in the event that the operations of the branch are audited by the IRS or a state or local taxation authority.

Branch profits tax

The US imposes a 'branch profits tax' on foreign corporations that carry on business in the US through a branch. The 'branch profits tax' is designed to make a foreign investor indifferent, from a federal income tax perspective, as to whether they invest in the US through a branch of a foreign corporation or through a US subsidiary corporation. The 30% non-treaty reduced 'branch profits tax' rate mirrors the domestic withholding tax rate on dividends paid by a US subsidiary to a foreign shareholder. To the extent that the dividend withholding rate is reduced under an applicable income tax treaty, the 'branch profits tax' rate will also generally be reduced to the same rate.

Where the foreign business enterprise is a resident of a treaty country

As a general rule, where a business enterprise that is a resident of a country with which the US has concluded a bilateral income tax treaty either wholly or partly carries on business in the US, the business profits earned by the foreign business enterprise will be subject to US federal income tax only if it conducts the business in the US through a 'permanent establishment'.

The term 'permanent establishment' is generally defined in income tax treaties as 'a fixed place of business through which the business of an enterprise is wholly or partly carried on'. Most treaties specifically provide that the term permanent establishment includes a place of management, a branch, an office, a factory and a workshop. Certain newer treaties also provide that a foreign business enterprise will be deemed to have a permanent establishment in the US where personnel of the foreign business enterprise are physically present in the US for certain periods of time. The determination of whether a particular foreign business enterprise carries on business in the US through a permanent establishment is very fact specific and subject to interpretation. Each individual case must be carefully analyzed in order to determine whether a particular foreign business enterprise carries on business in the US through a permanent establishment.

In those cases where a foreign business enterprise is determined to carry on business in the US through a permanent establishment, the foreign business enterprise is subject to US federal income tax on the profits attributable to the permanent establishment. As a general rule, the profits to be attributed to a permanent establishment are those which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions. For the purpose of determining the business profits of a permanent establishment, the foreign business enterprise is entitled to claim deductions for expenses incurred for the purposes of the permanent establishment, whether incurred in the country where the permanent establishment is located or elsewhere. The deductions generally permitted in determining how much profit to attribute to a permanent establishment include a reasonable amount of executive and general administrative expenses, and other similar expenses incurred for the purposes of the permanent establishment. In addition, a permanent establishment is generally permitted to deduct expenses incurred for its purposes by the head office.

Foreign business enterprise doing business in the US through a US subsidiary

In most cases, foreign business enterprises that establish US operations do so through a wholly owned US subsidiary corporation. A US subsidiary corporation is a separate taxpaying entity that pays US federal income tax, at regular graduated corporate income tax rates, on its worldwide income. Depending on the laws of the particular foreign country, the corporate subsidiary format may provide the foreign parent corporation with the ability to defer the recognition of income generated by the US subsidiary until the income is actually repatriated to the foreign country of residence of the parent corporation. The repatriation of income earned by the US subsidiary will generally be subject to US withholding tax. The domestic withholding tax rate on dividends is 30%. However, the 30% domestic withholding tax rate on dividends is often reduced under the terms of an income tax treaty entered into between the US and the foreign parent's country of residence. It should also be noted that the US imposes limitations on the deductibility of interest paid to related persons on debt guaranteed by related persons. No such limitation applies if the applicable debt-to-equity ratio is 1.5 to 1 or less.

The primary tax disadvantage to operating in the US through a wholly owned subsidiary is that the earnings of the subsidiary are subject to two levels of US federal tax. The earnings of the subsidiary are subject to federal, as well as to state and local (where applicable), income taxes; and the after-tax earnings that are distributed to foreign shareholders are also subject to US federal withholding tax. Depending upon the laws of the particular foreign country, the foreign parent may be entitled to claim relief for US income taxes paid on income that is also subject to tax in the foreign parent's home country. Generally, such relief is provided in the form of a foreign tax credit or a 'participation exemption'.

The primary non-tax advantage associated with operating in the US through a wholly owned US subsidiary corporation is that the corporate subsidiary format offers limited liability. From the perspective of a shareholder, the primary benefits associated with limited liability status are:

- Shareholders are generally not liable for the debts and obligations of the corporation, except to the extent of their invested capital

- Lawsuits can generally only be brought against the corporate subsidiary as a person separate and distinct from its shareholders.

As a general rule, limited liability protection is extremely important to all types of businesses, but is essential for businesses that are particularly susceptible to being named as a defendant in a lawsuit.

Other non-tax advantages associated with operating in the US through a US subsidiary corporation (as opposed to as a branch) are:

- A subsidiary generally provides a better local image and profile
- A subsidiary may provide better access to local lenders
- Certain local incentives and grants may be available only to a local subsidiary, and not to a branch.

Basics of Corporate Income Taxation for State and Local Purposes

In order for any state or locality to impose their corporate income tax, a taxable presence or nexus with such jurisdiction must exist. Under federal law, according to Public Law (PL) 86-272, a multistate corporation cannot be subject to state or local corporate income tax if the following conditions are met and these are the only activities conducted in-state:

- Solicitation of orders by company representatives
- The sale of tangible personal property
- Orders are sent outside the state for approval or rejection
- If approved, the goods are filled by shipment or delivery from a point outside the state.

PL 86-272 protection applies only to taxes imposed on net income and not to franchise taxes imposed on net worth or capital. In addition, PL 86-272 protection does not apply to activities such as the leasing of tangible personal property, the sale or leasing of services, the sale or leasing of real estate or the sale or licensing of intangibles.

Once a corporation has corporate income tax nexus in a state or locality, the taxable income is generally determined by starting with federal taxable income as determined under the IRC. Certain states/localities may have their own addition/subtraction modifications in calculating state taxable income.

Certain states/localities draw a distinction between business income and non-business income. In such states, business income is sourced to the state using a one-, two- or three-factor apportionment formula; this can be based on sales only, or on a combination of property, payroll and sales. In such states, non-business income is usually allocated 100% to the state of commercial domicile (that is, where the company's headquarters are located).

The majority of states and localities, however, subject a corporation's state taxable income based on formulary apportionment (i.e., one-, two- or three-factor formula comparing in-state sales divided by everywhere sales; in-state property divided by everywhere property; and in-state payroll divided by everywhere payroll). There is a recent trend in many states (including New York and California) of adopting a single sales factor apportionment formula to determine state taxable income subject to the state's tax rate. State income tax rates for corporations can vary from 5% to over 10%. State and local income taxes are deductible in determining taxable income for federal purposes. For example, if the state tax rate is 10% and the federal rate is 35%, the cost of the state tax is 6.5%, net of the benefit of the federal deduction (10% x 35%).

In addition, states generally require a separate corporation income tax return for each legal entity doing business in their state. Many states may permit or require a corporation that is conducting a 'unitary business' with affiliated corporations to file a combined or consolidated corporate income tax return, including affiliates that do not have an independent taxable presence or nexus in such state or locality. New York state and city, for example, allow or require related legal entities to file a combined return if there exists common ownership, a unitary business and substantial intercompany transactions among the combined members or affiliates. California requires affiliated companies to file on a worldwide consolidated basis, inclusive of related corporations incorporated in foreign countries. A corporation conducting a unitary business in California may, however, make a water's-edge election to exclude any related foreign incorporated affiliates and file a consolidated California tax return inclusive of only US-incorporated affiliates.

The bottom line for inbound corporations doing business in the US is to consult with a US tax advisor who specializes in state and local tax consulting before choosing the appropriate entity type and prior to doing business in the US. This will enhance the corporate taxpayer's chances that its state and local corporate income tax burden is minimized.

Acquisition of a US Corporation: Basic US Federal Income Tax Issues

The following discussion considers the very basic US federal income tax issues associated with the taxable acquisition of a US corporation by a foreign corporation. In this context, the term 'taxable acquisition' refers to acquisitions where the foreign corporation pays for the acquisition with cash and/or a note and the seller of stock or assets recognizes gain or loss on all of the consideration received. The following analysis assumes that the shareholders of the US corporation being acquired do not want to retain a continuing equity interest in the combined business enterprise of the foreign corporation and the US corporation being acquired. It should be noted that each potential acquisition presents its own particular issues, and that non-tax factors are often determinative in structuring the acquisition of a US corporation by a foreign corporation.

The basic choice for a foreign corporation acquiring a US corporation is whether to structure the acquisition of the US corporation as an acquisition of assets or as an acquisition of the capital stock of the US corporation.

Acquisition of assets of US corporation by foreign corporation

As a general rule, a foreign corporation that acquires the assets of a US corporation obtains a 'stepped-up basis' in such assets. That is, for the purpose of claiming future depreciation and amortization on the acquired assets and for the purpose of determining the gain or loss on the eventual sale of the assets, the basis of the acquired assets is 'stepped up' to the amount of the consideration paid for the assets. It should also be noted that the acquisition of the assets of a US corporation (as opposed to the stock of the corporation) prevents the foreign corporation from gaining access to certain corporate tax attributes such as: methods of accounting, net operating loss carryovers, capital loss carryovers, tax credits and earnings and profits amounts.

Acquisition of stock of US corporation by foreign corporation

In a taxable stock acquisition, the foreign corporation that acquires the stock of a US corporation obtains basis in the stock of the US corporation, but the assets retain their historic adjusted basis. The sale of stock generally is a taxable event for the US shareholders of the US corporation. In contrast to a taxable asset acquisition, in the case of a taxable stock acquisition the purchaser generally does succeed to the relevant corporate tax attributes referred to above, subject to certain limitations. For example, the future utilization of net operating loss carryovers may be severely limited.

Section 338 election

Under certain conditions, a foreign corporation can elect, for federal income tax purposes, to treat the acquisition of the capital stock of a US corporation as an acquisition of assets.

State and local tax issues

State and local income tax issues cannot be overlooked in making the final determination as to whether to structure the acquisition of a US corporation as an acquisition of assets or as an acquisition of stock. Each state in which the acquired US corporation does business may have different rules that impact the acquisition. In many cases, the state and local income tax issues can be a very important factor in making such a determination.

Corporate reorganizations

Although the previous discussion assumed that the shareholders of the US corporation being acquired do not want to retain a continuing equity interest in the combined business enterprise of the foreign corporation and the US corporation being acquired, it should be noted that the US has adopted extensive reorganization rules. Generally, under such rules a foreign corporation may be able to acquire the shares of a US corporation through the exchange of shares. Under certain conditions, such transactions can be tax-free to the exchanging US shareholders.

Summary

The determination of how to structure the acquisition of a US corporation by a foreign corporation is extremely complex and requires very thorough due diligence and analysis. The determination is governed by very significant tax and non-tax considerations. Preferences of buyers and sellers for one form of transaction rather than another (sale of assets versus sale of capital stock) are often resolved through comprehensive negotiation of the purchase price. In addition, it is important that US tax considerations be evaluated in conjunction with all relevant foreign tax and non-tax considerations, to ensure that opportunities are not missed and that costly mistakes are not made. It is crucial that a foreign corporation contemplating the acquisition of a US corporation address these issues very early in the process and that they retain experienced US tax professionals to assist them in making the most appropriate choice as to how to structure the particular acquisition.

US Federal Income Taxation of Non-US Citizens

For US federal income tax purposes, an 'alien' is an individual who not a US citizen. As a general rule, 'resident aliens' are subject to US federal income tax on their worldwide income, the same as US citizens. In contrast, 'non-resident aliens' are generally subject to US federal income tax only on their US-source income and certain income connected with the conduct of a trade or business in the US.

Aliens are treated as non-resident aliens for US federal income tax purposes unless:

- They are 'lawful permanent residents' of the US (i.e., they hold an 'alien registration card', commonly known as a 'green card')
- They meet the 'substantial presence test'.

Therefore, a non-citizen and non-green card holder will be treated as a resident alien for US federal income tax purposes only if they meet the substantial presence test. However, even if the individual meets the substantial presence test, they will be treated as a non-resident alien if they meet the 'closer connection test'.

Substantial presence test

- In determining whether or not an individual meets the substantial presence test for the 2013 tax year, the individual must be physically present in the US for at least 31 days during 2013 and at least 183 days during the 3-year period that includes 2013, 2012 and 2011, including all of the following:
- All of the days that the individual was physically present in the US in 2013
- One-third of the days that the individual was physically present in the US in 2012
- One-sixth of the days that the individual was physically present in the US in 2011.

For the purposes of the substantial presence test, an individual is treated as being physically present in the US on any day that the individual is physically present in the country at any time during the day.

There are certain exceptions to the above-noted rule, the most important of which is days that the individual was an 'exempt individual' - that is, days when the individual was physically present in the US but for which they were an 'exempt individual' do not count in the determination of whether or not they meet the 183-day test for the purposes of the substantial presence test.

Closer connection to a foreign country

In order to meet the closer connection test, an individual must meet all of the following criteria:

- Be present in the US for less than 183 days during the year

- Maintain a tax home in a foreign country during the year
- During the year, have a closer connection to one foreign country in which the individual has a tax home than to the US.

An individual's 'tax home' is the general area of the individual's main place of business, employment or post of duty, regardless of where they maintain their family home. An individual's 'tax home' is generally the place where they permanently or indefinitely work as an employee or as a self-employed individual.

Possible application of income tax treaties

Under certain conditions, income earned by certain non-resident aliens may be exempt from US income federal income tax by application of the particular provisions of an income tax treaty entered into between the US and the individual's country of residence.

State and Local Income Taxation of Individuals

Most states impose a personal income tax. In most cases, state income tax is imposed on individuals who are residents of the particular state under the laws of that state, and on individuals who are domiciles of the state. Individuals who live in one state that imposes an income tax but work in another state that imposes an income tax are generally permitted to claim a credit on their state of residency return for income taxes paid to the state in which they work. Most states also impose an income tax on income earned in the particular state by non-residents of that state.

In addition, certain cities and municipalities (for example, New York city) also impose an income tax. Such income taxes are generally imposed only on individuals who are residents of the particular city or municipality.

Foreign Ownership of US Situs Real Property

There are few restrictions or special rules regarding the ownership of US situs real property by foreign persons.

Due to the potential application of the federal and state estate taxes, tax-efficient structuring of the ownership of US situs real property by foreign persons is crucial. Inappropriate structures can potentially result in disastrous estate tax consequences.

As a general rule, US-source rental income earned by a foreign person is subject to a 30% federal withholding tax on the gross amount of the rental income. However, non-resident owners of rental producing US situs real property can elect to be taxed on their US-source rental income on a 'net' basis. In most, if not all, cases the making of the 'net election' will result in a much lower amount of tax being payable than if the gross rental income is taxed at 30%.

Under the Foreign Investment in Real Property Tax Act, 1980 (FIRPTA), special rules apply in connection with the sale of US situs real property by foreign persons. These rules seek to ensure that gains resulting from sales of US-situs real property will be subjected to US tax.

Structuring the ownership of US situs real property by foreign persons

There are several alternatives available to foreign persons as to how to structure their ownership of US situs real property. The alternatives range from the simplest (direct ownership by foreign individuals) to the most complex (indirect ownership through a tiered corporate structure). Other ownership alternatives include ownership through a limited liability company, a partnership, a foreign corporation or a domestic corporation. Each of the alternatives has its own inherent advantages and disadvantages.

Although the most costly to implement and maintain, the tiered corporate structure is often the best alternative for foreign persons who invest in US situs real property. Under the tiered corporate structure, foreign persons own a direct interest in a foreign corporation. The foreign corporation, in turn, owns all of the stock of a US corporation; and the US corporation holds legal title to the US situs real property. The primary advantage to the tiered corporate structure is that, upon the death of a foreign individual who is a shareholder in the foreign corporation, the US situs real property should not be included in the gross US estate of the foreign decedent for US federal estate tax purposes.

For those foreign investors who are less concerned with the possible application of the federal and state estate taxes, a less complex alternative may be more appropriate. It must be noted that each situation is different and that a 'one size fits all' or 'cookie cutter' approach should not be applied in determining what particular structure is most appropriate in a particular case. It is crucial that each particular situation be carefully analyzed in order to identify the best solution for the particular foreign investor.

Taxation of rental income received by foreign investors in US real property

As noted above, non-resident alien individuals and foreign corporations that derive rental income from real property located in the US are subject to US tax in one of two ways. Where rental income derived from real property located in the US is treated as FDAP income (and not as income effectively connected with the conduct of a trade or business in the US), non-resident alien individuals and foreign corporations that receive such income are subject to a 30% US withholding tax on the gross amount of the rental income.

If, on the other hand, rental income derived by a non-resident alien or foreign corporation from real property located in the US is 'effectively connected with the conduct of a US trade or business', then the net rental income will be subject to US tax at the regular graduated income tax rates applicable to US citizens (or resident aliens) or domestic corporations (depending upon whether ownership of the US real property is held directly by an individual or through a corporation). The 'net' rental income subject to US federal income tax at regular graduated rates is equal to the gross rental income less all applicable deductions, including depreciation, mortgage interest, real property taxes, insurance, brokers' costs, repairs and maintenance, and other operating expenses.

There is little or no guidance in the IRC or applicable Treasury Regulations as to what types of commercial activities carried on by a foreigner rise to the level of a trade or business for US tax purposes. As a result, the determination of what types of commercial activities constitute a trade or business is generally left to the courts to determine on a case-by-case basis. In general, courts will consider the following factors in making the determination:

- The nature of the US commercial activities
- The level and extent of the US commercial activities
- The continuity of the US commercial activities
- The amount of time devoted to the US commercial activities
- The amount of income derived from the US commercial activities
- Other relevant facts and circumstances.

The 'net election'

In many, if not most, cases it is advantageous for a foreign investor who receives income derived from real property located in the US to have that income taxed on a net basis (i.e., as income effectively connected with the conduct of a US trade or business) rather than on a gross basis (i.e., as FDAP income that is not effectively connected with the conduct of a US trade or business). Foreign investors who would not otherwise be considered to be conducting a trade or business in the US are permitted to elect to have their US-source income derived from real property located in the US treated as if it was effectively connected with the conduct of a US trade or business. This election is known as a 'net election'. In order to make the 'net election', the foreign corporation or non-resident alien individual must have at least some gross income from US real property. The consent of the IRS is not required to make a 'net election'.

As a general rule, the ideal situation for making a 'net election' exists where a foreign investor's investment in US real property generates positive cash flow from rental operations but where there are losses for tax purposes due to the claiming of non-cash deductions such as depreciation and amortization.

The 'net election' is made by attaching a statement to the non-resident alien's or foreign corporation's US income tax return, and covers all US real property owned by the foreign person. The election is effective for all subsequent tax years unless revoked with the consent of the IRS.

Example:

- Foreign Investor, a non-resident alien individual for US federal income tax purposes, owns a small commercial building located in the US
- Foreign Investor makes a 'net election' to treat the net rental income derived from the building as income effectively connected with the conduct of a trade or business in the US
- Foreign Investor is entitled to annual gross rental income of US$100,000 from the commercial building
- In connection with the ownership of the building, Foreign Investor pays annual mortgage interest of US$25,000, operating expenses of US$35,000 and is entitled to claim annual tax depreciation of US$15,000
- Because income derived from real property located in the US in connection with which a 'net election' has been made is taxed on a net basis, only US$25,000 (US$100,000 of annual gross income less US$75,000 of allowable expenses) of the US$100,000 of gross annual income derived from the building would be subject to US tax (at graduated income tax rates applicable to individuals who are US citizens or resident aliens).

The Foreign Investment in Real Property Tax Act

Background

The Foreign Investment in Real Property Tax Act, 1980 (FIRPTA) was enacted to combat perceived abuses whereby foreign investors were able to avoid, with relative ease, otherwise applicable US taxes on the disposition of interests in US real property. FIRPTA imposes a tax on gains derived by foreign persons from the disposition of US real property interests. In theory, collection of the tax imposed by FIRPTA is ensured by the operation of a tax withholding mechanism. The tax withholding mechanism is designed to prevent foreign sellers from removing proceeds derived from the sale of US situs real property without paying the taxes due in connection with such sale.

What is a 'US real property interest'?

As noted above, foreign persons who dispose of a US real property interest are subject to tax on gains realized on such disposition. A United States real property interest (USRPI) is defined to include any interest, other than an interest solely as a creditor, in:

- Real property located in the US or the US Virgin Islands
- Certain personal property associated with the use of real property (e.g., farm machinery)
- An interest in a US real property holding corporation (USRPHC)

Withholding on dispositions of USRPIs

As a general rule, a transferee of a USRPI from a foreign person must withhold and remit 10% of the total amount realized by the foreign person on the disposition of the USRPI. For purposes of the FIRPTA withholding provisions, the amount realized includes cash, the fair market value of noncash consideration and liabilities assumed by the purchaser to which the USRPI was subject immediately before or after the transfer. It is important to note that the amount to be withheld by the transferee is 10% of the amount realized by the transferor, not 10% of the gain. This concept is illustrated in the following example.

Example:

- A, a foreign individual owns a 100% fee simple interest in Blackacre. Blackacre meets the FIRPTA definition of a USRPI. Blackacre is sold to B (a US resident and citizen) for US$2 million in cash, non-cash consideration with a fair market value of US$1 million and the assumption by B of US$2 million of liabilities to which Blackacre was subject immediately before the sale. A's adjusted basis in Blackacre immediately before the sale was US$4 million
- Amount realized by A on sale of Blackacre: US$5 million

- A's adjusted basis in Blackacre at time of sale: US$4 million
- Gain realized by A on sale of Blackacre: US$1 million
- On the assumption that none of the available exceptions applies, B would be required to withhold US$500,000 (10% of the US$5 million realized by A on the sale of Blackacre to B) **not** US$100,000 (10% of A's gain on the sale of Blackacre) from the proceeds otherwise payable to A.

As a general rule, the purchaser/transferee is required to report and pay the withheld tax to the US Treasury by the 20th day after the date of transfer. It is also crucial to note that the 10% withheld on the amount realized by the foreign transferor of a USRPI is not the amount of US tax actually due from the transferor in connection with the sale of the USRPI. The 10% amount withheld is merely an advance payment toward the foreign transferor's final US tax obligation in connection with the sale of the USRPI. Failure of a purchaser/transferee to withhold the required amount on the purchase of a USRPI from a foreign transferor can result in the purchaser/transferee becoming liable for the FIRPTA tax amount that should have been withheld.

Compliance issues

Purchasers and other transferees of USRPIs are required to use IRS Forms 8288 (US Withholding Tax Return for Dispositions by Foreign Persons of US Real Property Interests) and 8288-A (Statement of Withholding on Dispositions by Foreign Persons of US Real Property Interests) to report and remit any tax withheld on the acquisition of a USRPI. As a general rule transferees of USRPIs are required to file Form 8288 and pay over the withheld tax by the 20th day after the date of the transfer. In addition, transferees must attach copies A and B of Form 8288-A to Form 8288. The IRS will stamp Copy B of Form 8288-A and send it to the person subject to withholding. The person subject to the withholding must attach Copy B of Form 8288-A to its US income tax return in order to receive credit for the amount of tax withheld.

Withholding certificates

The amount that must be withheld in connection with the disposition of a USRPI can be decreased or eliminated pursuant to a withholding certificate issued by the IRS. Withholding certificates can be issued where:

1) The IRS determines that reduced withholding is appropriate because:

   (a) The amount required to be withheld pursuant to FIRPTA would be more than the foreign transferor's maximum tax liability in connection with the disposition of the USRPI; or

   (b) Withholding of the reduced amount would not jeopardize collection of the tax.

2) There exists an exemption from US tax of all gain realized by the transferor; or

3) There exists an agreement between the foreign transferor and the IRS for the payment of tax which provides adequate security for the ultimate tax liability.

Withholding certificates are commonly issued where the foreign transferor is able to demonstrate to the IRS that the income tax due in connection with the sale of a USRPI is less than the amount required to be withheld under FIRPTA. Withholding certificates issued in such cases are commonly referred to as 'reduced-rate certificates'. 'Reduced-rate certificates' authorize the purchaser/transferee to withhold (and remit) an amount less than the 10% FIRPTA withholding tax payable in connection with the sale of a USRPI by a foreign transferor.

Filing for refunds of FIRPTA tax already paid

As noted earlier, a foreign transferor is entitled to file for a tax refund in cases where a withholding certificate was not issued and it is determined that the ultimate tax liability associated with the disposition of a USRPI is less than the 10% FIRPTA tax withheld.

Effective advance planning is crucial

The FIRPTA withholding provisions can be quite complex. Having said that, effective advance planning can yield one or more of the following positive results:

- Reduction or elimination of the withholding tax imposed by FIRPTA through the use, where appropriate, of withholding certificates and/or other tax planning techniques;
- Entitling a foreign transferor of a USRPI to receive a refund of tax paid where his or her ultimate tax liability in connection with the sale of a USRPI is less than the amount withheld under FIRPTA; and
- Ensuring that all compliance and reporting requirements imposed by FIRPTA are met in a timely fashion.

Other US Taxes

Background

The federal government and many of the states impose a host of taxes in addition to the aforementioned income tax. The most important of these other federal taxes are the gift tax and estate tax. Federal gift and estate taxes are designed to be a unified transfer tax system. As a general rule, the transfer of property by an individual during their lifetime, and upon their death will not be subject to US federal gift or estate taxes unless the total value of property transferred during their lifetime and upon their death exceeds a certain threshold amount. In recent years, there have been numerous significant changes to the law pertaining to the federal gift and estate tax systems.

Federal gift tax

Federal gift tax generally applies to transfers of all types of property (real, personal, tangible and intangible) by gift. The donor is considered to make a gift to the extent the fair market value of the property transferred exceeds the value of any consideration received in exchange for the transferred property. As a general rule, individuals can make annual gifts up to certain threshold amounts without incurring any gift tax and without the annual gifts counting against their lifetime exemption amount. For 2013, the annual gift tax exclusion amount is US$14,000 per donee.

Donors of gifts who are neither US citizens nor residents are subject to US federal gift tax only on transfers of US-situs real and tangible property. Gifts of intangible property made by such donors are not subject to US federal gift tax.

Federal estate tax

Federal estate tax is imposed on transfers of property that are triggered by an individual's death. As a general rule, the gross estate of an individual who was a US citizen or resident on the date of death includes the value of all property (wherever situated) owned by the decedent on the date of death. The federal estate tax is calculated by applying the relevant estate tax rates to the decedent's taxable estate (i.e., the gross estate as reduced by any applicable deductions).

As a general rule, a decedent who is neither a US citizen nor a resident on their date of death is subject to US federal estate tax on US-situs real, tangible and intangible property which they owned on the date of death. For these purposes, the term 'intangible property' includes stock in a domestic corporation, bonds and debt obligations of US obligors and US partnership interests. In addition, in calculating their federal estate tax liability, such decedents are generally only eligible for much smaller credit amounts than US citizen or resident decedents. The liability of decedents who are neither US citizens or residents on their date of death may be affected by estate and gift tax treaties entered into between the US and the decedent's country of residence.

Transfer Pricing Issues

The US transfer pricing rules are designed to ensure that the terms of transactions entered into between related parties that have business operations in different countries are not used to artificially allocate profits to lower tax jurisdictions and deductions to higher tax jurisdictions.

The overriding principle of the US transfer pricing rules is that transactions between related parties should reflect 'arm's-length' terms (i.e., as if the related parties were independent, unrelated parties).

The US transfer pricing rules apply to related party transactions involving goods and services, including intercompany purchases between related parties, loans between related parties, and the payment of management fees from one related party to another. There are alternative methods for determining whether a particular transaction between related parties reflects 'arm's-length' terms.

As a general rule, related parties that engage in transactions which may be subject to the US transfer pricing rules should have transfer pricing studies prepared. As a general rule, a fully compliant transfer pricing study can be used to avoid the potential imposition of penalties where the transfer prices used turn out to have been inappropriate.

Taxpayers who desire certainty regarding the transfer prices used in particular transactions with related parties can enter into advance pricing agreements with the IRS. An advance pricing agreement is a binding agreement between the taxpayer and the IRS which applies an agreed-upon transfer pricing methodology to specified transactions between the taxpayer and a related party. Advance pricing agreements generally have a term of 3 to 5 years.

Federal Tax Incentives

The federal government provides certain income tax incentives to both domestic businesses and to foreign business that carry on a trade or business in the US. Two of the more significant federal tax incentives are described below.

Domestic production activities deduction

Subject to certain limitations, a taxpayer engaged in manufacturing and other qualified production activities is entitled to claim a deduction against gross income equal to 9% of its 'qualified production activities income'. The amount of the domestic production activities deduction cannot exceed 50% of the wages paid by the taxpayer that are allocable to the taxpayer's domestic production gross receipts.

Credit for increased research expenditures

The credit for increased research expenditures is available until 31 December 2013. Taxpayers are entitled to claim a credit equal to a certain percentage by which 'qualified research expenses' exceed a certain base year amount. Expenses eligible for the credit are limited to those incurred in conducting research undertaken to discover information that is technological in nature and intended to be useful in the development of a new or improved business component. In addition, the research must relate to a new or improved function, performance, reliability or quality.

Tax Treaty Network

As of April 2013, the US had entered into 58 bilateral income tax treaties with other countries. The US has also entered into a number of estate and gift tax treaties, exchange of information agreements, and shipping and aircraft agreements with a number of other countries.

As a general rule, income tax treaties are designed to prevent taxation from becoming an impediment to international trade and commerce. Tax treaties are designed to prevent double taxation of the same items of income and to promote international trade and commerce by providing for reduced rates of tax on certain types of income. For example, most, if not all, income tax treaties entered into between the US and foreign countries provide for the reduction of otherwise applicable withholding tax rates on interest, dividend and royalty income.

Pursuant to all US income tax treaties, a foreign business enterprise that is resident in a treaty country and which does business in the US is subject to US federal income tax only to the extent that it carries on business in the US through a 'permanent establishment'. The general definition of 'permanent establishment' is 'a fixed place of business through which the business of an enterprise is wholly or partly carried on'.

Generally, US income tax treaties contain 'limitation on benefits' provisions. Limitation on benefits provisions are designed to combat 'treaty shopping' by ensuring that only *bona fide* residents of a treaty country are entitled to claim benefits under an applicable income tax treaty. The tests for determining whether a particular person is a resident of a treaty partner country (and thereby entitled to claim benefits under the treaty) can be extremely complex.

Accounting and Reporting

Statutory requirements/accounting records

The basic regulations governing accounting are based on the laws of the state (or District of Columbia) in which the entity was formed. There is no general requirement for companies to have an audit, nor even to prepare financial statements. The only requirement is to keep books and records sufficient to prepare accurate tax filings.

Income tax filings are prepared using accounting methods specified in the IRC and regulations issued by the Internal Revenue Service. The IRC is enacted by Congress to meet revenue and other goals as determined by Congress. The IRC gives no recognition to US Generally Accepted Accounting Principles (GAAP). US GAAP are promulgated by the Financial Accounting Standards Board (FASB) with the stated goal of providing standards that foster financial reporting that provides useful information to investors and other users of financial information. FASB is a private not-for-profit organization, but is recognized by the US Securities and Exchange Commission (SEC) as the source of accounting standards for public companies.

Since 2002, the FASB and the International Accounting Standards Board (IASB) have done significant work on convergence between US GAAP and International Financial Reporting Standards (IFRS). While the two accounting frameworks are now much more similar than they were at the beginning of the process, substantial differences still remain.

Businesses that are not taxed as partnerships, do not have inventories, are not engaged in certain industries and have less than US$10 million in annual gross receipts can elect to prepare their income tax filings on a cash rather than an accrual basis. Even if the income tax filings are prepared on the accrual basis, there are significant differences between accounting under the IRC versus under US GAAP.

Audited annual and unaudited quarterly financial statements are required to be filed with the SEC if the company is listed on an exchange; otherwise registers its securities with the SEC such that they are permitted to be freely traded; or has a class of securities with at least 500 owners and at least US$10 million in assets. Companies subject to this requirement are referred to as SEC 'registrants' or 'issuers'. For domestic companies, the financial statements must be prepared in accordance with US GAAP, as interpreted by the SEC. Such filings with the SEC must also apply additional accounting rules promulgated by the SEC that apply only to SEC filings.

Companies in certain industries are also required to file audited financial statements with various federal and/or state regulators. This most prominently includes banks, securities broker/dealers and insurance companies. Financial statements filed with regulators are in some cases required to be prepared in accordance with US GAAP (e.g., securities broker/dealers), while in other cases they must be prepared in accordance with special accounting methods promulgated by the regulator (e.g., insurance companies).

If a company is not required to file financial statements with the SEC or another regulator, then there are generally no statutory requirements as to what accounting framework can be used. The various states (and the District of Columbia) have jurisdiction over the audit function and the licensure of certified public accountants (CPAs), whose license allows for the issuance of audit opinions. State regulations will often restrict what accounting framework can be used in financial statements for which a CPA issues a report (i.e., control of the accounting framework indirectly through regulation of the CPA rather than the company directly.) Generally, CPAs are permitted to issue reports that are prepared in accordance with US GAAP, with the income tax basis of accounting (the accounting method used by the entity in preparing its income tax filings) or with the cash basis of accounting.

Many states, such as New York, now also permit the CPA to audit or otherwise report on financial statements prepared in accordance with IFRS, including IFRS for Small and Medium-Sized Entities (IFRS-SME) if the entity qualifies.

The CPA is usually also permitted to report in accordance with a foreign accounting framework if the report is intended for foreign (and/or internal) use and the CPA's report states that restriction. The CPA can also report on any accounting framework set forth in an agreement, provided that the CPA's report states that it is restricted to the use of the parties to the agreement.

Private companies frequently prepare financial statements and involve a CPA to fulfill a requirement in an agreement, such as a lending agreement or a stockholders' agreement. The accounting framework is usually subject to negotiation. In lending situations, banks will often accept financial statements prepared in accordance with the income tax basis, as long as the entity prepares its income tax filings on the accrual basis. This can often save significant cost, as the entity can use the accounting that it must do for income tax purposes anyway without also having to convert to US GAAP.

In 2013, the American Institute of CPAs (AICPA) created a new accounting framework, the Financial Reporting Framework for Small and Medium-Sized Entities (FRF-SME.) This is somewhat analogous to IFRS-SME, but with a very important difference: IFRS-SME is part of IFRS, and an entity using it is in compliance with IFRS if the entity meets the criteria for being able to use it; but AICPA-SME is not part of US GAAP, so any financial statements prepared using AICPA-SME cannot automatically be said to be in compliance with US GAAP.

The regulations of many states do not permit a CPA to issue reports on financial statements prepared under FRF-SME unless it is pursuant to an agreement calling for such a framework and the report's use is restricted to the parties to the agreement.

It remains to be seen whether FRF-SME will gain any acceptance from lenders and other users of financial statements. The AICPA hopes that those who currently now use income tax basis financial statements will at least find FRF-SME more useful for financial decision-making while still providing cost savings compared with the preparation of US GAAP financial statements.

CPA services on financial statements

If a private company decides to issue financial statements and engage a CPA, there is a choice in the level of service for which the CPA can be engaged. The CPA can be engaged to audit, review or compile the financial statements. Reviews and compilations are performed in accordance with the Statements on Standards for Accounting and Review Services (SSARS) issued by the AICPA. The SSARS regarding reviews and compilations are analogous, respectively, to the International Standards on Review Engagements (ISRE) and International Standards on Related Services (ISRS) issued by the International Auditing and Assurance Standards Bureau. Review and compilation standards and practice is more extensively developed in the US than internationally, principally because of the lack of a statutory audit requirement.

The level of CPA service required under an agreement is subject to negotiation. For smaller or well-collateralized loans, lenders will often accept financial statements that are reviewed or even compiled by a CPA rather than audited.

Audits of financial statements for purposes other than SEC filings are usually performed under US GAAS, as promulgated by the Auditing Standards Board of the AICPA. Audits of financial statements for the SEC filings of SEC registrants must be performed in accordance with the standards of the Public Companies Accounting Oversight Board (PCAOB). The PCAOB is legally a private non-profit corporation that is, however, entirely controlled by the SEC. Most state regulations allow the CPA to issue audit reports on private entities in accordance with PCAOB standards if that is what the entity chooses to have the auditor use, although this is unusual.

Not including the portion of the PCAOB standards relating to reporting on management's report on internal controls, US GAAS and PCAOB standards are broadly similar. Both have some requirements that are in excess of those of International Standards on Auditing (ISA). A US GAAS audit will inherently be in compliance with an ISA audit, provided that the auditor meets a very few additional requirements contained in ISA.

Most state regulations, as well as the standards of the AICPA, preclude the US auditor from issuing a report solely under ISA. Engaging the auditor to perform the audit under ISA in addition to US GAAS or PCAOB standards, however, is generally not a problem.

Reporting by foreign companies raising capital in the US

For a foreign company to be listed in the US or to issue securities that are otherwise freely tradable in the US, the SEC reporting requirements are less onerous if it qualifies as a foreign private issuer (FPI). To qualify as an FPI, an entity must:

- be organized in a foreign jurisdiction
- have no more than 50% ownership by US residents (directly or indirectly)
- have no more than 50% of its directors and officers be US citizens
- have no more than 50% of its assets in the US.

An FPI still must file annual financial statements that are audited under PCAOB standards. The financial statements do not, however, have to be prepared in accordance with US GAAP. The entity can prepare the financial statements in accordance with the method of accounting it uses in its home country, as long as there is an audited note to the financial statements reconciling net income measured under that reporting framework with net income measured under US GAAP. The entity can also elect to prepare the financial statements in accordance with IFRS as issued by the IASB (not a local variation), in which case it is not required to include a reconciliation to US GAAP.

Status of IFRS

As discussed above, private companies in the US are permitted in many states to prepare their general purpose financial statements in accordance with IFRS. There is, however, very little marketplace demand or acceptance of IFRS. Its use is, for the most part, limited to companies who need to prepare IFRS financial statements for foreign owners. In such situations, domestic lenders and others will often accept the IFRS financial statements.

The use of IFRS by private companies would probably expand significantly if the SEC were to require the use of IFRS for filings by SEC registrants. As of a few years ago, the SEC seemed ready to adopt IFRS; but at the present time, the SEC appears to be prioritizing enforcement actions arising from the 2008 financial crisis. More importantly, recent reports and statements by the SEC indicate that the SEC has grown skeptical of the acceptability of IFRS for use by companies selling securities to US investors.

It seems right now that if IFRS is ever adopted by the SEC, it will be in some form whereby there is a process for possible substantial modification for US purposes and an endorsement process for all changes to IFRS promulgated by the IASB. Even if IFRS as issued by the IASB were accepted, it would still be subject to interpretation by the SEC as well as additional rule making, just as the SEC currently does with US GAAP as issued by the FASB.

The Next Step

Contact Marks Paneth LLP to discuss your needs.

Marks Paneth LLP
685 Third Avenue
New York, NY 10017
United States

www.markspaneth.com

Paul Bercovici, Principal
T: +1 212 201 2297
F: +1 212 201 2298
E: pbercovici@markspaneth.com

James M. Robbins, Principal
T: +1 212 503 8971
F: +1 212 503 8972
E: jrobbins@markspaneth.com

Disclaimer: Morison International Limited (MI) is a global association of independent professional firms. Professional services are provided by individual member firms. MI does not provide professional services in its own right. No member firm is liable for the acts or omissions of any other member firm arising from its membership of MI.

An independent member of
Morison International

Marks Paneth LLP