

A Carnival of Information



27th
annual
ACCOUNTING SHOW

September 19-21, 2012

Broward County Convention Center / Ft. Lauderdale



27th Annual Accounting Show September 21, 2012 Ft. Lauderdale

12:45pm-1:35pm	<u>Choice of Entities</u> 1 Jeffrey H. Greene, CPA, PFS Jeffrey H. Greene, CPA, PA
1:35pm-2:25pm	<u>Identify Theft & False Tax Returns from the IRS Perspective.....</u> 7 IRS Representative
2:40pm-3:30pm	<u>International Tax Issues (Foreign Taxpayer)</u> 9 Leslie A. Share, Esq Shareholder/Packman, Neuwahl & Rosenberg, PA
3:30pm-4:20pm	<u>Taxpayer Considerations: When to Yell "Fire"</u> 34 William H. Simon Jr, W. H. Simon & Co, PA

2011 - 2012 Accounting Shows Committee

Gary Fracassi - Chair		
Paulette Holder - Vice Chair		

Randee Abramson	Lucinda Gallagher	Christine Moreno
Jaime Angarita	Wendy Johnson	Mario Nowogrodzki
Alan Campbell	Thomas Longman	Pat Patterson
Bethany Carr	James Luffman	Robert Rankin
Lynn Clements	William Maloney	Richard Shapiro
Richard Dotson	Roger Michels	Poornima Srinivasan

Choice of Entities

Jeffrey H. Greene, CPA, PFS

Jeff Greene, CPA
Managing Shareholder
Jeffrey H. Greene, CPA, PA

Jeffrey Greene, CPA, is the founding shareholder of Jeffrey H. Greene CPA, PA, a varied tax, accounting, and financial firm. He is a past president of the Florida Institute of CPAs (FICPA). He has served as a member of the Board of Governors of the FICPA and as a member of the American Institute of CPAs Board. In addition, he has served on the AICPA Strategic Planning Committee.

For the past 25 years, Mr. Greene has lectured to professionals on various business and individual taxation issues. He has also appeared on television and radio programs as a guest speaker. He has presented courses on taxation matters on a national basis and has received recognition as an outstanding discussion leader. For the past 15 years, he has served as chairman of the City of Hollywood's pension and disability board with over \$200 million in investments.

Mr. Greene earned his bachelor's degree from the University of Miami. He has received his designation of PFS from the AICPA.

Choice of Entity

Jeff Greene

Certified Public Accountant

CPAGreene@aol.com

	C Corporation	S Corporation	Partnerships: General Partnership (GP) and Limited Partnership (LP)	Limited Liability Partnership (LLP)	Limited Liability Company (LLC)
Limit on Number of Owners	Minimum of one; no maximum.	Maximum of 100, but a family may elect to be treated as a single shareholder for these purposes regardless of the number of shareholder members of the family	Minimum of two; no maximum.	Minimum of two; no maximum.	Minimum of two in order to be taxed as partnership; however, almost all states permit formation of one-member LLCs that are treated as nonentities for federal purposes unless there is an election to be taxed as a corporation; no maximum number of members.
Limit on Types of Owners	No limit.	Owners limited to individuals, estates, and certain types of trusts.	No limit.	No limit.	No limit.
Limit on Type of Capital Structure	No limit; may have different classes of stock.	Limited to one class of stock (although may have voting and nonvoting stock).	No limit.	No limit.	No limit.
Limited Liability	Generally, shareholders of a C corporation are not personally liable for the debts of the corporation, regardless of whether they participate in management. The only exception is when the corporate veil is pierced or if the liability arises from a shareholder's own actions.	Generally, shareholders of an S corporation are not personally liable for the debts of the corporation, regardless of whether they participate in management. The only exception is when the corporate veil is pierced or if the liability arises from a shareholder's own actions.	In a GP, all partners are jointly and severally liable for debts of the partnership. In a limited partnership, there must be at least one general partner who is liable for the debts of the partnership; the limited partners are not personally liable for partnership debt as long as they do not participate in management.	Under most LLP statutes, the partners are jointly and severally liable for the obligations of the LLP. However, a partner is not liable by way of indemnification, contribution, assessment, or otherwise, for the debts, obligations, or liabilities of the LLP arising from the negligence, wrongful acts, or misconduct committed in the course of the business by another partner or an employee, agent, or representative of the LLP.	In a LLC, absent an agreement to the contrary, no members are liable for entity debt, regardless of whether they participate in management.

	C Corporation	S Corporation	Partnerships: General Partnership (GP) and Limited Partnership (LP)	Limited Liability Partnership (LLP)	Limited Liability Company (LLC)
State Filing Requirements	Must file articles (or certificate) of incorporation with filing officer of a state.	Must file articles (or certificate) of incorporation with filing officer of a state.	There is no formal state filing requirement applicable to a GP, although some states authorize the filing of statements of authority or limitation of authority. A GP is subject to the laws of the jurisdiction in which the GP has its chief executive office. An LP must file a certificate of limited partnership.	A GP may become an LLP by filing an application under the laws of the state of formation. The filing is effective for one year and must be renewed annually.	An LLC must file articles of organization, or certificate of formation.
Insurance of Financial Responsibility Requirement	None.	None.	None.	Several state statutes require LLPs to maintain a minimum amount of insurance or provide a bond to cover the types of liabilities to which the LLP statute applies.	None.
Period of Duration	A C corporation continues in perpetuity unless the articles of incorporation specify otherwise.	An S corporation continues in perpetuity unless the articles of incorporation specify otherwise.	A GP need not specify a term. It may be organized as an at-will GP or a GP for a defined term or a specific purpose. An LP must set forth a date upon which it will be dissolved.	As long as annual renewal applications are filed, an LLP continues until dissolved either by operation of law or by agreement of the partners.	An LLC need not specify a term. It may be organized as an at-will LLC or an LLC for a defined term or a specific purpose.
Formation	Generally tax-free.	Generally tax-free.	Generally tax-free.	Generally tax-free.	Generally tax-free.

	C Corporation	S Corporation	Partnerships: General Partnership (GP) and Limited Partnership (LP)	Limited Liability Partnership (LLP)	Limited Liability Company (LLC)
Choice of Taxable Year	With the exception of personal service corporations, a corporation may choose any taxable year.	An S corporation (and a personal service corporation) must use a calendar year unless the corporation can establish a business purpose for use of a fiscal year. If a fiscal year is used, the corporation must make a payment to the IRS annually that approximates tax deferral received by shareholders.	Both a GP and an LP generally have the same taxable year as a majority of the partners. If the majority of partners do not have the same taxable year, the partnership uses the taxable year of the principal partners. If the principal partners do not have the same taxable year, the partnership uses the calendar year.	An LLP generally has the same taxable year as a majority of the partners. If the majority of partners do not have the same taxable year, the partnership uses the taxable year of the principal partners. If the principal partners do not have the same taxable year, the partnership uses the calendar year.	An LLC generally has the same taxable year as a majority of the members. If the majority of members do not have the same taxable year, the LLC uses the taxable year of the principal members. If the principal members do not have the same taxable year, the LLC uses the calendar year.
Method of Accounting	Must use accrual method if over \$5 million per year in average gross receipts.	May generally use cash method unless it sells goods out of inventory.	A GP may generally use the cash method unless it sells goods out of inventory. An LP is subject to more limitations on use of the cash method. It may only use the cash method if it does not sell goods out of inventory AND: (i) it is not treated as an association taxable as a corporation; (ii) it is not subject to the limitations applicable to GPs; (iii) its interests are not sold in a registered offering; (iv) more than 35 percent of its losses are not allocated to limited partners; and (v) it is not formed for the principal purpose of avoiding or evading federal income tax.	An LLP may generally use the cash method unless it sells goods out of inventory.	Single member LLC that is disregarded as an entity uses the taxable year of its member. An LLC is <u>never</u> subject to the same limitations on the use of the cash method as an LP. A single member LLC that is disregarded as an entity uses the method of accounting of its member.

	C Corporation	S Corporation	Partnerships: General Partnership (GP) and Limited Partnership (LP)	Limited Liability Partnership (LLP)	Limited Liability Company (LLC)
Federal Tax Filings	No filing necessary upon formation (except for an EIN request); must file Form 112 annually.	Must file Form 2553 to make S election; must file Form 1120S annually and distribute Forms K-1 to shareholders.	No filing necessary upon formation (except request for an EIN); must file Form 1065 annually and distribute Forms K-1 to partners.	Same filing requirements as a GP.	Same filing requirements as a GP.
Self-Employment Taxes	Not applicable to corporate dividends; shareholder-employees is subject to employment taxes on wages.	Not applicable to S corporation pass-through income.	A general partner's share of partnership income is generally subject to self-employment taxes. A limited partner's share of partnership income is generally not subject to self-employment taxes unless the income is a guaranteed payment for services.	A partner's share of partnership income is generally subject to self-employment taxes.	Uncertain.
Fringe Benefits	One of the major incentives to incorporation is the fact that the corporation may deduct the costs of fringe benefits provided to shareholder-employees and the recipient may exclude the value of the benefits from gross income.	Premiums paid by S corporation for health insurance, group term life insurance, and disability insurance for shareholders who own two percent or less of the value of the S stock are fully deductible and excludable; however, health insurance premiums for shareholders who own more than two percent are generally deductible but not excludable.	Health insurance premiums paid by partnership for health insurance for partners are not excludable. Group-term life insurance and disability insurance premiums are not deductible.	Same as partnership.	Same as partnership.

	C Corporation	S Corporation	Partnerships: General Partnership (GP) and Limited Partnership (LP)	Limited Liability Partnership (LLP)	Limited Liability Company (LLC)
Income Tax on Entity:					
Tax on Income from Operations	Yes	No (with the exception of \$1375 (tax on excess passive-investment income) and \$1374 (tax on built-in gains on certain accounts receivable)).	No tax at entity level.	No tax at entity level.	No tax at entity level.
Tax Upon Sale of Asset	Yes.	No (with the exception of \$1374 (built-in gains tax)).	No.	No.	No.
Recognized Gain Upon Distribution of Asset	Yes. Corporation recognizes gain on distribution of appreciated asset.	Yes.	Normally no gain or loss at partnership level, although if the distribution is not pro rata and the partnership owns hot assets, there may be ordinary income or capital gain recognized.	Normally no gain or loss at partnership level, although if the distribution is not pro rata and the partnership owns hot assets, there may be ordinary income or capital gain recognized.	Normally no gain or loss at LLC level, although if the distribution is not pro rata and the LLC owns hot assets, there may be ordinary income or capital gain recognized.
Recognized Loss Upon Distribution of Asset	No, unless liquidating distribution.	No, except liquidating distribution.	No.	No.	No.
Ability of Entity to Deduct Losses	Corporation can deduct losses, subject to rules regarding NOLs and capital losses.	No entity deduction of loss.	No entity deduction of loss.	No entity deduction of loss.	No entity deduction of loss.
Ability of Equity Owner to Deduct Losses	No deduction available to shareholders for corporation's operating losses.	Current deduction (limited by basis, which does not include share of entity debt), the amount-at-risk rules, and the passive-loss rules).	Current deduction (limited by basis (which includes share of entity debt), amount-at-risk rules, and passive-loss rules).	Current deduction (limited by basis (which includes share of entity debt), amount-at-risk rules, and passive-loss rules).	Current deduction (limited by basis (which includes share of entity debt), amount-at-risk rules, and passive-loss rules).
Equity Owner Taxed on Undistributed Income	No.	Yes.	Yes.	Yes.	Yes.

	C Corporation	S Corporation	Partnerships: General Partnership (GP) and Limited Partnership (LP)	Limited Liability Partnership (LLP)	Limited Liability Company (LLC)
Effect of Nonliquidating Distribution of Cash on Equity Owner	Dividend (ordinary income) to extent of E&P; then recovery of basis; then capital gain.	Generally treated as a recovery of basis and then capital gain.	Tax-free to the extent of basis; then generally taxed as capital gain, although if the partnership owns hot assets, some or all of the excess may be treated as ordinary income.	Tax-free to the extent of basis; then generally taxed as capital gain, although if the partnership owns hot assets, some or all of the excess may be treated as ordinary income.	Tax-free to the extent of basis; then generally taxed as capital gain, although if the LLC owns hot assets, some or all of the excess may be treated as ordinary income.
Effect of Nonliquidating Distribution of Property on Equity Owner	Same consequences as distribution of cash; basis of distributed property is its fair market value.	Generally recovery of basis and capital gain (with the exception of an S corporation with an accumulated E&P account).	Nonrecognition of gain and basis in distributed property equal to partnership's basis, although if the distribution is not pro rata and the partnership owns hot assets, the partner may recognize ordinary income or capital gain.	Nonrecognition of gain and basis in distributed property equal to partnership's basis, although if the distribution is not pro rata and the partnership owns hot assets, the partner may recognize ordinary income or capital gain.	Nonrecognition of gain and basis in distributed property equal to LLC's basis, although if the distribution is not pro rata and the LLC owns hot assets, the member may recognize ordinary income or capital gain.
Taxation of Sales of Equity Interests	Shareholder generally recognizes capital gain upon sale of stock with limited exceptions.	Shareholder generally recognizes capital gain upon sale of stock with limited exceptions.	Partner generally recognizes capital gain with exception of §751 (ordinary income treatment to extent of hot assets).	Partner generally recognizes capital gain with exception of §751 (ordinary income treatment to extent of hot assets).	Member generally recognizes capital gain with exception of §751 (ordinary income treatment to extent of hot assets).
Effect of the Sale of an Equity Interest on the Entity	Shares may be freely exchanged without effectuating a dissolution of the corporation. However, if there is a transfer of more than 50 percent of the stock of a corporation over a three-year testing period, the corporation is considered as having an "ownership change," which will limit the corporation's use of NOLs and other tax attributes.	Shares may be freely exchanged. However, if stock is transferred to an ineligible shareholder or a seventy-sixth shareholder, the corporation involuntarily terminates its status as an S corporation and immediately becomes a C corporation.	If, in any 12-month period, 50 percent or more of the total interest in partnership capital and profits is transferred, the partnership involuntarily terminates.	If, in any 12-month period, 50 percent or more of the total interest in partnership capital and profits is transferred, the partnership involuntarily terminates.	If, in any 12-month period, 50 percent or more of the total interest in LLC capital and profits is transferred, the LLC involuntarily terminates.

Planning Point LLC to S Corporation

Planning point:

Characteristic	Partnership	S Corporation
Control	The exchange of property for a partnership interest is tax-free without regard to control.	The incorporation is tax-free only if the transferor of property is in control.
Boot	Taxable only to the extent its fair market value exceeds the basis in the partnership.	Taxable to the extent of the lesser of fair market value or gain realized.
Encumbered property	Reduction in liability treated as a distribution; basis in partnership reduced by amount of reduction; nonrecourse liability allocated solely to contributing partner.	Basis reduced by the full amount of the liability shifted to the corporation.
Allocations with respect to contributed property	Must take into account the difference between fair market value and adjusted basis.	Allocated pro rata in accordance with daily-apportionment rules.
Accounts payable	Allocated to the contributing partner.	Deductible payables not treated as liabilities in excess of basis.
Character of contributed property	Unrealized receivables, inventory, and capital-loss property retain status in the partnership.	Determined at the corporate level, except appreciated property transferred for the purpose of converting ordinary income to capital gain.
Receipt of interest in exchange for services	Gain is recognized by the partnership on pro rata transfer of assets; deduction for services allocated to other partners.	No gain recognized by the corporation; deduction allocated pro rata in accordance with daily-apportionment rules; gain is recognized to the shareholder if the fair market value of stock received.
Debt-equity	Nonrecourse loan to partnership gives basis solely to loaning partner.	Debt treated as equity may terminate election if it is a second class of stock, or if lender is ineligible shareholder or causes the maximum shareholder limit to be exceeded.

***Identify Theft & False Tax Returns
from the IRS Perspective***

Frances Kleckley

Presentation Will Be Available
On-line After the Conference

***International Tax Issues (Foreign
taxpayer)***

Leslie A. Share, Esq

Leslie A. Share
Shareholder
Packman, Neuwahl & Rosenberg, P.A.

Leslie A. Share, a shareholder in Packman, Neuwahl & Rosenberg, P.A., specializes in the areas of domestic and international tax, estate and business planning, and wealth preservation. Mr. Share has advised clients in numerous and diverse areas such as Broadway theatrical productions, domestic and foreign real estate like-kind exchanges, Internet tax planning, advanced domestic and foreign wealth preservation techniques, U.S. tax treaties, Internal Revenue Service examinations and voluntary compliance programs and preferred structures for U.S. persons investing overseas and engaging in foreign business activities. Mr. Share has written articles for publications such as the Asset Protection Journal, Entertainment Law & Finance, Estate Planning, the University of Florida Law Review, and an American Bar Association book entitled Foreign Investment in U.S. Real Estate—A Comprehensive Guide. He is AV rated by Martindale-Hubbell, a Florida Super Lawyer in the field of tax law for 2009-2012, listed in Top Attorneys in Florida, and a Florida Institute of CPAs Outstanding Discussion Leader for 2007-2010. Mr. Share received his B.A. from Northwestern University, his J.D., with honors, from the University of Florida, and his Master of Laws in Taxation from New York University. While in law school, he served as chief tax editor and research editor of the Florida Law Review.

International Tax Update— Foreign Taxpayers

FICPA 2012 Annual Accounting Show
September 21, 2012

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Is the Individual Client Foreign, U.S., or Foreign But Soon to Become U.S.?

- This has become our most common everyday international tax practice issue—individuals who have moved here or are considering moving here, along with “accidental” U.S. residents and citizens
- Advance planning techniques may differ depending upon the country of origin and how long they plan to stay in the U.S., although it isn’t always easy to be certain
- Will it just be “mom and the kids” or the whole family?
- It’s **NEVER** too late to do U.S. tax, wealth preservation and estate planning, but you can accomplish more with sufficient advance notice

Pre-Immigration Planning—Part I

- Proper timing and implementation are the keys to successful planning
- Foreign trusts provide an excellent opportunity to potentially avoid both U.S. income and estate tax for wealthy foreign individuals expecting to move to the U.S.
- Effective regardless of the status of the settlor/decedent at the time of his death to fund potential U.S. estate tax or increase the value of his estate on a tax-free basis

Pre-Immigration Tax Planning—Part II

- **Accelerate gifts to family members or one or more trusts for their benefit**
- Many assets of foreign individuals can be gifted or sold tax-free—make cash gifts from non-U.S. accounts wherever possible
- Unlimited tax-free gift transfers to trust possible so long as the transferor is a non-U.S. citizen or domiciliary
- This technique can help avoid foreign forced heirship/community property laws—choose a domestic or foreign jurisdiction where the settlor can accomplish his or her dispositive goals
- Gift shares of other foreign entities or other foreign assets as advance estate planning

Pre-Immigration Tax Planning—Part III

- Accelerate income, defer unrealized losses and deductible expenses
- Consider making the check-the-box election for qualified foreign entities to trigger gains
- Accelerate rent payments if possible or sell income-producing property
- Accelerate royalties, licensing fees, and other similar payment arrangements, perhaps at a discount if necessary
- Exercise stock options relating to offshore services BEFORE moving to the U.S.
- Accelerate deferred compensation payments relating to offshore services BEFORE moving to the U.S.

Pre-Immigration Tax Planning—Part IV

- Sell appreciated foreign assets and domestic assets where the capital gains would be tax-free for an NRA
- Maintain foreign residency status as long as possible using an applicable U.S. income tax treaty
- Treat installment sales by an NRA as a deemed “election out” where the U.S. would not tax the gains, and consider gifting the obligation
- Planning can mitigate § 679 five-year rule—consider avoiding it through the use of a domestic trust established in a U.S. APT-friendly jurisdiction, using a new trust, a resettled trust, or a completely or partially domesticated foreign trust

U.S. Withholding Tax on Passive U.S. Source Income

- A foreign taxpayer is taxed at a flat 30% rate (the “flat tax”) on certain U.S. source investment type income (often called “FDAPI” or “fixed or determinable annual or periodical income”) not effectively connected with the conduct of a U.S. trade or business
- FDAPI includes (but is not limited to) interest [other than portfolio interest and § 1273 original issue discount (OID)], dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, and emoluments under §§ 871(a)(1)(A) and (h), 881(a)(1) and (c)

U.S. Withholding Tax on Passive U.S. Source Income

- IRS Forms W-8BEN and W-8IMY
- IRS Forms 1042 and 1042S
- Withholding liability can exist even without an actual payment, as FDAPI includes income deemed paid by one related party to another under § 482, see Central de Gas de Chihuahua, S.A., 102 T.C. 515 (1994)
- **The withholding agent is liable for unpaid tax under § 1461**—a very common problem for U.S. corporations and partnerships with foreign ownership, and foreign owned U.S. rental properties

The Portfolio Interest Exemption— A Great Planning Opportunity

- Foreign lenders may receive tax-free interest when paid by an “unrelated” U.S. borrower
- No limitations on terms, except the U.S. borrower and the foreign lender must use typical arm’s-length loan agreements
- Family members are “unrelated” for direct loan purposes, but check the complex attribution rules for entity borrowers and lenders
- Contingent interest taxed at regular 30% rate
- Form W-8BEN must be received by the borrower before any payments are made to the lender

What Type of Entity Is The Foreign Entity?

- Another very common international tax practice issue—individuals with interests in foreign entities
- For U.S. tax purposes, they could be corporations, partnerships, trusts, or disregarded entities
- U.S. tax and compliance rules vary substantially depending upon the type of entity
- Facts, circumstances, and applicable foreign laws may control entity treatment

Form 8832

- A foreign eligible entity may adopt a classification different from its default classification by filing Form 8832
- The effective date can generally be 75 days prior to the date Form 8832 is filed, with certain procedures available to extend the ability to make a “retroactive election.” Please note, although some of these procedures are “automatic” (e.g., see Rev. Proc. 2009-41 allowing a late election up to 3 years and 75 days of the requested effective date) one might need to apply for a Private Letter Ruling to obtain relief if you are “very late”
- **NOTE:** the election to treat an entity classified as a corporation into an entity that is classified as a partnership or disregarded entity constitutes a liquidation of that entity and may have associated U.S. income tax consequences

Threshold Questions For “Hybrid” Clients

- What type of visa does the client want? Working? Student? Green Card? Will the rest of the family also need visas?
- Is the client prepared to pay U.S. income tax on worldwide income?
- Is the client prepared to report worldwide assets to the IRS?
- Is the client prepared to pay U.S. gift tax on worldwide gifts?
- Are the client’s heirs prepared to pay U.S. estate tax on the client’s worldwide estate?
- Are the client prepared to preserve assets from being taken by potential creditors under the U.S. legal system?

U.S. Income Tax Residence Rules

- U.S. citizens ✓
- U.S. Green Card ✓ (possible treaty exception)
- 183 days or more in a calendar year ✓ (possible treaty exception)
- 30 days or less in a calendar year —not a U.S. resident
- Substantial Presence Test—3 year rule (add total days in current year, 1/3 of days in prior year, and 1/6 of days in second prior year)—if 183 days or more ✓ unless either a “closer connection” to a foreign country (Form 8840) or deemed to be a resident of a treaty country under a “tiebreaker” rule (Form 8833), 121 days per year maximum avoids this
- Special rules for students, diplomats, certain other individuals, and limited medical condition situations arising in the U.S. that prevent the individual from leaving the U.S.

U.S. Estate and Gift Tax Residence Rules

- Not the same as U.S. income tax rules
- U.S. citizens ✓
- U.S. domiciliary ✓ (possible treaty exception)
- Domicile determination is based upon the intent of the person as manifested by the facts showing permanent abode
- NRADs only have a **\$60,000 estate tax exclusion** and no gift tax exclusion other than the annual exclusion
- Annual exclusion gifts (\$13,000 for 2012) and to non-citizen spouses (\$139,000 for 2012)
- It is possible to be an income tax **resident** and a **nondomiciliary** for U.S. estate and gift tax purposes
- Medical conditions **don't** avoid income tax residence, but **may** avoid U.S. domiciliary status

Does Your Foreign Client Have a U.S. Trade or Business with Effectively Connected Income?

- Having a U.S. office, employee, or dependent agent can have severe, unexpected related consequences for a foreign business
- Title passage test applies for inventory sales to determine source
- Foreign (as well as U.S.) sales income can be taxable by the U.S. if there is too much of a U.S. presence and there are ongoing U.S. contract negotiations and sales—if at all possible, keep these activities offshore
- Services performed in the U.S. are subject to tax, but **NOT** services performed outside of the U.S.

Does Your Client Have a U.S. Trade or Business with Effectively Connected Income?

Things to avoid if practically possible :

- **Don't** have business cards or a web site with a U.S. address
- **Don't** have salesmen of the foreign business negotiate and conclude contracts while in the U.S.—“please send e-mail orders to my foreign office and it can help you”
- Have title to goods sold pass **outside** of the U.S. (for example, “F.O.B. Guayaquil”)
- For a **service business**, only perform work while not present in the U.S., and prepare an appropriate written service agreement that confirms this

Inbound Use of U.S. Income Tax Treaties

- The U.S. has an extensive network of income tax treaties which may provide extensive benefits to U.S. persons and treaty country residents—use Form 8833 for “treaty-based positions” or W-8BEN as applicable
- Reduced or eliminated withholding tax on passive income
- Higher standard than regular U.S. tax law for treaty country residents conducting business in the U.S.—the “permanent establishment” with attributable “business profits”

Inbound Use of U.S. Income Tax Treaties (continued)

- Special rules for determining income tax residence—the “treaty tiebreaker test” may provide substantial planning opportunities
- Reduced U.S. branch profits tax rates and special exclusions
- 15% “qualified dividend” rule has resulted in treaty-shopping attempts by rearranging existing “bad” structures—will they work?

Inbound Use of U.S. Income Tax Treaties (continued)

- “Limitation of benefits,” “business purpose” and other anti-treaty shopping rules to prevent “third country party” use of treaties—see, e.g., Aiken, Del Commercial Properties
- “Savings clauses” prevent treaties from overriding general U.S. tax rules for U.S. citizens
- Exchange of information between the “competent authorities” of each country—automatic, simultaneous, spontaneous, specific

Form W-7, Application for IRS Individual Taxpayer Identification Number

- New form revised January, 2012
- An ITIN is a nine-digit number issued by the IRS to individuals who are required for U.S. tax purposes to have a U.S. taxpayer identification number but who do not have and are not eligible to get a social security number (SSN)
- Form W-7 does not apply if you have an SSN or you are eligible to get an SSN as a U.S. citizen, U.S. green card holder or admitted for U.S. employment

W-7 Form 1041-0103 Department of the Treasury Internal Revenue Service		Application for IRS Individual Taxpayer Identification Number For use by individuals who are not U.S. citizens or permanent residents. See instructions.		OMB No. 1545-0074																
An IRS individual taxpayer identification number (ITIN) is for federal tax purposes only.				FOR IRS USE ONLY <table border="1"> <tr><td> </td><td> </td><td> </td><td> </td></tr> </table>																
Before you begin: • Do not submit this form if you have, or are eligible to get, a U.S. social security number (SSN). • Getting an ITIN does not change your immigration status or your right to work in the United States and does not make you eligible for the earned income credit. Reason you are submitting Form W-7. Read the instructions for the box you check. Caution: If you check box b, c, d, e, f, or g, you must file a tax return with Form W-7 unless you meet one of the exceptions (see instructions).																				
a <input type="checkbox"/> Nonresident alien required to get ITIN to claim tax treaty benefit b <input type="checkbox"/> Nonresident alien filing a U.S. tax return c <input type="checkbox"/> U.S. resident alien (based on days present in the United States) filing a U.S. tax return d <input type="checkbox"/> Dependent of U.S. citizen/resident alien Enter name and SSN/ITIN of U.S. citizen/resident alien (see instructions) ▶ e <input type="checkbox"/> Spouse of U.S. citizen/resident alien f <input type="checkbox"/> Nonresident alien student, professor, or researcher filing a U.S. tax return or claiming an exception g <input type="checkbox"/> Dependent spouse of a nonresident alien holding a U.S. visa h <input type="checkbox"/> Other (see instructions) ▶ Additional information for a and f: Enter treaty country ▶ and treaty article number ▶																				
Name (see instructions) Name at birth if different ▶ 1a First name Middle name Last name 1b First name Middle name Last name																				
Applicant's mailing address 2 Street address, apartment number, or rural route number. If you have a P.O. box, see separate instructions. City or town, state or province, and country. Include ZIP code or postal code where appropriate.																				
Foreign (non-U.S.) address (if different from above) (see instructions) 3 Street address, apartment number, or rural route number. Do not use a P.O. box number. City or town, state or province, and country. Include ZIP code or postal code where appropriate.																				
Birth information 4 Date of birth (month/day/year) Country of birth City and state or province (optional) Sex <input type="checkbox"/> Male <input type="checkbox"/> Female																				
Other information 5a Country(ies) of citizenship 5b Foreign tax I.D. number (if any) 5c Type of U.S. visa (if any), number, and expiration date 6a Identification document(s) submitted (see instructions) <input type="checkbox"/> Passport <input type="checkbox"/> Driver's license/State I.D. <input type="checkbox"/> USCIS documentation <input type="checkbox"/> Other Date of entry into the United States (MM/DD/YYYY) Issued by: No. Exp. date: / / 6e Have you previously received a U.S. temporary taxpayer identification number (TIN) or employer identification number (EIN)? <input type="checkbox"/> No/Do not know. Skip line 6f. <input type="checkbox"/> Yes. Complete line 6f. If more than one, list on a sheet and attach to this form (see instructions). 6f Enter TIN or EIN ▶ and Name under which it was issued ▶ 6g Name of college/university or company (see instructions) Length of stay: City and state																				
Sign Here Under penalty of perjury, I (applicant/delegate/acceptance agent) declare that I have examined the application, including accompanying documentation and statements, and to the best of my knowledge and belief, it is true, correct, and complete. I authorize the IRS to disclose to my acceptance agent volume or return information necessary to make a determination regarding the assignment of my IRS individual taxpayer identification number (ITIN), including any previously assigned taxpayer identifying number. Signature of applicant (if delegate, see instructions) Date (month/day/year) Phone number																				
Keep a copy for your records Name of delegate, if applicable (type or print) Delegate's relationship to applicant <input type="checkbox"/> Parent <input type="checkbox"/> Court-appointed guardian <input type="checkbox"/> Power of Attorney Signature Date (month/day/year) Phone Fax Name and title (type or print) Name of company EIN Office Code																				
For Paperwork Reduction Act Notice, see separate instructions. Cat. No. 102028 Form W-7 (Rev. 1-2002)																				

Form W-7, Application for IRS Individual Taxpayer Identification Number

- Acceptance Agents (AAs) are persons (individuals or entities such as colleges, financial institutions, accounting firms, etc.) who have entered into formal agreements with the IRS that permit them to assist applicants in obtaining ITINs
- Certifying Acceptance Agents (CAAs) are individuals or entities who are also authorized to verify the applicant's claim of "identity" and "foreign status" through a review of appropriate documentation, as well as verifying the authenticity, accuracy and completeness of the supporting documentation

Form W-7, Application for IRS Individual Taxpayer Identification Number

- AAs may submit Form W-7, attached U.S. Federal income tax return, and any supplemental documentation to the IRS, but only facilitate the application, as they are not authorized to issue the ITIN directly
- Once the ITIN is issued, the AA receives the applicant's number directly from IRS
- AAs/CAAs may charge a fee for their services
- A list of authorized Acceptance Agents is available on the IRS website

Form W-7

Any individual who is not eligible for an SSN but who must furnish a taxpayer identification number must apply for an ITIN on Form W-7—examples:

- NRA eligible for reduced U.S. withholding tax benefits under a U.S. income tax treaty
- NRA required to file a U.S. tax return or filing only to claim a refund
- NRA who elects to file a joint U.S. tax return with a U.S. citizen or resident alien spouse
- U.S. substantial presence test resident alien who files a U.S. tax return
- Alien spouse claimed as an exemption on a U.S. tax return
- Alien individual eligible to be claimed as a dependent on a U.S. tax return
- NRA student, professor, or researcher who is required to file a U.S. tax return, or who is claiming an exception to the tax return filing requirement
- A dependent/spouse of an NRA U.S. visa holder
- Undocumented immigrants

Form W-7

- Under the prior procedure, copies of the required documents could be submitted if they were notarized by a U.S. notary public legally authorized within his or her local jurisdiction to certify that the document was a true copy of the original. To do this, the notary had to see the valid, unaltered, original document and verify that the copy conforms to the original
- Notarizing Officers at U.S. Embassies and Consulates overseas could provide these notarial and authentication services
- Such copies could also be submitted if they were notarized by a foreign notary under the Hague Convention procedures for countries that have joined the Hague Convention
- Under these procedures, a certification is issued in the form of an "apostille" attached to the copy of the document
- If the document originated in a country that is not party to the Hague Convention, applicants were required to have the document certified by the issuing foreign authority

New ITIN Rules Causing Havoc

- Effective June 22, 2012, the IRS made significant interim changes to the ITIN application process
- The IRS indicated that these changes were required due to substantial fraud occurring in the application process
- Unlike the Social Security Administration, which requires an individual to submit "original" documents to obtain a Social Security Number (SSN), the IRS has accepted notarized copies of documents for ITINs
- The IRS intended the interim procedures to apply only to applicants generally seeking ITINs for the purposes of filing U.S. individual income tax returns, but they actually have a much broader scope
- Because the April 17 filing deadline had passed, the IRS anticipated that a small number of taxpayers would need ITINs before the end of 2012, when new rules will supposedly be issued
- However, the IRS failed to take into account the lack of desire to send in original documents that practitioners and taxpayers fear will disappear into the proverbial bureaucratic black hole

New ITIN Rules Causing Havoc

- The IRS now only issues ITINs when applications include original documentation, such as passports and birth certificates, or certified copies of these documents from the issuing agency
- ITINs will not be issued based on applications supported by notarized copies of documents
- In addition, ITINs will not be issued based on applications submitted through certified acceptance agents unless they attach original documentation or copies of original documents certified by the issuing agency

New ITIN Rules Causing Havoc

- Persons who need ITINs to get their tax return processed can do so by submitting their original documentation or certified copies of their documentation by mail
- Documentation will be accepted at IRS walk-in sites but will be forwarded to the ITIN centralized site for processing
- Some categories of W-7 ITIN applicants are not impacted by these interim changes
- Military spouses and dependents without an SSN who need an ITIN, by providing a copy of the spouse or parent's U.S. military identification, or applying from an overseas APO/FPO address

New ITIN Rules Causing Havoc

- NRAs applying for ITINs for the purpose of claiming tax treaty benefits (use boxes a and h on Form W-7)
- New ITIN applications of this category that are accompanied by a US tax return are subject to the new interim document standards
- The key problem: NRAs often need ITINs for reasons besides filing a U.S. tax return—third-party withholding for various income, such as FIRPTA, certain gambling winnings or pension income, and for other information reporting purposes
- FIRPTA Forms 8288/8288-A/8288-B ITIN filing status and requirements are presently uncertain
- Existing documentation standards will be maintained only for these applicants, but IRS scrutiny of the documents will be heightened

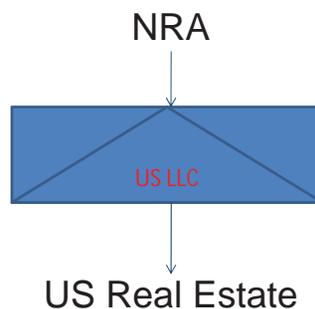
What Structure Should I Recommend to an NRA Investing in the U.S.?

- Income tax savings and estate tax avoidance—can a foreign investor enjoy both?
- Investment structures for many foreign persons now **MUST** be transparent—a complete switch from the way we used to practice!
- Many existing structures now need to be changed to become transparent—and it can have a significant U.S. income tax cost

Alternative U.S. Investment Planning Structures For NRAs

- There are at least **seven** different types of potential investment structures for foreign investment in the United States
- Each has potentially different U.S. income and estate tax consequences
- Consider the need for asset protection/limited liability—foreign investors often are unaware of our litigious society

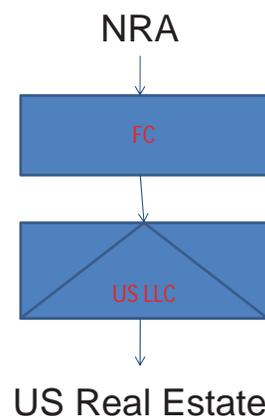
Structure 1—NRA Directly Owns U.S. Real Estate Pass-Through Structure



Structure 1—Attributes

- 15% long-term capital gains rate available
- Only one level of U.S. income tax
- NRA must file Form 1040NR, no anonymity
- No BPT or BLIT applies
- FIRPTA withholding applies when the U.S. real estate is sold
- No U.S. estate tax protection
- No deduction or capitalization of expenses permitted if there is never any income generated by the U.S. real estate
- No liability protection

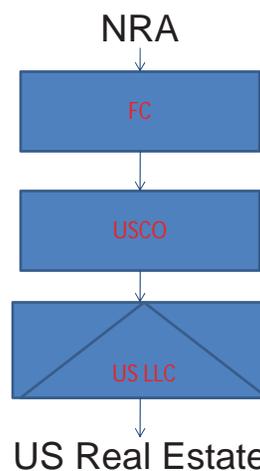
Structure 2—Foreign Corporation Non-Pass-Through Structure



Structure 2—Attributes

- No long-term capital gains rate available
- Federal and state corporate income taxes apply
- FC must file Form 1120F, limited anonymity for NRA
- BPT or BLIT may apply
- FIRPTA withholding applies when U.S. real estate is sold
- Likely U.S. estate tax protection
- No deduction or capitalization of expenses permitted if there is never any income generated by the U.S. real estate
- Limited liability protection for NRA
- **This is the most “traditional” form of planning for NRAs**

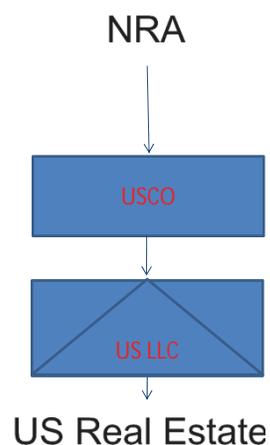
Structure 3—Foreign and Domestic Corporation Non-Pass-Through Structure



Structure 3—Attributes

- No long-term capital gains rate available
- Federal and state corporate income taxes apply
- USCO must file Form 1120, no return generally required for FC, limited anonymity for NRA
- In general, no BPT or BLIT
- No FIRPTA withholding when U.S. real estate is sold, no second-level tax if proper planning
- Likely U.S. estate tax protection
- Deduction or capitalization of expenses generally permitted
- Limited liability protection for NRA

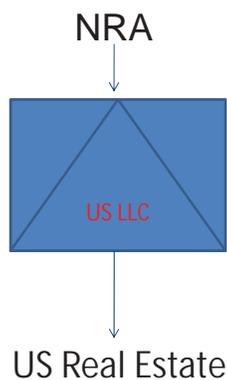
Structure 4—Domestic Corporation Non-Pass-Through Structure



Structure 4—Attributes

- No long-term capital gains rate available
- Federal and state corporate income taxes apply
- USCO must file Form 1120, limited anonymity for NRA
- No BPT or BLIT
- No FIRPTA withholding when U.S. real estate is sold, no second-level tax if proper planning
- No U.S. estate tax protection unless certain treaties apply
- Deduction or capitalization of expenses generally permitted
- Limited liability protection for NRA

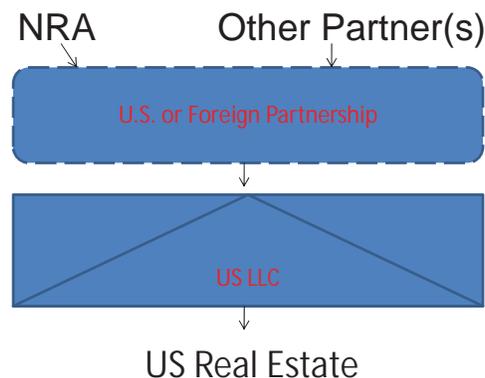
Structure 5—Single Member Domestic LLC Pass-Through Structure



Structure 5—Attributes

- 15% long-term capital gains rate available
- Only one level of U.S. income tax
- NRA must file Form 1040NR, no anonymity
- No BPT or BLIT applies
- FIRPTA withholding applies when U.S. real estate is sold if a single-member LLC
- No U.S. estate tax protection
- No deduction or capitalization of expenses permitted if there is never any income generated by the U.S. real estate
- Limited liability protection for NRA

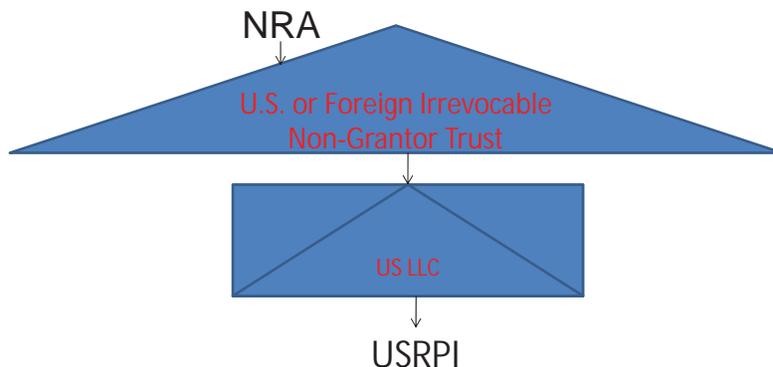
Structure 6—Foreign or Domestic Partnership, Pass-Through Structure



Structure 6—Attributes

- 15% long-term capital gains rate available
- Only one level of U.S. income tax
- NRA must file Form 1040NR using K-1, no anonymity
- No BPT or BLIT applies
- § 1446 withholding applies when the U.S. real estate is sold with regard to NRA's partnership interest
- U.S. estate tax protection is uncertain—the more foreign layers, the better
- Deduction or capitalization of expenses generally permitted
- Limited liability protection for NRA

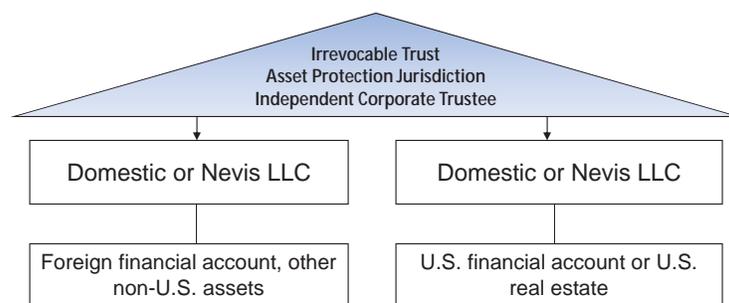
Structure 7—U.S. or Foreign Non-Grantor Irrevocable Trust—Pass-Through Structure



Structure 7—Attributes

- 15% long-term capital gains rate available
- Only one level of U.S. income tax
- Trust generally must file Form 1040NR, anonymity for NRA
- No BPT or BLIT applies
- FIRPTA withholding applies when U.S. real estate is sold
- Likely U.S. estate tax protection
- No deduction or capitalization of expenses permitted if there is never any income generated by the U.S. real estate
- Limited liability protection for NRA
- **This can be the best overall structure for the right NRA client**

“State of the Art” Planning— “Emergency Funds Trust” for Settlor, Spouse, and Family



Note—the timing of potential U.S. tax “check-the-box elections” for each holding company will need to be determined, along with the trust jurisdiction, trustee and the protector or advisory committee.

Taxpayer Considerations: When to Yell " Fire"

Bill Simon

WILLIAM H. SIMON, JR.
PRINCIPAL
W. H. SIMON & COMPANY, P.A.

Mr. Simon, a former IRS executive, has more than 30 years experience in tax administration, public accounting and business management. He is presently principal of W.H. Simon & Company, a public accounting firm concentrating in tax controversy matters before the Internal Revenue Service.

Prior to forming W.H. Simon & Company, he was a tax partner and Director of the Tax Department in an international accounting firm. He was also Director of IRS Practice and Procedures for the firm.

Prior to joining the international accounting firm, his previous experience included 15 years with the Internal Revenue Service. His most recent position with the IRS was Assistant Regional Commissioner of Examination responsible for all examination programs in 7 states. During his career with IRS he has managed all of the functions of IRS including Examination, Appeals, Collection, Criminal Investigation and Service Centers.

Bill brings a dimension to his profession which is truly unique. He provides clients with an inside view of the IRS from a technical, as well as procedural standpoint, and is able to assist clients in making decisions on tax matters. Since forming W. H. Simon & Company, P.A., he continues to aggressively represent clients throughout the country as well as internationally. Bill has conducted seminars for attorneys and CPAs and has served as discussion leader for numerous seminars for professional organizations such as the FICPA, other State CPA Societies, Enrolled Agent organizations and Tax Executive Institute.

WHEN TO YELL “FIRE”
FICPA 27TH ANNUAL ACCOUNTING SHOW
SEPTEMBER 21, 2012
BY W.H. SIMON, JR., CPA

- I. Overview – Are you in “over your head”?
 - A. Know your limitations
 - B. Not a sign of weakness to tell client “you need a person with more expertise in this area”
 - C. Representation with the Internal Revenue Service is not an area that you learn at the expense of your client and in the end at your expense
- II. Focus your practice and your efforts
 - A. Evaluate your “skill sets” and your experience
 - B. Before you take an engagement make sure you know what needs to be done and that you are capable of doing the job
 - C. Don’t rely on advice from sources that you do not “know”
 - D. Today’s world is not a place to be a “generalist”
- III. Specific Areas
 - A. Conflict of Interest
 1. Recognize the existence of conflict of interest and the potential for conflict of interest
 2. If you did not recognize the conflict at the beginning you still may be able to correct the situation
 3. Examples
 - a. Joint return
 - Preparation of returns
 - Examination representation
 - b. Collection
 - Innocent Spouse
 - Delinquent payroll taxes
 - Trust Fund Recovery Penalties
 - c. Examination of returns you prepared
 4. If you accept an engagement with a conflict of interest or potential for conflict of interest, you need a written waiver from the clients involved. The written waiver must be maintained for 36 months after the end of the representation and if requested, available to all IRS employees (§10.29 of Circular 230).

B. Offshore Voluntary Disclosure Transactions

1. Not every client with unreported offshore transactions should participate in the Offshore Voluntary Disclosure Program
2. Make sure you discuss alternatives with your clients prior to putting them into the Offshore Voluntary Disclosure Program
3. Offshore Voluntary Disclosure Program is not an amnesty program
 - no guarantee of non-prosecution

C. Criminal

1. Privilege vs. Confidentiality
2. Use of Kovel Letter and its limitations
3. Recognizing potential criminal issues
 - Preparation of returns
 - Collection issues
 - Examination issues
4. When to call for more experience
 - Another CPA
 - Legal counsel

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