

## **WHEN A FOREIGN NATIONAL DIES WITH ASSETS IN NEW YORK, WHAT HAPPENS? WHAT WEALTH ADVISORS, LEGAL ADVISORS AND GLOBETROTTERS NEED TO KNOW**

People from all over the world have assets located in New York, from bank accounts and securities, to artwork and real estate. Whether you are an individual who bought an apartment for a child in college or an art aficionado getting an appraisal from Christie's or Sotheby's, it is worth considering what happens to these assets on death. How do the next of kin or beneficiaries get access to the property (the right to enter your apartment, for instance)? What are the tax consequences? We hope that this article will present a few practical pointers for globetrotters. We'll take a particularly close look at New York real estate investment and ownership by people who are not U.S. citizens and are not domiciled in New York or the U.S. We'll call them Internationals.

Remember "domicile" is defined differently for estate and income tax purposes. Since we are looking at issues that arise on death, "domicile" means living in the U.S. with the intent to remain indefinitely rather than number of days physically present in the U.S.

### **Can I leave assets to family members without going through the courts? How can assets be accessed without going to court?**

An International who dies owning real estate in New York in his or her name, in most cases, will need an ancillary probate proceeding in New York to access and transfer the property. An "ancillary" proceeding means that the local court must determine who the right person is to receive the assets. This may involve affidavits from notaries, certificates from foreign courts, cost, time and expense.

From the New York Court's perspective, the purpose of the ancillary proceeding is to appoint someone in New York to be the person (or one of the people) charged with managing the New York estate and paying the New York debts including state and federal estate taxes (if any). The New York proceeding is called an ancillary *probate* proceeding (if the person died with a will) or an ancillary *administration* proceeding (if the person died without a will). It is brought in the Surrogate's Court in New York, the court that handles will and trust matters.

Here's an example of what can happen. Last year, the father of a young Italian woman attending college in Colorado, passed away suddenly without a will. He had \$70,000 in a bank account at a New York branch of a large U.S. bank. The Italian law firm for the family tried to contact the bank over many months to get access to the funds for the daughter in Colorado. By the time the Italian firm contacted us, the account had been closed by the bank and so much time had elapsed that the bank was about to pay the funds to the Division of Unclaimed Property for New York State. A lengthy, expensive ancillary administration proceeding was required to finally get access to the bank account funds and deliver them to the daughter.

However, when real estate and other assets are held in an entity such as an LLC, trust or corporation, an ancillary probate proceeding may not be necessary.

### **My family member or International client died with assets in New York. How do I recover the assets?**

When an International dies with a will from the International's country, the process generally begins in that home country. The will is submitted to the appropriate authority in the home country to get legal

authorization to collect assets, pay debts, manage property and distribute it to the beneficiaries under the will. In New York, we would call this person the Executor, but in many countries this role may be played by heirs who have certificates of heirship and distribution decrees.

When the International's "executor" discovers New York property in the estate, he or she should retain a New York attorney to bring an ancillary probate proceeding in New York. This ancillary proceeding deals only with the property located in New York. Upon death, New York State immediately places a tax lien on real estate located in New York. The process to release the New York lien is part of the ancillary proceeding. Once the New York ancillary executor is appointed, he or she has authority over the New York property. After paying New York creditors (including mortgages) and paying or providing for the New York and federal taxes, the ancillary executor may transfer the property to the International's beneficiaries.

For an International who dies without a will, the process of gaining legal control over his or her New York assets is similar to that described above. "Ancillary Administrator" is the title for the person appointed to manage the New York estate.

#### **When is ancillary probate or administration unnecessary?**

Ancillary probate (or administration) will generally not be necessary when New York real estate is held in an entity such as an LLC, trust or corporation.

Ancillary probate may also be unnecessary when, for example, real estate<sup>1</sup> is held by more than one person; it will depend on how legal title is held. For example, married couples frequently hold title in a form that insures the survivor of the couple owns the property automatically on the first death. When the first spouse dies, the property passes by operation of law rather than by will to the surviving spouse. No ancillary proceeding is necessary, but, as discussed below, tax issues may arise.

When there are more than two owners or the owners are not married, real estate is generally held as "tenants in common" and the International's estate will need an ancillary proceeding in New York. If the International had a will, the interest in the real estate will go to the beneficiaries named in the will; if the International didn't have a will, the real property will go to the persons designated by New York State law. Thus, ancillary probate is necessary for real estate interests held as tenants in common.

#### **New York State and federal estate taxes.**

Whether or not an ancillary proceeding in New York is required, estate tax may be unavoidable. Seventeen countries have estate tax treaties with the U.S. that govern estate taxation for people domiciled in those countries.<sup>2</sup> The treaties have a big impact as seen in the examples below. Internationals from countries that don't have an estate tax treaty are allowed to exclude \$60,000 of their U.S. situs assets from federal estate tax. This is tiny compared to the \$5,490,000 that U.S. citizens and residents can exclude from federal estate tax. In addition, Internationals may also be subject to New York estate tax. Until recently, New York State also limited Internationals to a \$60,000 estate tax

---

<sup>1</sup> Keep in mind that other assets such as bank and investment accounts, stock and artwork may share similar titling issues.

<sup>2</sup> See the IRS Estate and Gift Tax Treaties webpage attached.

exclusion on New York assets. Fortunately, the law has changed and Internationals may now exclude the same amount as a person domiciled in New York. The amount this year (2017) is \$5,250,000.

Ownership of cooperative apartments (a/k/a “coops”) is very common in New York. The estate tax consequences of that ownership for Internationals are very different under New York State and federal law. The difference pivots on the “situs” of the asset under the two sets of laws. A coop is held via (i) shares of stock in a corporation that legally owns the building and (ii) a proprietary lease on the apartment from the corporation to the shareholder owner. The shares of stock and the lease are considered to be intangible property (and “intangible property” is included in the larger category of personal property). New York State deems intangible property to be located in the country where the International is domiciled; thus, New York State regards coop shares as located in the International’s home country. The federal government, however, deems intangible property to be located in the place where the underlying property is located (in this case, the U.S.). Therefore, a New York coop apartment is taxable under federal estate tax law but not under New York State law.

Real property, such as a condominium apartment (a/k/a “condo”) or a house is different. It is deemed located in New York by both New York State and the federal government. So, if the International owned a condo, it may be taxed by both the state and the federal government.

#### **If an entity holds real estate (rather than an individual) will it be subject to estate taxes?**

Many people hold real estate in a trust, LLC or corporation rather than in their own name. Whether an entity (or the real estate it holds) are taxable for estate tax purposes depends on the type of entity involved, the tax elections made by the entity (pass-through or not) and other factors including how the property is being used (personal or business). The permutations are numerous.

#### **Examples**

To clarify the variations in estate tax treatment of real estate held by an International at death under various scenarios, consider the following (*dollar estimates are used for clarity*):

##### **Example 1**

An International from a country that does not have an estate tax treaty with the U.S. dies owning a coop apartment in New York titled in his name alone. The value of the property on the date of death is \$6,000,000. The International is permitted to exclude \$60,000 of U.S. situs property from federal estate taxes. That means that \$5,940,000 is taxable. The rate is approximately 40%. The resulting federal estate tax would be about \$2,376,000.

New York State taxes property that is deemed to be located in New York. Since a coop is considered to be located outside of New York in the International’s country, the amount of New York estate tax is zero.

##### **Example 2**

If instead of a coop the International owned a condo valued at \$6,000,000 and titled in his name when he died, the federal estate tax would still be \$2,376,000; but now there would also be a New York Estate tax on the value of the property.

The New York estate tax on \$6,000,000 would be about \$510,800. The federal and state taxes owed by the International on the condo would total \$2,886,800 (\$2,376,000 federal + \$510,800 New York).

### Example 3

How does an estate tax treaty between the International's country and the U.S. change these results? Let's go back to the first scenario but assume that the International is a UK citizen who owns a coop in New York. The UK citizen is domiciled in the UK. Because of the U.S.-UK treaty, the UK International is treated as if he or she had died a resident of the U.S. The UK International is therefore entitled to exclude \$5,490,000 from federal estate tax. Under this scenario, the UK International would now owe:

\$ 6,000,000	Coop apartment value
<u>(5,490,000)</u>	Federal exclusion available under U.S.-UK Estate Tax Treaty
\$ 510,000	Taxable amount

At a roughly 40% tax rate, the federal tax is \$204,000 (40% \*\$510,000) instead of the \$2,376,000 estate tax owed under Example 1 where the International was from a non-treaty country. The New York estate tax would still be zero because the coop is intangible property deemed located in another country.

Each "treaty" country has a different tax arrangement with the U.S. If the International's country does have a treaty, the specific rules will determine how federal estate tax is computed.

### Example 4

A condo apartment for private use is held by an International (from a non-treaty country) in a single member LLC which is disregarded for income tax purposes. The estate tax results are the same as in Example 2 where the International holds real property (the condo) in his own name. The New York estate tax would be about \$510,800. The federal estate tax would still be \$2,376,000; the federal and state taxes together would total \$2,886,800 (\$2,376,000 federal + \$510,800 New York).

### Example 5

Same facts as Example 4 except the International holds the real property in a single member LLC that has elected to be taxed as a corporation for income tax purposes. The result is that New York State now sees the asset (because it's taxed as a corporation) as "personal property" having a situs outside of New York; therefore, there is no New York State estate tax. For the federal government, the situs of the property is the U.S., so the property has a federal estate tax of \$2,376,000.

What if a foreign corporation owns the New York real estate? With proper planning, an International may be able to structure ownership of New York property in such a way that its situs is deemed to be outside the U.S. In that case, the property may not fall under either the federal or New York estate taxing regimes (although it would be subject to U.S. income taxes).

These simplified examples illustrate the dramatic variations in estate taxes that an International and his heirs or beneficiaries may confront. The key variables are (i) whether or not his or her country has an estate tax treaty with the U.S., (ii) the legal form in which he or she holds the property and (iii) if the property is real estate, the type of real estate owned and its use.

Summary of Examples 1-5  
 NEW YORK AND FEDERAL ESTATE TAXES ON NEW YORK REAL ESTATE  
 FOR INTERNATIONALS

	<b>New York Estate Tax</b>	<b>Federal Estate Tax</b>	<b>Total Tax</b>
Ex. 1 Coop (No Treaty)	zero	\$2,376,000	<b>\$2,376,000</b>
Ex. 2 Condo/House (No Treaty)	\$510,800	\$2,376,000	<b>\$2,886,000</b>
Ex. 3 Coop (UK Treaty)*	zero	\$510,000	<b>\$510,000</b>
Ex. 4 Condo (disregarded entity)	510,800	\$2,376,000	<b>\$2,886,000</b>
Ex. 5 Condo (LLC treated as corp.)	zero	\$2,376,000	<b>\$2,376,000</b>

\* U.S.-UK Estate Tax Treaty. Each country has a different treaty.