Introduction to International Taxation

Saul Larner, Ph.D.,LL.M., MBA

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ASSET PROTECTION PLANNING

Saul Larner, Ph.D., LL.M.

PROPERLY USED, FOREIGN ASSET PROTECTION TRUSTS ARE AN INTEGRAL AND INTEGRATED PART OF THE OVERALL ESTATE AND FINANCIAL PLAN

Asset protection planning with the foreign trust should be integrated into the overall financial and estate planning for the client and should complement it. Structuring such planning in this manner is not only sensible, but it provides the best argument possible to rebut the suggestion that the planning was motivated by intent to defraud, hinder or delay creditors. Its purpose should be to plan against a possible future event that would result in economic and financial devastation to the grantor's estate.

Foreign situs asset preservation can and should foster accomplishment of the following general estate planning and financial planning goals:

1. Probate avoidance.
2. Confidentiality of Value and Nature of assets
3. Vehicle for Global Investing
4. Ease in Transferring Assets to Family Members
5. Avoidance of Possible Monetary Exchange Controls
6. Will Substitute/Avoid Multiple Wills in Various Jurisdictions where assets are held.
7. Privacy for Estate Plan
8. Facilitate Handling of Affairs in the Event of Disability or Unavailability
9. Flexibility
10. Minimization of Taxes
11. Presevation of Assets for Dependent Family Members
12. Diversification of Asset Management by Using Offshore Trust Company
13. Diversification of Investments into Overseas Securities Markets.

The two goals in the offshore asset protection trust are for the Settler (our U.S. securities client) to protect his assets from his future, potential creditors. This trust will include a spendthrift (anti-alienation) clause and he will remain a beneficiary to use the monies from these securities during his lifetime and those of his heirs.

Because it is much more difficult to access the assets of an offshore trust than a domestic trust, both physically and legally, the effectiveness stems from persuading the potential creditor to not pursue the action or at least settle. (Remember always that, “Settlement is an art”.

Perhaps we tend to feel that our client will not need asset protection as he is an honest man. No doubt he is. However, he may have a lifestyle based on his projected earnings on his securities and all of a sudden the market crashes and he cannot wind down his lifestyle in time to meet his current obligations.

METHODS OF ATTACK

No matter what the circumstances, the creditor must first obtain a judgment against our U.S.investor in a U.S.court. Especially if there are fraudulent conveyance issues. In this case, the U.S. investor is an honest man and a fraudulent conveyance is not an issue. However, if he doesn’t create this mechanism now, he may find that his life circumstances changes later when it will be too late to form the offshore entity without it being a fraudulent transfer. After a judgment is obtained, the creditor may bring a suit against our client in the jurisdiction where the trustee is domiciled on where the trust assets are located.

There are, in actuality, only three arguments that the creditor can claim:

1. Asset protection features of the trust tend to offer public policy in the jurisdiction where the post judgment action is brought. Therefore, the governing law of the trust could be ignored, although it usually isn’t.

2. The Settlor's transfer was fraudulent and should be set aside, which is clearly not the case here as our client plans to have us form the trust expeditiously.
3. The offshore trust is a "sham" trust or is the alter ego of the settler and because the Settlor never really parted with dominion and control over the trust assets, the courts should disregard the trust structure. There are a number of specific methods to address the "control issues" (protectorship, letters of wishes, advisory committees, co-trusteeships, etc.)

<u>THERE ARE TWO TYPES OF CAPITAL ASSET STRUCTURES</u>

There are two ways to shield assets into an offshore asset protection trust.

1. <u>EXPORT THE ASSETS</u>

   All of the assets are placed in a foreign jurisdiction with a foreign structure and a foreign trustee and all ties with the U.S. federal and State federal and state judicial systems are severed. It is difficult for the creditor to travel to this jurisdiction as most of them don't recognize U.S. judgments.

   Moreover, in some jurisdictions, a plaintiff is required to post ten to fifteen percent of the amount claimed as a condition to filing the lawsuit.

2. <u>IMPORT THE LAW</u>

   One selects a favorite jurisdiction in conjunction with a U.S. Family Limited Partnership or other domestic legal entity that holds some of the U.S. investors of the assets.

   A. The U.S. investor conveys all or part of his interests or shares to the foreign trustee. The goal is that the barricades of the aggressive foreign law applicable to this law will have been brought "on shore" to the U.S. in a way as to defeat the creditor.

B. When one imports the foreign law, it may still be possible to export the assets at a later time (by virtue of a liquidation right provided to the trustee/limited partner in the partnership agreement. (There is always the risk that the assets can be frozen here, that the timing of moving constitutes a fraudulent transfer or the immovability of the assets.

C. In this instance, securities are movable and the U.S. investor is not vulnerable to a fraudulent transfer presently. However, timing is always critical and we do live in an imperfect world meaning that the circumstances may in the unforeseen future create a fraudulent transfer situation.

3. ANTI-DURESS CLAUSE: One should insert an "anti-duress" or "anti-alienation" provision which provides that if the trust receives an enforcement order from a U.S. court, they are mandated to ignore the directions from any person who is acting under the jurisdiction of the court. Moreover, it is best that the trustee be mandated to transfer the assets to another jurisdiction.

4. LOCATION OF TRUST ASSETS:

It is best to have the trust assets in jurisdictions other than the trust situs. A creditor can find that a lawsuit filed in the trust situs jurisdiction may be ineffective if the trust assets are not located there. However, this will be ineffective with careless planning. In other words, stay away from a custodial arrangement with a branch of a U.S. bank abroad which may inadvertently expose trust assets to the jurisdiction of the U.S.courts.

THE ROLE AND DUTIES OF THE PRACTITIONER

Before we can recommend an appropriate set of structures for our U.S. client, we must gather sufficient information from him:

1. We must investigate his situation as follows:

   A. We must fully explore his financial situation.

   B. We must obtain an affidavit of solvency so we are not victims of a fraudulent transfer act.

   C. We must examine his financial statement.

   D. Will the plan hinder any present or potential subsequent creditor?

   E. We examine all of his debts, liabilities and obligations in detail and itemize all risks, exposures, guarantees and contingent liabilities. Also,k we gather information about his historic method of doing business and his general reputation among business associates and past creditors.

   F. We investigate to eliminate suspect as to criminal activity and money laundering and if there is any doubt, then we refuse to represent him. We might seek the advice of co-counsel with expertise in creditors' rights and fraudulent transfers when appropriate.

2. We then explore the client's motives.

   A. ECONOMIC OR INVESTMENT ISSUES:

      1. <u>Economic diversification:</u> We might engage a portfolio manager to oversee the international investment component of his assets to reduce economic risk and increase the potential portfolio return. This advisor will have a decided advantage over U.S. money managers in making foreign investment decisions for the client. Further, the arrangement helps to ensure that these assets are co-ordinated with a comprehensive estate plan.

2. There can be participation in investments not otherwise available to the investor. Certain foreign mutual funds and other investment vehicles are not available directly to a U.S. investor, but are available to foreign trusts and foreign corporations, even if owned by, controlled by or benefiting a U.S.investor.
3. Pre-planning in anticipation of currency controls.

B. TAX ON ESTATE PLANNING ISSUES:

1. Tax Transfer Planning
2. Income Tax Planning

C. PERSONAL OR FAMILY ISSUES

1. An offshore trust will establish a new set of financial and legal relationships and will expedite further movement of the U.S. investor wealth in the event he may wish to re-locate in the future.
2. Marital property planning (establishing a vehicle to receive partitioned community property, spousal gifts and to establish qtip trusts).

   NOTE: Careful exploration may uncover multiple benefits of an offshore trust and influence the way the plan is ultimately structured.

TAX TREATMENT OF A TYPICAL ASSET PROTECTION TRUST

Usually, an irrevocable discretionary trust is established by a U.S. citizen or resident Settlor in a foreign jurisdiction whose law recognizes "self-settled" spendthrift trusts (for the benefit of the Settlor) with a trustee who will have the authority to make most of the substantial decisions. The beneficiaries of the trust will include beneficiaries who are citizens or residents in the U.S., members of the Settlor's family, including the settler. Because the trust is so assigned so that the U.S. court will exercise primary jurisdiction over the administration of the trust, and because no U.S. trustees have any authority to control or substantiate decisions of the trust, it is considered a "foreign trust" for U.S. tax purposes. Because it will have U.S. beneficiaries, under code 679, it is treated as a grantor trust and all income is taxed to the grantor.

There is no tax angle when a U.S. citizen or resident establishes a typical asset protection trust. Its income is included in the Settlor's taxable income and its assets are included in the Settlor's gross estate. However, the assets held in the trust at the time of his death will receive a tax-free step up in basis.

USE OF AN INTERNATIONAL BUSINESS COMPANY (IBC) WITH AN OFFSHORE TRUST

An IBC is formed by a nonresident of a favorable non taxable jurisdiction. The trustee of an offshore asset protection trust may transfer the trust assets to the IBC in exchange for its stock. The transfer of appreciated assets by the trustee of an offshore trust to an IBC is subject to a capital gain under I.R.C. #467, unless the IBC is engaged in a trade or business. [1] The IBC then generally contracts with a foreign bank or other investment management firm to manage the assets. A nominee arrangement between offshore trusts and IBC's may avoid the income tax consequences of I.R.C. #367.[2]

The use of IBC's with offshore trusts serves four primary purposes.

1. Corporations are more commonly recognized investment vehicles by civil law countries.
2. There is often a concern about leaving assets in jurisdictions with favorable asset protection laws. The use of an IBC makes it easier to transfer substantially all of the trust assets to a custodial bank or other custodian in a stronger jurisdiction,.

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[1] *See* Osborne, Asset Protection: Domestic and International Law and Tactics, #23.18 (Clark, Boardman & Callaghan, 1995).

[2] I.R.C. #367(d).

3. If the trustee of the offshore trust invests in foreign securities, the settler may be subject to foreign death taxes. By forming an IBC, the trustee, and therefore the settler of an asset protection trust, is deemed to own shares of stock in the IBC, not the securities of companies purchased in other jurisdictions, thereby avoiding foreign death taxes. It is questionable whether a nominee IBC formed by the trustee of an asset protection trust that acquires foreign securities avoids foreign death taxes.
4. Foreign funds and foreign securities can be sold without registering with the U.S. Securities and Exchange Commission under the Regulation S exemption of the 1933 Securities Act. Banks are normally more comfortable contracting with an IBC than the trustee[3]
5. There are 4 major potential tax problems with the IBC.
    A. Capital losses in the IBC are not deductible until the IBC is liquidated.
    B. The IBC converts all capital gains into ordinary income (39.6% tax vs.l 20% tax).
    C. Double taxation results from distributions of dividend income from the U.S. sources (stock in U.S. companies)through the offshore trust to the U.S. beneficiary (or to a direct owner of the IBC); and
    D. There is no step-up in basis at the death of the U.S.shareholder of an IBC not engaged in a trade or business (i.e. it owns passive investment assets).

6. Therefore, the foreign trustee of the offshore trust should form a foreign LLC. None of the four disadvantages as stated above apply. However, only a corporation formed outside the country in which the stock is purchased avoids foreign death taxes. Thus, use of the LLC is only a partial answer. In the U.S., for most entities (foreign or

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[3] *See* Spitz, Barry, International Tax Havens Guide, Offshore Tax Strategies, #18.04, Aspen Publishers, Inc. (2002).

domestic), U.S. persons are allowed to check-the-box (under Treasury Regulations) on IRS Form 8832 to treat an entity as either a corporation or a partnership (or disregarded entity for a one person LLC) for tax purposes. However, the U.S. Treasury Regulations list entities formed under corporate laws of stated jurisdictions as per se corporations. What this means is that if an IBC is formed under any of these particular jurisdictions, the IBC is treated as a corporation for tax purposes, with no election available under the check-the-box. In order to properly plan, the IBC must be formed in a foreign jurisdiction that is not treated under U.S. regulations as a per se corporation for tax purposes. Thus, an IBC, for legal purposes, can be formed, but the check-the-box form can be filed with the IRS to treat this organization as a partnership or disregarded entity for tax purposes. A disregarded entity is a flow-through entity for tax purposes, meaning the owner and not the entity is taxed. This results in treating the entity as a corporation for asset protection purposes and as a flow through entity for tax purposes. With a legal (nto tax) existing IBC, inheritance taxes in a foreign country, such as the U.K. are avoided. However, for tax purposes (not legal), the IBC is treated as a disregarded entity, avoiding the negative tax aspects of an IBC stated above.[4]

[4] *Ibid*

STRICTLY CONFIDENTIAL

CLIENT QUESTIONNAIRE

Prior to commencing a formal relationship with you as our Client, we have a legal obligation to request and obtain information and support documentation as specified in this form. We confirm that all such information and support documentation held by us will be retained in the strictest confidence.

Please note that in order to facilitate the establishment of account relationships with financial institutions e.g. Banks and Investment Brokers, we may be required to furnish these financial institutions with this information and/or copies of the aforementioned to support documentation.

By returning this document and the relevant information and support documentation to us, you will be regarded as having provided us with your consent to act at our discretion in this regard.

CLIENT QUESTIONNAIRE

SECTION 1 - PERSONAL INFORMATION

1	**Name:**		
2	**Residential address:** (Including post code)		
3	**Telephone number:**	**Home**	
		Work	
		Mobile	
4	**Facsimile:**	**Home**	
		Work	
5	**Email:**	**Home**	
		Work	
6	**Work Address:** (Including post code)		
7	**Date of birth:**		
8	**Place of birth**:		
9	**Nationality**:		
10	**Country of tax residency / domicile**		
11	**Occupation:**		
12	**Estimated net worth:** (Please provide brief summary of your principal assets)		
13	**Through whom were you recommended to**		

	Larner Preferred International?	
14	**How should we contact you?**	

Client initial:

SECTION 2 - BACKGROUND INFORMATION

1	**Background:** **(Please provide a brief summary of your career to date or attach a copy of your curriculum vitae)** **This should include details relating to your source of wealth/income**	
2	**Please provide details of the source of funds to be used in relation** **to the business to be transacted.**	

3	**Bankruptcy:** **Have you or any corporation of which you have been an Officer, Director or a ten percent or more shareholder, ever been obliged to come to an agreement with creditors?**	**(Please tick)** YE NO **If yes, please provide details**
4	**Tax, Audit & Tax Returns:** **Are your local tax returns filed to date?**	**(Please tick)** YE NO **If no, please provide details**
	Are you the subject of court proceedings, legal action, litigation or investigation by the authorities of any jurisdiction	**(Please tick)** YE NO **If yes, please provide details**
5	**Liabilities:** **Do you currently have any direct or indirect (e.g. as guarantor) liability for any loan in excess of £100,000 or currency equivalent**	**(Please tick)** YE NO **If yes, please provide full details**

Client Initial:

6	**Criminal Offences:** **Have you, or any corporation of which you have been an officer, director or ten percent or more shareholder, ever been convicted of any crime (other than minor traffic violations), indicted or the subject of any investigation by any law enforcement agency, regulatory body or any foreign agency or government?**	**(Please tick)** YE NO **If yes, please provide full details**
7	**Other Names:** **Have you ever used, or do you currently use, a name other than that provided in section 1 of this questionnaire?**	**(Please tick)** YE NO **If yes, please provide full details**
8	**Financial/Tax/Legal Advice:** **Have you taken such advice concerning this present matter?** (We may request sight of documentary evidence of such advice)	**(Please tick)** YE NO **If yes, please provide full details**
9	**Have you ever used tax planning structures in the past?** If yes please provide full details	**(Please tick)** YE NO **If yes, please provide full details**

DECLARATION

I CONFIRM THAT THE DETAILS GIVEN IN THIS QUESTIONNAIRE ARE, TO THE BEST OF MY KNOWLEDGE, ACCURATE.

SIGNED: ______________________ **DATE:** ______________________

SECTION 3 - SUPPORT DOCUMENTATION REQUIRED

In addition to completing this Client Questionnaire, we are required to request and obtain information and support documentation before we can commence a formal relationship with you as our Client. Larner Preferred International will hold all such information and documentation in the strictest of confidence.

Please provide us with the following documentation: -

1. A certified/notarised clear copy of your passport

2. An original or certified copy of a utility, rates or local authority bill, or bank statement of recent date (i.e. within last three months), showing your name and residential address;

3. A reference from a respected professional who knows you. This should include confirmation of your full name, home address and the length of time that you have been known to the referee – see specimen attached;

N.B. Certification of copy documents may be avoided if the copy is taken by a Larner Preferred consultant other wise then please see attached Certification Guide We will accept certification from a suitable person, such as:

- A Lawyer or Accountant;

- A Director or Manager of a Bank;

- A Notary Public, a member of the Judiciary, a senior Civil Servant, a British Embassy official or a serving Police Officer.

FACT FINDER

INTERNATIONAL TAX PLANNING

FOR MULTI-NATIONAL COMPANIES

Saul Larner, Ph.D.,LL.M.

BUSINESS ENTITIES

1. How should the business activities and the functions of each operation or service entity within the group be distributed globally?

2. What is the most appropriate business form for each entity within the group?

3. What are the likely tax and non-tax risk factors affecting the transaction flows in each structure?

4. Does it meet the business and organization objectives?

5. What should be the form of the entity? Should it be a branch or subsidiary?

6. Who should own it?

7. Would tax treaties reduce the holding rates?

8. Should one use an intermediary company as a holding company?

9. Do you have any intellectual property—patents, logos, trademarks and know how which should be used by the business?

10. Once the business shows a profit, what do you intend to do with the proceeds? *(Use them for personal expenditures or to leverage other investments).*

11. Are there any problems with partners, creditors or customers?

12. Is there a need for expertise in the industry?

13. Is movement a real concern? (i.e. transfer of domicile to be of the same corporate personality).

14. What is the profit motive?

15. To what extent do you plan to rely on the resources of the expansion locations?

16. Who are the business partners, what are their credentials and are they in favor of the expansion?

17. Where are you planning to expand and have you done a business marketing plan?

18. How do your present business financials compare with your projections?

19. What is the nature of the operation and the products or services?

20. What is the size and market share of the existing and potential penetrations per country?

21. What is the projected before-tax rate of return and cash flow (per market)?

22. What are the projected non-tax costs (per market)?

23. Is the project expected to be long or short term?

24. Is the project expected to be run under centralized *management (foreign markets division, foreign representative office or branch or under decentralized management via foreign subsidiaries?).*

25. What are all of the objectives of the client?

26. What is the expected size of the proposed operations and the expected tax issues at operational levels?

27. What is the flow of inbound and outbound cash, (i.e., to what extent does the client want the profits to be repatriated home or left abroad for expansion?

28. Prepare a tax flowchart on major income flows, envisaged from host to home country and identify the key points of tax incidence on each of them.

29. What manufacturing and marketing intangibles does the company own and how mature are they?

30. What funding resources/facilities the company have available?

31. What distribution networks have you considered?

32. Does the company plan to establish a presence in the country or will the marketing and service operations be conducted through independent agents?

33. Will it be necessary to send people to the foreign country to support the service arm of the operations and the manufacturing operations when they commence?

34. In what country do you prefer the management to be in?

35. Would control be direct or advisory?

36. What percentage of local directors will form part of the management team?

37. What nominee directors will be considered?

38. Where would the meetings be held?

39. What formation and recurring costs do you expect?

40. Do you wish to transfer funds or change domicile quickly?

41. Have you considered exchange rates and regulations affecting accumulated funds?

42. What are the exchange controls and currency restrictions?

43. What type of law protection do you require, (i.e. tax treaties)?

44. Are there any financial incentives to locate the manufacturing facility in that country?

45. What is the level of risk of expropriation, political instability or currency restriction that is acceptable to the U.S. company for making direct investments into the foreign country?

46. Would you consider using an intermediary company set up overseas?

47. What are your concerns in avoiding future estate taxes?

48. What distribution networks have you considered?

NON TAX ISSUES

1. Will the laws of the country allow this type of investment?

2. Is the business legal in that country?

3. Are raw materials, other materials and technology available in that country?

4. What are the profit potentials?

5. What is the location and is it convenient?

6. What is its relationship with other countries?

7. Where are the intended markets?

8. Do they have ample and economic work forces?

9. What is the capital investment required?

10. What is the size of the market and can the products or services be used in other countries?

11. What is the sophistication of the society?

12. What is the system and stability of the government?

13. What is the international perception of the government?

14. What is the financial system of the region?

BUSINESS FINANCE

1. How should the foreign investment or creations be financed?

2. Should it be debt or equity, both and in what ratio?

3. Should it be financed by the parent company, locally or from third country sources? Is borrowing funds necessary?

4. Can the funds be retained or used abroad or are they required to be repatriated to the home country?

5. How do you minimize the exchange risks in borrowing?

6. Do you intend to set it up independently or with local partners?

7. What is the business plan of the investor or taxpayer?

8. What return does he expect from the project and when? (i.e. Does he wish to repatriate the profits home as soon as they are earned abroad, or does he wish to keep them abroad for re-investment?).

9. Are there any unusual considerations in the loans you are seeking?

10. Have you investigated the cost of loans from other parties?

11. How much should be financed?

12. Should the assets be actively or passively managed?

13. What is the repatriation and investment policy?

14. Will the investment strategy consist of actively or passively managed assets?

BUSINESS ACQUISITION

1. Should the foreign operations be formed through acquisitions of an existing entity or through the acquisitions of an existing entity or through the incorporation of a new legal entity?

2. Should the acquisition be based on the purchase of shares or assets?

3. When do you plan to implement the plan?

JURISDICTION TAX SYSTEM

1. How does the tax system in the host country interact with the tax system in the home country?

2. Can tax residence in the host country be avoided?

3. Should an intermediary jurisdiction be used for tax purposes?

4. How can we minimize the tax liability or maximize the post-tax profits (return on investment) when the project is fully operational? The assumption is that either the post-tax profits are to be repatriated to the parent company or retained in the subsidiary for expansion abroad or both. Please specify.

5. How can domestic tax law, tax treaties or use of intermediate entities be used to minimize the overall taxability and still meet the business objectives? (It is important to consider that tax liability is a combination of taxable income or tax base and the tax rate, the liability can be reduced if either of the two are reduced).

6. Is the U.S. business expected to be profit or loss generated?

7. What are the marginal tax rates for the past 5 years?

8. Does the group file a consolidated tax return?

9. What past, existing and pending litigation exists with the IRS and any other tax jurisdiction?

TAX TREATIES

1. How are tax treaties interpreted in the contracting states involved?

2. What terms follow the meaning under the domestic law?

3. What are the source and characterization rules?

4. Are tax treaties under renegotiation?

5. Are they likely to be amended in the foreseeable future?

HOME COUNTRY QUESTIONS

1. With which countries does the home country have a double treaty agreement?

2. Does the home country have transfer pricing rules?

3. Does the home country have anti-avoidance or CFC legislation?

4. Does the home country have thin capitalization rules?

5. Will the home country foreign operation have start-up losses? If so, for how long?

6. How will the foreign operation be capitalized?

7. What is the group attitude toward risk?

HOST COUNTRY QUESTIONS

1. Does the host country have a double taxation treaty with the U.S.?

2. Does the host country have any special tax advantages for forming a manufacturing facility?

3. Does the host country have transfer pricing regulations?

4. Does the host country have any applicable customs duties on imports of raw materials for manufacturing the product?

5. What is the direct and indirect cost of labor and how does it compare with other countries?

6. Does the host country have any free-trade zones?

7. Does the host country charge value added tax?

INTERMEDIATE COUNTRY QUESTIONS

1. With which third counties do the home and host countries have double treaty agreements?

2. What level of activity is required for the third country intermediary to have a permanent establishment where sales will be made?

3. Does the intermediary country have accumulated income tax?

Circular 230 Disclosure

Pursuant to IRS Circular 230, Saul Larner, Ph.D., LL.M., dba Larner Preferred International, is providing you with the following notification. The information contained in this presentation is not intended to (and cannot be used by anyone to avoid IRS penalties). This presentation supports the promotion, marketing and planning techniques of real estate relates to investment and personal residence, but not taxation.

You should seek advice based on your particular circumstance from an independent tax advisor or attorney. The above named advisor does not render tax or legal advice, although many segments of real estate sales and marketing advice overlap.

FOREIGN PERSONS INVOLVED IN REAL ESTATE TRANSACTIONS

Foreign ownership of U.S. real estate continues to grow in leaps and bounds in the California marketplace. Some acquire property as a part-time residence, some for investment and in other cases in order to conduct a U.S. business. The U.S. tax rules that apply to ownership and dispositions of U.S. real estate by foreign persons are different in some important respects from the rules that apply to U.S. persons.

As highly skilled advisors, we well know how to properly transact business with foreign investors in U.S. real estate, and to avoid certain personal liabilities for improper U.S. federal income tax compliance, as it pertains to real estate investment advice.

We will consult with you and any appropriate advisors in areas including but not limited to:

1. The curtailment or legal avoidance of estate taxes.

2. Whether an entity is best treated as U.S. or foreign

3. Compliance with the Foreign Investment in Real Property Tax Act (FIRPTA) for sale by foreign persons of U.S. real property interests.

4. Fundamentals of U.S. federal income taxation of foreign investors with U.S. rental income.

Following is an example of one potential procedure for FIRPTA withholding.

1. A Delaware LLC is formed and managed by a Belize related company.

2. A Belize IBC is formed to loan money to the LLC.

   Note: We use the IBC to loan money rather than having a foreigner do so. There are better estate tax results this way. If the foreigner loans to the LLC, that note is secured by the U.S. real estate and would be an asset subject to U.S. estate tax for a non resident or resident alien. However, if a Belize IBC makes the loan, then there is no US estate tax for the Belize IBC.

   The foreigner can hold the shares in the Belize IBC and that is not taxable in the U.S. This is a turn key operation.

3. The foreigner makes offers on real estate and instructs that title be taken in the name of the LLC.

4. A U.S. Trust account is set up at a U.S. Bank for the Belize IBC.

5. U.S. lenders will loan money for purchase of the properties.

6. A deed of trust will be provided as a security instrument to be recorded against the property along with a promissory note.

SAUL LARNER, Ph.D.
MODULE 1
ASSIGNMENT

1. NON TAX ISSUES FOR INVESTING OVERSEAS

A. Business viability
B. Availability of resources
C. Market access
D. Market potential
E. Political and economic stability
F. Government grants and incentives
G. Geographic location
H. Business infrastructure
I. Availability of a skilled and low cost work force
J. Strong currency—less risk of devaluation
K. Asset protection—prevent buyers from coming back to demand refunds.
L. Better copyright and patent laws and enforcement (There are a lot of finite differences in various countries).
M. Some people like to be able to spend more time in certain countries.
N. Some people feel a social responsibility to help certain countries grow.
O. Some people wish for an excuse to visit a country more.
P. I have heard of people who open branches to keep friends and relatives employed.
Q. Belief in the work culture and economic value system of the country (such as China).
R. Management is more productive than burdensome.
S. International financing takes place more efficiently and readily offshore.
T. Employees will have a better quality of life on their salaries.
U. International financing has more flexibility as well. Financing instruments offer more readily an array of variations in types of interest, maturity dates, advance refunding and conversion possibilities.
V. Potentials for more structured insurance and re-insurance. Many high-risk insurance policies (such as political risk or environmental casualty) could not be written onshore because of government regulation and taxation, and many insurance companies would be forced to significantly increase premiums if they were not allowed to reinsure groups of risk.
W. It is a haven for those who understand the risks associated with investment and finance and therefore do not need government interference with their decision processes.
X. Lack of traceability of intangible goods.

Y. Abolished withholding taxes on dividends as well as other taxes.
Z. Avoid domestic liability for economic hazards.
AA. Government assistance programs. (Grants, help with labor supply and other labor issues.
BB. Higher return and acceptable risk are usually better.

2. WHAT IS AN INTERMEDIARY ENTITY?

This is an entity where there is a broker or agent to negotiate between two parties, as opposed to an owner doing the negotiations. This is by one definition. However, perhaps in this course, the answer has to do with conduit financing as it pertains to Section 7701(1). If nothing else, this section gives us the boundaries within which regulations must be framed. The IRS, will of course, be expected to look beyond its bare terms for its tax-favored patterns of international investment.

Common patterns of financing through intermediary entities—back-to-back loans, guarantees, pledges and other security arrangements-are built on contractual links sufficiently concerted to make them "transactions".

A. Reasons you might wish to use an intermediary entity

1. **Help in treaty shopping or take advantage of special tax incentives and exemptions and tax concessions.**
2. **Allow finance to be raised from international capital markets at lower cost.**
3. **Assist in transfer of funds through an acceptable profit extraction or diversion within a global organization. They hold the profits overseas for reinvestment or defer their distribution to the home country until it can be done in a tax-beneficial manner.**
4. **Greater knowledge and skills**
5. **Ease of stricter confidentiality**
6. **More economical structuring of legal mechanisms including all types of documents and formations.**
7. **Knowledge of many variables, such as currency risks and fluctuations which will be used to negotiate more effectively.**
8. **Political, social and business connections which should reduce costs for formation, structuring and operating the business.**
9. **Knowledge of import and export issues and variables.**
10. **Knowledge of laws as they relate to asset protection.**
11. **Knowledge to accomplish the goals as set forth in the answers to the first question above.**

In order to conclude this answer, I must close by saying that in summary, both debt and equity are two key elements of a "financing transaction". The stock in a corporation can be in the form of a similar interest in a partnership or trust that has some essential features of debt. It can also include in the same category of being a "financing transaction" if it is a lease, a license or any other transaction in which a person makes an advance of money or other property or grants rights to use property to a transferee who is obligated to repay or return a substantial portion of the money or other property advanced, or the equivalent of cash.

3. **WHAT ARE THE DIFFERENCES BETWEEN DEBT AND EQUITY IN FOREIGN INVESTMENT?**

   A. **Introductory statement:**
      1. **For those who really want to get into this and possibly as a paper, a good source is "William T. Plumb, The Federal Income Tax Significance of Corporate Debt, 26 Tax L. Rev. 369 (1971).**
      2. **Once the nature of a foreign entity is set, the classification of the interests held in it by its owners still poses problems. The tax regime imposed on CFC's for example, turns significantly on the degree of voting control held by U.S. shareholders as does the indirect credit for foreign income taxes under section 902. It is therefore often necessary to identify voting stock and voting power in foreign entities against a background of foreign corporate norms differing appreciable from those of U.S. law.**

   B. **Dividends (equity) and interest (debt) are treated differently in foreign taxation.**
   C. **Many countries impose withholding taxes on dividends (equity) but not on interest (debt), particularly if there is a tax treaty with the U.S.**
   D. **Debt interests in foreign corporations do not contribute toward their status as CFC's. The corporate debt is usually a capital asset in the hands of a U.S. person and transactions involving that debt (its retirement or transfer, for example, will normally entail a large amount of return of capital (thus permitting the repatriation of foreign earnings at a low tax cost).**
   E. **Many of the exciting maneuvers that once could be carried out with debt in foreign corporations have been blunted by recent changes in U.S. taxation.**
   F. **As stated above, DEBT constitutes BONDS. EQUITY constitutes shares in the company. Here are some characteristics of debt (bonds).**

      1. **Loans to company with or without interest payments as opposed to equity which is a return payable in dividends.**
      2. **Interest in debt (bonds) are payable at regular intervals or maturity.**

3. **Interest in debt is either fixed or variable where dividends are based on profits (equity).**
4. **With debt (bonds), the loan can be unsecured or guaranteed by the parent company.**
5. **With debt, there can be a back to back arrangement**
6. **Loan can be paid back in local or an agreed to foreign currency.**
7. **Borrower is obligated to comply with loan covenants, but in equity there is no commitment expect to pay dividends.**
8. **Per all of the above, of course, with both equity and debt, the holder of the securities can sell their holdings at a profit or loss.**

G. There can be hybrid instruments which combine both.

1. **Convertible loans**
2. **Option loans**
3. **Subordinated loans**
4. **Profit participation instruments**

H. Deduction of dividends (equity) is often changing in favor of the stockholder.

I. Interest expense (debt) is disallowed over "excess limitation".

J. As a dividend is distributed from TAXED profits and the interest is paid from pre-tax profits, the borrower can reduce these taxes by financing primarily through debt (as opposed to equity).

K. Loans may be obtained in any currency to avoid foreign risk.

L. "Double Dipping". This is a double deduction that can be obtained for the interest costs if the parent company borrows at home to invest in a foreign subsidiary in a tax haven, which then grants a loan to a sister subsidiary in the host country. (This is one example as to how intermediary is used).

M. Unlike dividends, interest income does not suffer from economic double taxation in the hands of the borrower or lender.

N. Equity may be preferred if there is low withholding tax on dividends in the host country and the foreign dividends are tax exempt at home. Also, if there are restrictions on the use of loan capital. The interest may not be deductible until paid and not on an accrual basis.

O. Under normal circumstances, debt is preferred to equity. The borrower can reduce his taxes by financing primarily through debt as opposed to equity capital.

4. DIFFERENT TYPES OF ENTITIES YOU WOULD CONSIDER AS AN OVERSEAS INVESTOR.

1. AGENCY. In order to deter a taxable event, the agent must be economically and legally independent, and preferably not act for only a single principal.

He must bear the entrepreneurial risks and be free to ac t without detailed instructions from the principal. (He is known in this country as an independent contractor). One example would be to hire this person to generate sales in a foreign country or pay him to produce "widgets". The disadvantage is that he cannot produce either just for you and you might not like to see him work for others as you may need his entire production and keep your ideas secret.

2. LICENSING ARRANGEMENT

Licensing a foreign entity to manufacture or market goods or services can be a low cost alternative to setting up one's own business presence abroad. The advantage is that it requires no cash investment and earns licensing royalties on the transfers of technology and other intangible rights. In addition, it provides the opportunities for the sale of specialized plant and equipment, raw materials or semi-finished components, training, technical assistance, etc. More advantages are that the licenser benefits from the existing market penetration, the marketing and distribution systems, local knowledge and connections and the operational facilities of the licensee.

The disadvantages are that once the overseas business activity is established, he may have problems in retaining effective control over the business conducted by the licensee. It may also limit his ability to establish his own presence in that market in future or to maintain or increase the royalty rates after a specified period. There is also the potential risk of inadequate protection over the intangible property rights. Nevertheless, licensing is widely used and is an attractive low-cost way to expand the business abroad.

3. FRANCHISING

This is a contractual relationship between the franchiser and franchisee. The franchiser grants a limited license to the franchisee for his system. He offers and maintains a continuing interest in the business of the franchisee in areas, such as marketing, quality control, systems, know-how and training. The franchisee makes a substantial capital investment in the business form his own resources and operates under the common trade name, marketing and systems provided by the franchiser.

Unlike a pure licensing arrangement as above, it is probable that the franchiser will be deemed to have a permanent establishment in the host country. He will also be exposed to transfer pricing issues and the product and service risks incurred by the franchisee.

4. REPRESENTATIVE OFFICE

A business presence can be maintained through a low-cost representative office. The disadvantage is that as a branch, it becomes taxable in the source state because it is a permanent establishment. However, depending on the jurisdiction, it can maintain a supply of goods, handle advertising, supply information and other activities on a tax-free basis. That is the advantage.

5.BRANCH

It is the same legal entity as the head office and its other branches. The company retains full ownership and control over its branch. It operates under the name of the company and the financial results are included in the company's accounts. The advantages are that there are no minimum capital requirements and no capital taxes, stamp duties or withholding taxes on remittances. It can be set up easily. There is no double taxation on the profits repatriated to the head office. The controlled foreign corporation rules do not apply.
It is unsuitable for long-term overseas investment or operations. It subjects the parent company to unlimited liability on its obligations. The local regulations may require a public filing of the parent's audited accounts and subject it to public disclosure.

A good strategy is to set up a branch during the period of start-up losses and to convert it to a subsidiary later when it becomes profitable.

6. COMPANY

One advantage is that it is usually more tax-beneficial as an entity than a branch. Like a branch, it is normally not taxable as a nonresident permanent establishment. It permits the deferral of tax by the State of the parent company until its profits are declared as dividends There are other tax planning opportunities which include the justified use of profit extraction techniques and structures involving intermediary offshore entities.

The disadvantages are that it has more demanding set-up and compliance requirements. It is subject to anti-avoidance measures, such as thin capitalization rules, transfer pricing and controlled foreign corporation rules. The dividend payments are subject to economic double taxation in countries using the classical tax system. There is usually no relief for the losses of the subsidiary. In some countries, a local company also requires equity participation by local residences.

7. PARTNERSHIP

Partnerships may be taxed as "pass through entities" where the individual partners bear the tax, or as companies subject to corporate tax.

The liability is limited and they cannot benefit usually from tax treaties. It can be a suitable entity for tax purposes because as pass through entities, they avoid the economic double taxation on dividends under the classical tax system.

A big disadvantage is that one of the partners usually has to assume unlimited liability.

9. **FOREIGN TRUSTS WITH U.S. GRANTORS**
10. **TRUE TRUSTS**
11. **FOREIGN TRUSTS WITH FOREIGN GRANTORS**
12. **HYBRID STRUCTURES**
13. **LIMITED LIABILITY COMPANIES**
14. **COMPANIES LIMITED BY SHARES**
15. **COMPANIES LIMITED BY GUARANTEES**
16. **COMPANIES LIMITED BY BOTH SHARES AND GUARANTEES**
17. **NO LIABILITY COMPANIES**
18. **UNLIMITED COMPANIES**
19. **MUTUAL COMPANIES**
20. **REGISTERED LISTED COMPANIES**
21. **CAPITAL MAINTRENANCE EXEMPT COMPANIES**
22. **INERNATIONAL BUSINESS COMPANIES**

I am not elaborating herewith on these last ones because whereas they weren't in the assigned reading, I assumed that it was getting into depth. As I do the paper in this module, I will refer to them. Otherwise, in future chapters. If I am inappropriate in not elaborating herein, please afford me the opportunity to further complete this answer. Thank you.

Saul Larner, Ph.D.

THE OFFSHORE ASSET PROTECTION TRUST

Saul Larner, Ph.D., LL.M.

The goal of this paper is for the reader to see the importance for the settler (our U.S. securities or other highly appreciated asset type of client) to protect his assets from his future, potential creditors. He should use an offshore asset protection trust for this purpose. This trust will include a spendthrift (anti-alienation) clause and he will remain a beneficiary to use the monies from these securities during his lifetime and those of his heirs.

Because it is much more difficult to access the assets of an offshore trust than a domestic trust, both physically and legally, the effectiveness stems from persuading the potential creditor to not pursue the action or at least settle. Remember always that, "Settlement is an art".

Perhaps we tend to feel that our client will not need asset protection as s/he is an honest
person. No doubt s/he is. However, s/he may have a lifestyle based on their projected earnings on their securities and all of a sudden the market crashes and s/he cannot wind down their lifestyle in time to meet his current obligations.

THE ROLE AND DUTIES OF THE PRACTITIONER

Before we can recommend an appropriate set of structures for our U.S. client, we must gather sufficient information from him:

3. We must investigate one’s situation as follows:

    A. We must fully explore one’s financial situation.

    B. We must obtain an affidavit of solvency so we are not victims of a fraudulent transfer act.

    C. We must examine one’s financial statement.

    D. We must see if this plan will hinder any present or potential subsequent creditor.

    E. We examine all of one’s debts, liabilities and obligations in detail and itemize all risks, exposures, guarantees and contingent liabilities. Also, we gather information about one’s historic method of doing business and his general reputation among business associates and past creditors.

    F. We investigate to eliminate suspect as to criminal activity and money laundering and if there is any doubt, then we refuse to represent this potential client.. We might seek the advice of co-counsel with expertise in creditors’ rights and fraudulent transfers when appropriate.

4. We then explore the client’s motives.

    A. ECONOMIC OR INVESTMENT ISSUES:

        4. <u>Economic diversification:</u> We might engage a portfolio manager to oversee the international investment component of one’s assets to reduce economic risk and increase the potential portfolio return. This advisor will have a decided advantage over U.S. money managers in making foreign investment decisions for the client.

Further, the arrangement helps to ensure that these assets are coordinated with a comprehensive estate plan.

5. There can be participation in investments not otherwise available to the investor. Certain foreign mutual funds and other investment vehicles are not available directly to a U.S. investor, but are available to foreign trusts and foreign corporations, even if owned by, controlled by or benefiting a U.S. investor.
6. Pre-planning in anticipation of currency controls.

B. TAX ON ESTATE PLANNING ISSUES:

3. Tax Transfer Planning
4. Income Tax Planning

C. PERSONAL OR FAMILY ISSUES

3. An offshore trust will establish a new set of financial and legal relationships and will expedite further movement of the U.S. investor wealth in the event one may wish to re-locate in the future.
4. Marital property planning (establishing a vehicle to receive partitioned community property, spousal gifts and to establish QTIP trusts).

   NOTE: Careful exploration may uncover multiple benefits of an offshore trust and influence the way the plan is ultimately structured.

METHODS OF ATTACK

No matter what the circumstances, the creditor must first obtain a judgment against our U.S. investor in a U.S. court. Especially if there are fraudulent conveyance issues. In this case, the U.S. investor is an honest person and a fraudulent conveyance is not an issue. However, if he doesn't create this mechanism now, s/he may find that their life circumstances changes later when it will be too late to form the offshore entity without it being a fraudulent transfer. After a judgment is obtained, the creditor may bring a suit against our client in the jurisdiction where the trustee is domiciled on where the trust assets are located.

There are, in actuality, only three arguments that the creditor can claim:

4. Asset protection features of the trust tend to offer public policy in the jurisdiction where the post judgment action is brought. Therefore, the governing law of the trust could be ignored, although it usually isn't.
5. The settler's transfer was fraudulent and should be set aside, which is clearly not the case here as our client plans to have us form the trust expeditiously.
6. The offshore trust is a "sham" trust or is the alter ego of the settler and because the settler never really parted with dominion and control over the trust assets, the courts should disregard the trust structure. There are a number of specific methods to address the "control issues" (protectorship, letters of wishes, advisory committees, co-trusteeships, etc.)

THERE ARE TWO TYPES OF CAPITAL ASSET STRUCTURES

There are two ways to shield assets into an offshore asset protection trust.

5. EXPORT THE ASSETS

   All of the assets are placed in a foreign jurisdiction with a foreign structure and a foreign trustee and all ties with the U.S. federal and State federal and state judicial systems are severed. It is difficult for the creditor to travel to this jurisdiction as most of them don't recognize U.S. judgments.

   Moreover, in some jurisdictions, a plaintiff is required to post ten to fifteen percent of the amount claimed as a condition to filing the lawsuit.

6. IMPORT THE LAW

   One selects a favorite jurisdiction in conjunction with a U.S. Family Limited Partnership or other domestic legal entity that holds some of the U.S. investors of the assets.

   A. The U.S. investor conveys all or part of his interests or shares to the foreign trustee. The goal is that the barricades of the aggressive foreign law applicable to this law will have been brought "on shore" to the U.S. in a way as to defeat the creditor.

   B. When one imports the foreign law, it may still be possible to export the assets at a later time (by virtue of a liquidation right provided to the trustee/limited partner in the partnership agreement. (There is always the risk that the assets can be frozen here, that the timing of moving constitutes a fraudulent transfer or the immovability of the assets.

C. In this instance, securities are movable and the U.S. investor is not vulnerable to a fraudulent transfer presently. However, timing is always critical and we do live in an imperfect world meaning that the circumstances may in the unforeseen future create a fraudulent transfer situation.

7. <u>ANTI-DURESS CLAUSE:</u> One should insert an "anti-duress" or "anti-alienation" provision which provides that if the trust receives an enforcement order from a U.S. court, they are mandated to ignore the directions from any person who is acting under the jurisdiction of the court. Moreover, it is best that the trustee be mandated to transfer the assets to another jurisdiction.

8. <u>LOCATION OF TRUST ASSETS:</u>

It is best to have the trust assets in jurisdictions other than the trust situs. A creditor can find that a lawsuit filed in the trust situs jurisdiction may be ineffective if the trust assets are not located there. However, this will be ineffective with careless planning. In other words, stay away from a custodial arrangement with a branch of a U.S. bank abroad which may inadvertently expose trust assets to the jurisdiction of the U.S. courts.

TAX TREATMENT OF A TYPICAL ASSET PROTECTION TRUST

Usually, an irrevocable discretionary trust is established by a U.S. citizen or resident settler in a foreign jurisdiction whose law recognizes "self-settled" spendthrift trusts (for the benefit of the settler) with a trustee who will have the authority to make most of the substantial decisions. The beneficiaries of the trust will include beneficiaries who are citizens or residents in the U.S., members of the settler's family, including the settler. Because the trust is so assigned so that the U.S. court will exercise primary jurisdiction over the administration of the trust, and because no U.S. trustees have any authority to control or substantiate decisions of the trust, it is considered a "foreign trust" for U.S. tax purposes. Because it will have U.S. beneficiaries, it is treated as a grantor trust and all income is taxed to the grantor[5].

There is no tax angle when a U.S. citizen or resident establishes a typical asset protection trust. Its income is included in the settler's taxable income and its assets are included in the settler's gross estate. However, the assets held in the trust at the time of his death will receive a tax-free step up in basis.

USE OF AN INTERNATIONAL BUSINESS COMPANY (IBC) WITH AN OFFSHORE TRUST

An IBC is formed by a nonresident of a favorable non taxable jurisdiction. The trustee of an offshore asset protection trust may transfer the trust assets to the IBC in exchange for its stock. The transfer of appreciated assets by the trustee of an offshore trust to an IBC is subject to a capital gain under I.R.C. #467, unless the IBC is engaged in a trade or business. [6] The IBC then generally contracts with a foreign bank or other investment

[5] IRC #679
[6] *See* Osborne, Asset Protection: Domestic and International Law and Tactics, #23.18 (Clark, Boardman & Callaghan, 1995).

management firm to manage the assets. A nominee arrangement between offshore trusts and IBC's may avoid the income tax consequences of I.R.C. #367.[7]

The use of IBC's with offshore trusts serves four primary purposes.

6. Corporations are more commonly recognized investment vehicles by civil law countries.
7. There is often a concern about leaving assets in jurisdictions with favorable asset protection laws. The use of an IBC makes it easier to transfer substantially all of the trust assets to a custodial bank or other custodian in a stronger jurisdiction,.
8. If the trustee of the offshore trust invests in foreign securities, the settler may be subject to foreign death taxes. By forming an IBC, the trustee, and therefore the settler of an asset protection trust, is deemed to own shares of stock in the IBC, not the securities of companies purchased in other jurisdictions, thereby avoiding foreign death taxes. It is questionable whether a nominee IBC formed by the trustee of an asset protection trust that acquires foreign securities avoids foreign death taxes.
9. Foreign funds and foreign securities can be sold without registering with the U.S. Securities and Exchange Commission under the Regulation S exemption of the 1933 Securities Act. Banks are normally more comfortable contracting with an IBC than the trustee[8]
10. There are 4 major potential tax problems with the IBC.
    A. Capital losses in the IBC are not deductible until the IBC is liquidated.

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[7] I.R.C. #367(d).

[8] *See* Spitz, Barry, International Tax Havens Guide, Offshore Tax Strategies, #18.04, Aspen Publishers, Inc. (2002).

B. The IBC converts all capital gains into ordinary income (39.6% tax vs.l 20% tax).

C. Double taxation results from distributions of dividend income from the U.S. sources (stock in U.S. companies)through the offshore trust to the U.S. beneficiary (or to a direct owner of the IBC); and

D. There is no step-up in basis at the death of the U.S. shareholder of an IBC not engaged in a trade or business (i.e. it owns passive investment assets).

6. Therefore, the foreign trustee of the offshore trust should form a foreign LLC. None of the four disadvantages as stated above apply. However, only a corporation formed outside the country in which the stock is purchased avoids foreign death taxes. Thus, use of the LLC is only a partial answer. In the U.S., for most entities (foreign or domestic), U.S. persons are allowed to check-the-box (under Treasury Regulations) on IRS Form 8832 to treat an entity as either a corporation or a partnership (or disregarded entity for a one person LLC) for tax purposes. However, the U.S. Treasury Regulations list entities formed under corporate laws of stated jurisdictions as per se corporations. What this means is that if an IBC is formed under any of these particular jurisdictions, the IBC is treated as a corporation for tax purposes, with no election available under the check-the-box. In order to properly plan, the IBC must be formed in a foreign jurisdiction that is not treated under U.S. regulations as a per se corporation for tax purposes. Thus, an IBC, for legal purposes, can be formed, but the check-the-box form can be filed with the IRS to treat this organization as a partnership or disregarded entity for tax purposes. A disregarded entity is a flow-through entity for tax purposes, meaning the owner and not the entity is taxed. This results in treating the entity as a corporation

for asset protection purposes and as a flow through entity for tax purposes. With a legal (no tax) existing IBC, inheritance taxes in a foreign country, such as the U.K. are avoided. However, for tax purposes (not legal), the IBC is treated as a disregarded entity, avoiding the negative tax aspects of an IBC stated above.[9]

[9] *Ibid*

FOREIGN NATIONAL MISSION STATEMENT

The mission and vision of S P LARNER is to become the preferred “custom shop” capable of creating integrated wealth planning strategies customized to the diverse needs of the foreign national client. We utilize the most competitive and cutting edge methods as they relate to real estate strategies.

In meeting our clients’ special objectives, we expect to be known for our character, commitment and competence. Our practice serves every foreign and domestic market for every individual and family who has a real estate need and the confidence and willingness to follow our recommendations.

It is our mission to define and implement the real estate game plan which will establish long term relationships with our foreign national clients who are financially stable and recognize the right balance to achieve their financial objectives within a comfortable time frame and to receive the maximum return on their real estate holdings with a minimum risk through effective purchasing, capital structures and mortgage financing.

It is our mission to educate the foreign national buyer of real estate in the U.S. to have the necessary facts available when he decides what types and terms of purchases he expects to make. Hopefully, they will feel better about their goals than they did prior to approaching us.

We will differentiate from the competition in a manner which is noticeable and personally meaningful to and well appreciated by our clients.

ANCA REALTY VISION STATEMENT

1. To become the highest level real estate firm in the highly specialized area of properties suitable for the foreign investor. We will be dedicated to and recognized for state of the art strategies to achieve tax advantaged objectives with optimum returns and minimum risk.

2. To possess the talent necessary to offer exceptional mortgage default resolution strategies to provide strong investment opportunities for our foreign clients.

3. We will see that our team will excel in this endeavor because there is no other opportunity that can inspire the passion, drive and profit potentials than in the foreign markets which are our prime focus.

4. We are committed to excellence in approach and to be on the cutting edge with our alertness and responsiveness to changes in our profession.

5. We expect our clients to seek us out because of our ability to customize programs to meet their diverse needs. This will include, but not be limited to quantitative methods in market forecasting techniques and the very latest financial planning techniques. Moreover, our real estate sales efforts will be tailored to our client's risk factor that will improve their overall financial security and comfort level in meeting their future financial goals.

6. Our professionalism will draw a dynamic, motivated and loyal staff who wish to build their future with the future of our efforts, based on the continuous and challenging growth opportunities.

7. We expect that our group will be highly publicized with frequent invitations to appear on talk shows and other media, to write featured articles in periodicals and to be published.

8. We will expect to be known for our character, commitment and competence. It will be the responsibility of our group to make certain that our clients do not "fall short" in their time of need for themselves and their families. We sill strive to make them happy and content.

9. We will properly educate our clients, allowing them to make wise investment decisions and to secure a better future. They will feel better about their goals than when they were first approached by us.

10. Our group will constantly be seeking new and innovative ways to help individuals and businesses set and achieve their financial goals through cutting edge and state of the art, strategic planning techniques.

11. We will all strive to be certain that our prospects and clients regard us as a resource who have exceeded expectations by the manner in which we fulfill needs, satisfy wants and solve problems. They will learn of our professional abilities and our desire to specialize in an unexcelled manner.

12. We will serve diligently in social and civic events where we have assumed responsibilities by attempting to enrich the lives of others and thus feeling entitled to the rewards which will include referrals and new business.

13. We will further position ourselves as being highly innovative and professional in the field through third party endorsements, testimonial letters and personal introductions.

I preface the list of questions with the following:

A. We have information only regarding that he has dealt with the non-tax issues and we are to focus only on the tax issues (even if we disagree with the non tax issues). Thus, when it comes to writing the proposal, the advisor should clear state that he is addressing the tax issues only.

B. We have no other information ahead of time that pertains to his needs for borrowing and we cannot assume whether he is or is not well funded.

C. As in all situations, one cannot go in sequence on the list of questions. One answer brings up certain discussions which would change the order of questioning or else there would be too many loose ends. Therefore,to comply with this assignment, I have chosen the 5 questions and will put additional questions under a separate heading, although in real life, I would probably change the order.

5 QUESTIONS:

1. What is your motive regarding profits?

2. Do you have a high equity base or will you require financing?
   If so, what possibilities have you considered?

3. Is there a need for expertise in the foreign jurisdiction?

4. What forms of business entities have you considered and how do you feel about each?

5. Have you completed a long range business plan? If so, may I see it?

ADDITIONAL QUESTIONS:

6. When do you project that the business will be profitable?

7. Do you have any intellectual property and know-how which will remain with the business?

8. What do you intend to do with the profits? Will you take them out of the business or let them remain for future endeavors?

9. What types of expansion are needed? Administrative, distribution, manufacturing, etc.

10. To what extent will you rely on the resources of the expansion locations?

11. Are there any specific problems with partners, creditors or customers?

QUESTIONS ABOAUT THE OVERSEAS EXPANSION:

12. Nature of operation and products or services.

13. Markets (size and shares and potential pentetration per country).

14. Projeted before-tax rate of return and cash flow (per market).

15. Projected non-tax costs (per market).

16. Whether the project is planned to be long-term or short-term?

17. Whether the project is planned to be run under centralized management (foreign markets division), foreign representative office or branch); or under decentralized management (via foreign subsidiary)?

18. Financing policy (where to finance--home or overseas), how to finance (equity/debt), how much to finance) and investment strategy (active, passive managed assets). OF COURSE, HERE WE ARE GETTING THE CLIENT'S THINKING OF THE SUBJECT.

19. Repatriation/reinvestment policy

QUESTIONS ABOUT THE DOMESTIC BUSINESS:

20. Whether the business within the US is projected to be profitable or loss-generating in the years to come,(as opposed to an earlier question about the past). (If the client responds, then ask for the numbers).

21. Marginal tax rates for the past five years. (This is for the advisor to determine and he needs to see proper records to determine this).

22. Tax attributes (NOLs NCLs, FTCs excess).

23. Whether the firm files consolidated tax returns.

PERSONAL PROFILE QUESTIONS:

24. Attitude toward risk (aggressive, middle of the road, conservative).

25. Past, existing and pending litigation (especially with the IRS).

ADDITIONAL QUESTIONS

26. Do you wish to repatriate your loan payments back into the U.S.?

27. Have you given thought to the currency of the debt you have selected?

28. Have you considered a program to convert debt to equity at a future time?

29. Are there any unusual considerations in the loans you are seeking?

30. Have you determined the parameters of the various aspects of the loan (i.e. debt-equity ratio, interest cover interest rate, size and duration of loan, relationshipo between lender and borrower, risk of profit sharing, repayment terms, loan convertibility, subordinated rights, etc.).

31. Would independent parties grant the same loan under the same conditions?

32. Do your sources of lendders include any related persons or have a definite relationship such as board members or share holders?

33. Do you intend for the subsidiary company to be undercapitalized and that the loan from the parent company will be of a permanent nature or on a non-arms length basis?

34. Have you investigated the cost of similar loans from other parties?

35. How do you feel about forming an entity in a country that doesn't have certainties on taxation relating to cross border transfer price issues?

MODULE 1
INTERNATIONAL TAX PLANNING
MALAYSIA COMPARATIVE ASSIGNMENT

Dear Valued Client's Financial Advisor

This letter of recommendation will first summarize your objectives as I understand them as well as propose a capital structure to address tax and non tax issues as follows:

FACTS AS I UNDERSTAND THEM:

You have made a decision to invest in Malaysia to set up a manufacturing plant for the entire Asian market. Therefore, I assume that the bulk of the production will be sold outside Malaysia.

I assume that you have forecasted the sales volume to be $2,000,000 for the first year with an increase of 20 percent each year for the additional 4 years. We assume that the gross profit before expenses will be a 20 percent loss during each of the first two years with an estimate of expenses of 20 percent leaving a 40 percent net loss before taxes during each of the first two years and then a 40 percent gross profit before expenses less 20 percent in expenses which will net a 20 percent proposed profit in each of the following three years.. However, I assume that these net profits before taxes will not have to be repatriated to the parent company after an initial period of loss during the first two years.

It is my understanding that the nature of your computer manufacturing is one with low-level assembly operations from components sourced from third parties either directly or through the parent company. In speaking with your production and human resource managers, it is my understanding that the key considerations in the labor market are (1)procurement skills, (2)Marketing and brand management and (3)sales and after-sales service organization.

Further, I have been advised by your research and development department that new patents will need to be filed and that they will rapidly increase in value. I further have been advised that you will be coming out with ancillary products which have great potential and that you will probably wish to sell these presently owned patents within a five year period as well as selling off the entire division to an Asian company who plans to use your readable display film to make monitors which will go with the computers they plan to market. I understand that their optimism and budgets are planned because there is no PDA device in the market which has good color in sunlight and they wish to be the first to get into and corner this market, and thus must have your patents to do this with.

Further and of utmost importance, we must take careful consideration to the case that while the parent company is a $50 million company, it is (1)Privately held, (2)The owner, Mr. Willy Saki Tumi owns the patents all personally (3)He wishes to leave $20 million offshore in an entity where his children, grandchildren and greatchildren will have monies for a college education. He wishes to give his daughter a $50,000 bonus if she marries someone other than an attorney. He wishes to have an income of $100,000 a year from the patents to support a young lady who he met in South Beach in Miami and spends a lot of time with. Mr. Tumi doesn't understand that when a 75 year old man has a 23 year girlfriend, with the Miami culture it is possible that she might find it difficult to stay in a relationship with an element of permanence so he wishes to be able to recapture the white Ferrari he is going to make available to her. He wants to protect his assets from his wife as he has heard stories that there are a few cases on record whereby a girlfriend has told her boy friend's wife about their escapades together. He wants to leave no stone unturned in protecting his assets.

He has two sons, 15 and 12 who are planning to go to MIT and study computer sciences and he wants an element of business continuation from an estate planning perspective so they will take over his company. His girl friend suggests that she be the trustee of his estate, but I understand that your attorneys have advised him against it. Their answer is that although he has implicit trust in her, that they feel that a 23 year girl friend who hasn't had a day of work experience or college lacks the experience to manage an estate. Because he feels that she has "street smarts", he wants her to have some input, therefore, you as a team of advisors wish that our recommendations take asset protection planning as an area to which there must be strict adherence and the strategies taken to the highest heights.

Next, we will discuss both tax and non tax issues as well as offshore asset protection planning in various sequences as they all interplay together and all are of the greatest importance in this plan—especially because of estate planning avoidance potentials in this interesting plan, although in Miami where these circumstances are so common.

1. First, we are going to get the patents out of his estate. They are worth only $5,000 now and later will be worth $25 million, hopefully, so we must get it out of the estate now so they will grow outside of it. With a worth of only $5,000 now, Mr. Tumi can use part of his annual gift tax exemption now without any consequences.

2. We will form an IBC in Belize to hold the copyright. This IBC will be owned by a trust. Therefore, if his lovely young lady ever becomes scornful and calls him in for a deposition and her new boy friend, an attorney, decides to ask who owns the IBC, Mr. Tumi can rightfully say without perjuring himself that he is only an employee of the trust and doesn't have to add any further information.

3. This trust now gives Mr. Tumi a private annuity which states that in future years he will get $100,000 a year for life using the proceeds from the sale of the patent. He wishes to assign this to his girl friend as she has indicated that she wants financial security. Mr. Tumi explains to her that the way the law works, he cannot do this as there would be incident of ownership. When she wants money, she has to write a letter of wishes to the trustee requesting this. Her reply is that

she can't feel secure with this arrangement and has asked Mr. Tumi to find a way to come up with money some other way to give her a sense of security. We will deal with this later.

4. Now, let's look at this annuity from a tax perspective. First, in everything we wish to do herewith, we wish to use all of our strategies to keep everything out of sections 672 to 679A which deal with controlled foreign corporations, foreign personal holding companies, etc. As we explained to Mr. Tumi, the IRS here has given us all three ways to pay taxes—now, later and never. His girlfriend was present and very excited about the "never" part and as a result, he concurred. This is not the first time we have seen this re-action from future recipients of money.

5. As you know as advisors, the annuity will grow tax deferred and there will be a small percentage tax when the money is withdrawn. However, because the annuity will eventually be bought out by the IBC which will then be owned by an offshore life insurance policy, the annuity will hopefully collapse within 5 years. The monies will be in an offshore, captive and self directed variable life insurance policy and monies will be borrowed without taxes. The girl friend has volunteered to borrow money for her future spending if it will be helpful to the total mechanism. She further stated that she discussed this with a personal friend who is an attorney and he asked her to mention if there could be what he calls an "escape clause". In that if there is borrowing and not a payback, there will be a reduction in the face value of the policy upon death and future generations will suffer. Unfortunately, this has turned into one of those rare, real life episodes where girl friend an boy friend have a monetary dispute, but we have advised Mr. Tumi that business continuation and dynasty provisions are of paramount importance to him and advised him to leave all decisions to you as his advisors who aren't so emotionally involved.

6. When the patents get sold, there will be borrowing opportunities out of the policy using these funds as well as for annuity payments. In order to keep this Section 7702 and 7702A compliant per the U.S. Tax Code as it pertains to life insurance, there must be five investments. One of these investments will be a factoring company to loan money to both the branch and the parent company with the receivables as collateral as well as putting profits offshore and complying and superceding the economic substance laws.

7. A second company owned by the offshore policy company will be a leasing company. Not only will it lease all hardware, machinery and computers to the parent and subsidiary companies, but it will lease the girl friend's Ferrari to the parent company. She will drive it and although she is a very honest lady, we advised Mr. Tumi that it is never a bad idea to keep people honest.

8. Next, all profits in excess of what is needed for the business and living expenses for Mr. Tumi and his loved ones will be in the offshore life insurance policy. The

businesses will also be owned by the policy for asset protection as well as future tax avoidance. This will co-ordinate with all of the business succession procedures to be followed in preparation for Mr. Tumi's sons taking over the business. While his girl friend has consulted the lawfirm Dewey, Takem and Howe, we recommended that the three of you as his advisors and myself meet with Roy L. Gold who is a highly respected estate planner and that we work out the details together.

9. Now that we have the basic structure which we will herewith summarize as the estate and business continuation plan, the tax sheltered patents, the leasing companies, the private annuities, and the offshore IBC and Trust all working together as a mechanism to curtail any taxes due and to give all present and future generations of Mr. Tumi the estate with the incentive planning he wishes, we will shift this discussion to the capital structures of the offshore entities which will hopefully generate profits in a tax advantaged way to put into the mechanism we have created.

10. You asked about the tax treaties between Malaysia and the United States. It is a moot issue here because all of the profits will be going to Belize and then accessed tax free in the United States. Our concern is regarding the taxes that must be paid on profits earned in Malaysia and it is appropriate that our discussion addresses them herewith. Malaysia doesn't have a tax treaty with the United States. However, with our structure for royalties charged to the company in Malaysia payable in Belize, the factoring company and all other components of the mechanism, the taxes will be minimal.

11. First, Malaysia doesn't tax on world income, but rather only that income that is earned there whether the firm is resident or non resident.

12. The company tax rate is 28 percent and the top personal tax rate is 28 percent and that is for income over RM 250,000. Thus, this is an appealing jurisdiction to send competent personnel to.

13. Dividends are tax-exempt on distribution and receipt. This makes equity financing perhaps more appealing than debt financing.

14. There is a withholding of 15% on interest which makes debt financing (bonds) less appealing.

15. Royalties have a 10 percent tax withholding. However, all royalties will be earned by an IBC in Belize so this is a mute issue here.

16. Technical and management fees are 10 percent. This is not unreasonable and in light of all of the other tax advantages, this fee doesn't deter my enthusiasm for this jurisdiction.

17. There is a real property tax on the disposal of real property over the short term. This is not an issue here for the following reasons. First, the premises are expected to be occupied for the entire five years and then sold to the new firm wishing to take it over. Second, the property will be owned by the Belizian trust and leased to the Malaysian entity. When the property gets sold, there will be rental income which will flow to the dynasty trust in Belize for future generations as well as for the annual income needed by Mr. Tumi to maintain his quality of life.

18. There are minimal anti-avoidance rules and the way we will structure our mechanism, there will be none that apply .There are no thin capitalization or formal transfer pricing rules. There are no Controlled Foreign Corporation rules which apply in Malaysia, in Belize and equally importantly, our structure clearly avoids legally all CFC rules in the United States and everything, even with Malaysia is totally taken out of Sections 672-679.

19. The tax incentives through tax holidays, investment allowances and various double expense deductions are of interest to us in that they offset the 10% technical and management fee taxes. This should come close to an even offset.

20. Losses can be carried forward indefinitely for offset against the same source. This is a very important reason to consider Malaysia because our mechanism will probably show losses and the ability to carry forward these losses will enhance the value of the proposed sale within five years.

21.You mentioned that your CPA asked you to inquire about the United Kingdom, Japan, Australia and India. We have eliminated these jurisdictions for the following reasons. First, none of them offer the tax shelters we wish for offshore planning. The treaties between the U.S. and Ireland have been abolished, the exempt limited companies between England and the Isle of Man are no longer a viable option. Moreover, we don't have an issue of double taxation as we have legally avoided taxation through our mechanism.

21. The salient issues here are that the tax incentives of Malaysia are superb. The tax structure is such that employees will be happy to move there. Third, there is a more than abundant labor supply there to meet your needs. Fourth, the tax laws are appropriate to float a public issue based on the taxation of dividends. Fifth, it will be easier to find the proper technical staff there.

22. The ownership will be the IBC as we discussed. The financing will be done by the sale of offshore stocks to non U.S. residents in the subsidiary company. The securities laws in the U.S. are much too difficult, complicated and expensive to form and raise the $1,000,000 in capital to get this company up and running. Plus, consumer confidence is too low in the United States.

23. However, we will discuss the issues with these countries. In India, a resident company is taxed on its world income The corporate tax rate is 35% plus a surcharge of 2.5% on income and short-term capital gains. The corresponding rate for a foreign country is 40%. What makes it virtually impossible is that nonresident companies are taxed on income received or deemed received or accrued or arising in India, capital gains on assets in India and income such as royalties and technical service fees for ser vices rendered in India. Moreover, in case of "business connection" in India, any income attributable to that connection is also taxable.

24. There are a few specific anti-avoidance rules in India with strict compliance and stringent penalties.

25. Their royalties tax incentives are being phased out and they seem to have little or nothing more than one can get in Malaysia.

26. It is easier to sell stock in the firm to an offshore mutual fund or to a private placement to an offshore entity investor. This gives one economic substance. In other words, for a U.S. citizen to put money offshore, he must have a reason to do so. One reason is that he wishes to invest in a certain company and he is not allowed to do so if he is a U.S. citizen as it is unregistered stock. Thus, he has an economic benefit to put his money into an offshore IBC which will then use the money to buy the stock. Not only does he feel that the company will take off and he has the right to take advantage of it, but he wishes to invest in a company in Malaysia because of their tax advantages and incentives.

27. We have totally eliminated Japan as the cost of production is too high, although they have a high tech labor pool. Most of the Japanese companies who compete have opened manufacturing facilities in Mexico because of the tax incentives there as well as the much lower cost of labor.

“If you perceive a contradiction, check your premises”.
(Francisco said to Dagny in “Atlas Shrugged” by Ayn Rand

1. The past secretary of the treasury, Paul O’Neill, on behalf of the United States backed out of the OECD’s program by asserting. “The courts ruled that companies were not engaged in sham operations to avoid income taxes as long as activities were carried out with even the most slender of business purposes and companies run a tiny risk of earning a profit by suffering a loss.

2. Bowing to this opposition, the OECD ceased striking against the heart of tax havens’ appeal by eliminating no and low tax rates from its definition of “harmful activities”.

3. The treasury department has warned that simply trying to stop inversions is hazardous because it probably would encourage a shift to other ways to accomplish reincorporation of a U.S. corporation in a low or no tax haven.

4. The U.S. has encouraged the use of financial and trade centers to create tax incentives for exporters like Boeing and Microsoft simply by the exporters using a company, which is set up in hours in a tax free center (such as the Bahamas and Nevis).

5. The U.S. grants approximately 90% tax reduction for establishing business in the U.S. Virgin Islands, as it did to build up Puerto Rico.

6. The U.S. increased the estate tax exemption as well as the sums of monies that can be put into a qualified retirement plan. The IRS has perhaps the most liberal tax exemption features of life insurance plans than anywhere in the world.

7. Further, it is the onshore world where a majority of money laundering takes place, but the offshore world takes the heat.

8. We must consider that tax loopholes get passed in Congress where the legislators see them, but the IRS has not.

9. The IRS recognizes numerous types of legal trust arrangements and that they are commonly used for estate planning, charitable purposes and holding assets for beneficiaries on a tax avoidance basis.

10. Moreover, a legitimate trust is allowed to deduct distributions to beneficiaries from its taxable income with a few modifications. Therefore, trusts can eliminate distributions to other trusts or other entities as long as they are named as beneficiaries.

11. The IRS has proved that their prime focus is on economic substance. We have all read cases where it is clear that trusts were backdated. However, the IRS put on blinders and focused only on the issue of economic substance.