

Accessing U.S. Assets of a Decedent Who Was Neither a U.S. Citizen Nor Resident

by Debra T. Hirsch and Melissa A. Terranova

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Debra T. Hirsch



Melissa A. Terranova

Debra T. Hirsch is a partner and Melissa A. Terranova is an associate with Fox Rothschild LLP.

In this article, Hirsch and Terranova explain how a foreign fiduciary or heir can procure a certificate from the IRS for the transfer of a foreign decedent's U.S. situs assets.

I. Introduction

The U.S. federal estate tax does not apply to the estate of a decedent who was neither a citizen nor a resident of the United States (a foreign decedent), unless the decedent owned assets that were situated in the United States at the time of death. U.S. situs assets having a value of up to \$60,000 are exempt from U.S. federal estate taxes. If the foreign decedent's U.S. assets exceed \$60,000, the excess is subject to U.S. federal estate taxes (unless excepted by an estate tax treaty). Regardless of the value of the foreign decedent's U.S. situs assets, the IRS requires some assurances to confirm that either the foreign decedent's estate is not subject to U.S. federal estate taxes, or if U.S. federal estate tax is due, the required returns have been filed and the tax has been paid.

The U.S. federal estate tax rules provide assurances that the required federal estate tax returns are filed, and taxes are paid when required. Those rules impose (1) a U.S. federal tax lien on all assets subject to U.S. federal estate tax, and (2) affirmative duties and potential personal liability on any person who has actual or constructive possession of a decedent's U.S. situs property. Persons who have actual or constructive possession of a decedent's U.S. situs property include brokers, custodians, and transfer agents (U.S. bankers).

Potential personal liability arises if the person in possession of a foreign decedent's U.S. assets transfers them to anyone other than an executor or administrator (fiduciary) appointed by a U.S. court without confirming that any tax due on the foreign decedent's U.S. assets has been paid. This individual may be personally liable for any U.S. federal estate tax that remains unpaid, up to the value of the decedent's assets formerly in his possession.¹

To avoid the risk of personal liability, most U.S. banks and other financial institutions in possession of a foreign decedent's U.S. assets will not relinquish possession of the decedent's assets to anyone other than a U.S. court-appointed fiduciary until they have ensured that any U.S. federal estate tax that may be due has been paid. To avoid liability, a U.S. banker will freeze the foreign decedent's account or assets until it receives a transfer certificate issued by the IRS or confirmation that a U.S. federal estate tax return is not required to be filed.

¹Section 6324(a)(2).

II. Accessing a Foreign Decedent's U.S. Assets

Access to a foreign decedent's U.S. situs assets held by a U.S. banker can be obtained by a U.S. court-appointed fiduciary or by following the IRS protocol under section 6325 regarding transfer certificates. If a trust holds a foreign decedent's U.S. assets and a U.S. trustee is serving, the U.S. banker can release the trust assets to the trustee, the IRS advised in an informal discussion.

A transfer certificate is a certificate permitting a U.S. banker to transfer U.S. situs property of a foreign decedent without liability.² A transfer certificate is required for any estate of a foreign decedent when a fiduciary has not been appointed by a U.S. court. The value of the U.S. situs assets will determine which returns and documents must be filed with the IRS. The first step is to determine the aggregate value of the foreign decedent's U.S. situs property as of the date of death. U.S. situs property includes real estate and tangible personal property located in the United States, shares of stock of U.S. corporations, and debts owned by a U.S. person.³ U.S. situs property also includes non-probate assets, including assets jointly owned by the decedent and another individual, and assets that have a beneficiary designated (such as an account with a transfer-on-death or pay-on-death designation). However, bank accounts (including checking and savings accounts and certificates of deposit) maintained with U.S. banks are not considered U.S. situs property.⁴

A. U.S. Situs Assets Are \$60,000 or Less

If the value of the foreign decedent's estate is \$60,000 or less, a transfer certificate is not required.⁵ However, a U.S. banker in possession of the foreign decedent's U.S. situs assets may still require assurance that the foreign decedent's estate is not subject to U.S. federal estate taxes. To obtain that assurance, U.S. bankers may accept a statement of facts relating to the estate submitted by the foreign fiduciary or heir "who may be reasonably regarded as in possession of the

pertinent facts," which provides information demonstrating that the total value of the foreign decedent's U.S. situs assets are \$60,000 or less.⁶ If the U.S. banker requires further assurances, the foreign fiduciary or heir must submit the following documents to the IRS:

- A copy of the decedent's last will and testament and any codicils thereto (including an English translation if in another language).
- A copy of each death tax or inheritance tax return and any corrective affidavits or statements filed with tax jurisdictions other than the United States (including an English translation if in another language).
- A copy of the decedent's death certificate (including an English translation if in another language).
- An affidavit, signed and made under oath before a notary public or other comparable local official. The affidavit may be in the form of a letter. The affidavit must include all of the following information: (1) the decedent's date and country of birth; (2) the date and place of the decedent's naturalization as a U.S. citizen or a statement to the effect that the decedent had never become a naturalized U.S. citizen; (3) a list of all the decedent's U.S. assets and the value as of the decedent's date of death for each; (4) the decedent's citizenship and residence at death; and (5) whether any of the decedent's U.S. bank accounts were used in connection with a trade or business in the United States.

If the foreign fiduciary or heir is unable to provide any of these items, the foreign fiduciary or heir must include a statement explaining why. The IRS will review the documents after they are submitted. Generally, the period for the IRS to process the affidavit and supporting documents is 90 days from the time the agency receives them.⁷ After review and processing, the IRS can issue a transfer certificate.

²Reg. section 20.6325-1(a).

³Reg. sections 20.2103-1 and 20.2104-1.

⁴Section 2104(c).

⁵Reg. section 20.6325-1(b)(1)(i).

⁶Reg. section 20.6325-1(b)(3).

⁷See IRS, "Transfer Certificate Filing Requirements for Non-U.S. Citizens."

B. U.S. Situs Assets Exceed \$60,000

If a decedent's U.S. situs assets exceed \$60,000, a Form 706-NA, "United States Estate (and Generation-Skipping Transfer) Tax Return (Estate of Nonresident Not a Citizen of the United States)," with the supporting documents specified in the form's instructions, must be filed with the IRS. If an executor is not appointed, "every person in actual or constructive possession of any of the decedent's property must file a return. If more than one person must file, it is preferable that they join in filing one complete return. Otherwise, each must file as complete a return as possible, including a full description of the property and each person's name who holds an interest in it."⁸ The IRS will issue the transfer certificate after review and acceptance of the Form 706-NA. The time frame for the IRS to process the Form 706-NA is six to nine months.⁹ Afterward, the transfer certificate can be provided to the U.S. banker to release the U.S. assets.

III. Conclusion

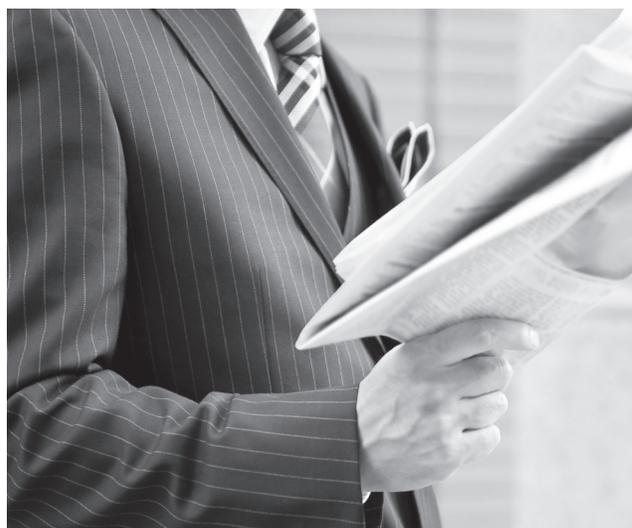
Depending on the value of the foreign decedent's U.S. situs assets, a U.S. banker can permit the transfer of the assets when a U.S. court-appointed fiduciary is serving. When a U.S. court-appointed fiduciary is not serving, a U.S. banker can permit the transfer of the assets on receipt of a statement of facts from the foreign fiduciary, or on receipt of a transfer certificate issued by the IRS. Until the U.S. banker receives these assurances, the foreign decedent's U.S. situs assets may be frozen by the U.S. banker to protect the U.S. banker from any liability for the U.S. federal estate tax. ■

⁸ See IRS, "Instructions for Form 706-NA."

⁹ *Id.*

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