Kate Kalmykov (00:09):

Hi everyone and welcome to the Immigration Insights Podcast presented by the GreenbergTraurig Global Immigration and Compliance Group. My name is Kate Kalmykov and I co-chair the Immigration Group at GT. In this capacity, we work with a lot of high net worth foreign nationals, a lot of companies in structuring their immigration to the United States. Because we are a large law firm, we have the benefit of working with many of our colleagues to create efficient tax structures as part of transferring operations to the US and personnel to the US. We also regularly work with our tax partners on optimizing tax structures for high net worth foreign nationals, looking for either a non-immigrant work visa to the United States or permanent residency and eventual citizenship. I'm honored today to be joined by my colleague from the tax group, Erez Tucner. Erez, can you briefly introduce yourself and tell us a little bit about your practice here at GT?

Erez Tucner (01:19):

Hello Kate and thank you first of all very much for inviting me to your Immigration Insights podcast. I'm an international tax lawyer as you know, and I've been practicing for more than 22 years in the United States here in New York. I mostly deal with taxpayers and members that have a cross-border international tax aspects. A big chunk of the clientele that I service and our group services are high net worth individuals and families that either live abroad and operate or invest in the United States or high net worth individuals and families that live in the United States that are US citizens or US persons that have operations or investments abroad outside the United States. And as you know, a lot of international tax issues come up when non-US individuals want to move to the United States and obtain a visa and then a green card and citizenship. And one of the things that always comes up is, "Okay, now that I obtained that visa or I move to the United States, or I'm applying for a green card or I'm applying for citizenship, what would be my tax situation?" And we advise them on the US tax situation and we coordinate it with the tax situation outside the United States, where they came from or where they have assets or operations.

Kate Kalmykov (03:16):

Talk about that a little bit because sometimes you and I we're of course colleagues and friends, but we can butt heads a little bit because the immigration and the tax objectives are not always aligned, right? Sometimes somebody's telling me, "I want to come to the United States, I want to get permanent residency in the United States," and we get on the phone and you say, "The worst thing you can do right now is to come to the United States." Let's talk about tax planning first. So what do you do in tax planning and what's the difference between tax planning for somebody who wants to come here temporarily versus somebody who's looking to relocate permanently?

Erez Tucner (04:00):

Before either moving to the United States and definitely before applying for a green card or citizenship, you have to take into account tax considerations and that's where I come in and when I start... Really, it's a matter of the benefit and cost because the benefit of acquiring residency in the US, there are many benefits to that. The cost is really that you get into the US tax net and the US from an income tax perspective, taxes its residents and US resident is the term for US tax purposes, taxes its US tax residents on worldwide income. So once you are considered a US tax resident for US federal income tax purposes, you are essentially going to pay tax on income you derive and gains you derived in the United States and outside the United States.

Kate Kalmykov ([05:06]):

Does that mean that you're double taxed or is there any kind of leeway there?

Erez Tucner ([05:15]):

Well, double tax means that the same income is also taxed by another jurisdiction and to alleviate... But first of all, the US will tax you. The US will tax you because you're a resident and the US taxes its residents on their worldwide income. If another jurisdiction tax the same income or more accurately, impose income tax on the same income or similar types of income, there are rules both in the US tax code that their goal is to mitigate double taxation. So the US under certain circumstance... Well the general rule, the US would grant a credit for foreign income taxes imposed on the same income that is taxed in the US, which means that part of the tax would go to the local jurisdiction, the non-US jurisdiction, part of the tax or none of the tax would go to the US. But those foreign tax credit rules are subject to a lot of complicated and strict conditions and they don't always work well. So there may be a situation where becoming a US tax resident not only means you will pay tax in the US also means that if you pay tax in another jurisdiction, it'll not offset the US tax, at least not completely.

Kate Kalmykov ([06:53]):

Does there need to be a tax treaty in place between the home country and the US in order to benefit from that?

Erez Tucner ([07:01]):

That's a great question. So I said the US tax code has foreign tax credit rules that allow to credit foreign income taxes subject to a lot of conditions and requirements, and that applies irrespective of a treaty. If the US tax rules are not helpful, then we can go to a treaty if applicable between the non-US jurisdiction, the relevant non-US jurisdiction, and the United States and see if the treaty can help on mitigating or preventing the double taxation. By the way, the treaty may say not only in terms of one country has to give a credit to the other country's taxes, the treaty may say in certain circumstances that only one country may tax the same income by agreement between the two countries. So it's really a matter of looking first at US law, local law and then treaties if applicable.

([08:18]):

But even if there is no treaty, even if a high net worth individual came from a jurisdiction in Latin America and the US doesn't have really income tax treaties with most Latin American jurisdictions, we have with Mexico, we have with Venezuela and we have recently with Chile, but if you come from Colombia, there is no treaty, but still, it doesn't mean that you're not going to get a foreign tax credit for Colombian taxes. You may still pay after you move to the United States. But again, the restrictions and conditions for getting a foreign tax credit are very complicated and require a really detailed analysis.

Kate Kalmykov ([09:00]):

Now when you meet with clients to do tax planning, are you just tax planning on US federal income taxes or are there other things that you're also advising on related to estates and the state taxes and exposure?

Erez Tucner ([09:18]):

I was talking about entering into the US federal income tax net and you are absolutely right, that's not all of it. You become a US resident. You are also subject... The US has US estate tax and US gift tax. Not

all jurisdictions in the world have US estate tax and gift tax, which is a tax that is not imposed on income, it's imposed on value of assets either when an individual dies or when the individual gifts an asset to another person. The tax rate, by the way, of the US estate and gift tax is relatively high. It's 40% on the value of assets that are subject to gift tax or estate tax. Fortunately for US residents, the estate or gift taxes apply only to the extent the value of assets that are either being gifted or that are being bequested after death by the resident estate.

(10:36):

The estate and gift tax only apply to assets in excess of a certain amount, which we call, we refer to it as the lifetime exemption amount, and that's in order not to apply the US gift and estate tax to what is perceived as relatively low amount of assets. So the lifetime exemption amount this year is 13.61 million per individual, meaning a US resident or citizen is generally subject to US estate and gift tax, but only on assets above 13.61 million per individual, which really means about 27.2 million married spouses. Now, what do I mean 2024? I mean if you never made gifts and you die in 2024, the US estate tax, which by the way applies to worldwide assets, so if you move to the United States and you have significant valuable assets outside the United States, you die, the estate tax will also apply to the value of your non-US asset and again, the value in excess of your applicable lifetime exemption amount.

(12:14):

So if an individual dies in 2024 and that individual died as a US resident or citizen, the US estate tax will apply to assets in excess of 13.61 million at the time of death. Whatever goes to the wife upon death is by the way, not subject to US estate tax when this first spouse dies and the US estate tax will apply when the second spouse dies. But whatever doesn't go to the wife, whatever goes to the children is subject to US estate tax, again, subject to the lifetime exemption. Now the lifetime exemption changes from time to time. For example, even now as the current state of law is, the lifetime exemption is scheduled to decrease by half of what it is starting 2026 because the 13.6 or those amounts of lifetime exemptions are as a result of tax reform passed by the Trump administration in 2017, which increased substantially, essentially doubled the lifetime exemption for US estate and gift tax purposes. But they did that only for eight years because of budgetary restrictions. So 2026, it comes back to half of what it is.

Kate Kalmykov (13:56):

So, what does that mean from a practical perspective? How do you take advantage before that 2026?

Erez Tucner (14:01):

Exactly, and just let me add one more relevant item.

Kate Kalmykov (14:11):

Of course.

Erez Tucner (14:11):

If you're a US resident for US estate and give tax purposes or a citizen, citizen is per se a resident, and you give gifts during your lifetime, again, there is a gift tax of 40% on gifts. But again, the same exemption applies. So you can give gifts of money or assets with a value up to your applicable exemption amount with no gift tax. Once you give a gift that is not subject to gift tax as a result of the exemption, the exemption is reduced dollar for dollar to be applied when you die. So what is the typical US estate and gift tax planning for US individuals? You are saying, "I don't want the assets or so much

assets to be in my hand. I don't want to own so much assets when I die because they will be subject to US estate tax." So the idea is to transfer them to somebody else, to the next generation before I die. And when I die, if you do it correctly, if it's a true transfer to another person, those assets will no longer be part of your estate and not be subject to US estate tax.

Kate Kalmykov (15:51):

And do you do that?

Erez Tucner (15:51):

If you are a US person-

Kate Kalmykov (15:54):

Do you do that through a trust or do you do that directly through a person?

Erez Tucner (15:58):

When I say... Okay, so one way to do it is to transfer assets now or cash to let's say your children, outright, but that's not something that-

Kate Kalmykov (16:11):

I think as a parent, many of us are worried about doing that.

Erez Tucner (16:14):

Exactly. That's not something that many parents want to do. But again, the idea is that this asset is no longer mine when I die. So a trust is the most effective vehicle to essentially effectuate the transfer of assets and cash to the next generation, it is a irrevocable trust, without actually transferring these assets and cash outright to the children or even the grandchildren. And so as long as the assets sit in the trust, first of all, the child or the grandchild do not have the assets outright and the right to use the asset is governed by the trust agreement and what the trustee and other figures of the trust are allowed to do with the assets. But the assets, even though they sit in a trust and were not given outright to the next generation for estate tax purposes, are not treated as assets of the decedent estate and therefore they're not subject to tax when the decedent dies, to estate tax.

(17:33):

In order for those assets to not be treated as assets of the grantor who later dies, for estate tax purposes, the grantor really has to cede control of the assets because it has to be, the concept is that it has to be a tool gift to the next generation. And the play here, and what we always think about is how to structure those trusts so that they are separated enough from the grantor so that the assets in the trust will not be treated as assets of the grantor estate when the grantor dies, but the grantor can still maintain some control over the assets during his lifetime, his or her lifetime, because that's what they want. And there is this tension between these two desires, "I want to take control, but I don't want the asset to be included in my estate," and that's really the main structure and estate and gift tax planning.

(18:47):

Now, you remember I said if you are a US person, you can gift through a trust to the next generation this year up to $13.6 million with no gift tax, up to 13.6 million worth of assets with no gift tax. By the way, what assets would I generally recommend to gift to a trust for the benefit of the next generation? Assets that are likely to appreciate because not only those assets will not be included in my estate, also the

appreciation of those assets will not be included in my estate. So that's a US person, a US resident. If you are a non-US resident, you can gift as many assets as you want to a trust for the next generation before you move to the United States, before you acquire your citizenship and before you acquire your US green card. Because as a non-US person, your non-US assets are not subject to US estate and gift tax.

(20:05):

So you are not subject to the exemption amount with respect to non-US assets that you have before you come to the United States. So if you have 50 million, a hundred million, $500 million of non-US assets that you can from a business and personal perspective place in a trust for the benefit of the next generation before you come to the United States, you do this before you come to the United States, and then when you become a US resident, if you die as a US resident or a US citizen, those assets will not be part of your estate and not be subject to estate tax. Last point on this, as long as the assets sit in those trusts, those type of trusts, even if the child dies, they're not subject to US estate tax because they are not owned by the child. So it's like a dynasty. We call it dynasty trust so that as long as the assets sit in the trust, there is no estate tax when there is unfortunately a death.

(21:17):

Last point on this, if I give the assets to a trust for the benefit of my children and those assets generate income or gain during my lifetime as usual, who pays the tax on such income or gain? Will my children have to pay tax on the assets that they now are the beneficiaries of? Well, no. We can structure irrevocable trusts in a manner that for income tax purposes, the assets are still treated as owned by the grantor until he dies. So even though the assets are not considered the grantor's assets for estate tax purposes, the grantor still pays the income tax on income and gain and not the children. There is another way to do it, which is the trust itself pays, and that's something we evaluate on a case-by-case basis.

Kate Kalmykov (22:20):

What about somebody who accidentally finds themselves within that US taxation net because maybe they've been coming here a lot, maybe they have a B-I, B-II visitor visa, and they've been spending six months out of the year here, we see that a lot, or somebody who's here just working as an H-I-B and E-II and L-I visa, and it's been now 2, 3, 4, 5 years, maybe they don't intend to get a green card, but does this impact them as well because they've been here for a long time?

Erez Tucner (22:58):

That's where it comes to I want to get a US visa and what does it mean for tax purposes? And what you have to remember is that you can become a US tax resident even if you don't have a green card, even if you are not a US citizen, even if you are here on the visitor's visa, because the first test of US tax residency for income tax purposes is based on the number of days you were physically in the United States during the year. And it's not only during the year. Well, if you are in the United States under any visa, almost any visa, subject to exceptions, but under any visa subject to exception, if you are here more than 183 days or more during the year, you are automatically a US tax resident for the entire year for US federal income tax purposes, which means you have to pay or you're subject to US federal income tax on your worldwide income for that year.

(24:16):

And by the way, next year, let's say you are here only 30 days or no days, so next year you'll not be a resident. It's a year by year determination, as long as you don't have a green card and you are not a US citizen. Even if you were here 170 days during the year, you may still be treated as a US tax resident for

US income tax purposes for the year because the US day count tax residency test takes into account not only the days you were here during the current year, but you also have to add a third of the days you were physically in the United States in the preceding year and a sixth of the days you were physically present in the United States in the second preceding year. So if you were here 170 days this year, 2024, and you were 30 days in the United States in 2023, you have to add a third of the days of 30 that you were here in 2023.

(25:31):

So that's 170 plus 10, that's 180. So if you were here another, let's say 24 days in 2022, you have to add a sixth of this. That's another four days, which brings you from 180 to 184 and you're a tax resident in 2024, even though you were here only 180 days in 2024. That's the mass technicality of that test. There are some exceptions that allow you even if you passed that day counting test and you reached 183 or more days of physical presence in the United States, there are some exceptions that allow you to still be considered a non-resident for the year based on, for example, a treaty with your home country and the United States and or based on closer connection during the year to your home country rather than to the United States. But these are exceptions to the general world. And then so this is... Let me just add two more exceptions.

(26:53):

There are certain very, very limited types of visa that do not cause you to be a resident of the United States for US income tax purposes as a result of staying in the United States, and the most notable one is a student visa. So if you come here on an F-I visa to study and you are engaged in a qualified education program, the days you are here are not counted as days of presence in the United States for purposes of the day count residency test. So you can be here a whole year as a student on an F-I visa, but your days of presence for this test will be zero and therefore you will not become a US tax resident for US income tax purposes.

Kate Kalmykov (27:52):

Now, let me ask you in the reverse. Sometimes we have people who either are permanent residents or citizens and they decide to relinquish those statuses. Perhaps they're relocating permanently overseas, perhaps they have some other family situation, what happens to them and everything you've talked about?

Erez Tucner (28:15):

If you do not have a green card and you are not a US for US income tax purposes, you will be a resident only based on number of days of physical presence in the United States. By the way, the United States doesn't have a center of life test for residency. You count days of presence. You were here in the US, that's one day.

Kate Kalmykov (28:46):

And this is actually another area of tension between the tax law and the immigration law because in the immigration law, once you are a permanent resident, even if you're here zero days a year, you're a permanent resident. And the immigration laws, our forms even ask when you're applying for citizenship for a reentry permit, "Have you paid taxes as a US resident?"

Erez Tucner (29:10):

If you are not a US green card holder and you are not a US citizen, you can change your residency when you don't no longer want to be a US tax resident. You just move out. You don't stay in the United States for the required days to make your [inaudible 00:29:29] and that's it. So that gives you a lot of flexibility to essentially relinquish your US tax residency status by just moving out. But if you have a green card or if you are a US citizen, then you are a US resident generally, you are a US tax resident, no matter much how many days you stayed in the United States, even if you live abroad the entire year, you are still a US tax resident because either you have a green card or you are a US citizen. And so when people come to you and say, "Oh, I want to apply for a green card, I've been here, I want to apply for a green card."

(30:15):

That's where I come in and say, "Think about it." Because if you want to leave in two years or three years or five years back to your home country, as long as you have the green card, you will still be considered a US tax resident and have to deal with me to coordinate your US taxes and your non-US taxes, et cetera. On the other hand, if you don't get a green card and you just move out, after you move you, again subject to the counting of days, you'll not be a US tax resident. So that's one big consideration to consider when somebody wants to apply for a US green card and citizenship. So let's say they did obtain a US green card and they moved out and I tell them, "You are still a US resident for US tax purposes." "Okay. You know what? I'll give up my green card or citizenship because I no longer want to be a US tax resident." Well, in this case, you have to consider that the US has a certain exit tax.

(31:29):

So what is the exit tax? If a US citizen gives up his or her US citizenship, that expatriate, it's called expatriation, the expatriate is subject to US exit tax that generally applies at the time of expatriation. The same exit tax applies when a green card holder gives up his or her green card, but only if the individual held the green card for at least eight years during the last 15 years, but at least eight years. So you can give up your green card after six years, let's say, or seven years, without being subject to the exit tax. What is the exit tax? Essentially, the US government wants you to pay tax on all appreciation in your assets at the time you expatriated, as if you sold these assets for fair market value, and pay income tax on the appreciation on the built-in gain in your assets, and then you can leave, then you can expatriate.

(32:51):

That estate tax also has an exemption. It only applies to appreciation in excess of $600,000 in your assets. So if you don't get a green card, you don't have to worry about estate tax, you don't have to worry about relinquishing the green card after you move. If you do get a green card, you will still be considered a US tax resident even if you live abroad. And then you have to consider relinquishing the green card and then you have to consider whether you're subject to an exit tax. Same thing with the citizenship.

Kate Kalmykov (33:24):

Well, it's certainly complicated and I'm glad that I have you as a resource to come to with these questions.

Erez Tucner (33:31):

But I do want to mention another question that comes up a lot. A US person is here on a work visa or H-I-B or an investment visa, and then they want to apply for a green card and they ask us, "Oh, what will happen with my taxes?" Well, as long as you are here, nothing will happen. You're a US tax resident before the green card because of days of presence, and you'll be a US tax resident for income tax

purposes after the green card, irrespective of US presence. So just getting a green card does not necessarily change your tax situation. It mostly changes the flexibility of giving up your US tax residency status if you decide to move out of the United States at a earlier date. You said it's complicated. There is another complication. The US has US federal income tax. It has US estate and gift tax, we spoke about. And then there is the income tax that is imposed by each state.

(34:40):

Again, subject to certain exceptions, most states impose an income tax and some states decided not to impose an income tax on individuals such as Florida and Texas, and that's a big force of attraction to live in those states. But if you move to California, New York, New Jersey, in addition to the US federal income tax, you will be subject to, your income and gains will be subject to state and local income tax. And by the way, the top bracket in California, state income tax in California is 13.3%. The top bracket of state income tax in New York is 10.9%. And if you live in New York City, add another 3.876%, which brings you to 14.7% top tax rate. By the way, it used to be the case that if you're subject to state income tax, at least it was deductible from your taxable income for US federal income tax purposes. So essentially, when you pay a state income tax, it would save you some federal taxes, but that's no longer the case. Since the tax reform in 2017, you can only deduct up to $10,000 of state and local income tax.

Kate Kalmykov (36:25):

Which is really insignificant if you're [inaudible 00:36:28].

Erez Tucner (36:28):

Yes. So all these considerations have to be taken into account when you move to the United States even if you don't get a green card. There is a lot more flexibility in terms of tax planning, income tax planning, and US estate and gift tax planning and US state income tax planning. The flexibility to plan before you move to the United States is much greater than the flexibility to plan after you're already here, after you're already resident.

Kate Kalmykov (37:06):

Well, thank you so much for sharing your insights today, and I think our listeners at the podcast really have a lot to think about, and obviously we'll include your contact information, so anybody who wants to follow up that wants to schedule a consultation, Erez, can do so. Thank you again.

Erez Tucner (37:25):

Thank you, Kate. It's always a pleasure working with you and it's even a greater pleasure to be a guest of your podcast.