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Much has been written about Thailand's new inheritance tax, which will take effect next February. But there is a trap for unwary Thais -- in fact, almost any foreigner -- who has investments in the US and dies. Many wealthy Thais, to diversify their investments, own publicly traded US stocks and bonds or land, houses or other real estate in that country.

The US has a long-standing estate tax, which differs from Thailand's new inheritance tax. Under the estate tax, the estate itself is taxable based on the value of all the assets of the deceased, and only the net estate after the estate pays the tax can be distributed to beneficiaries, while under the Thai inheritance tax the beneficiary pays the tax based upon the amount inherited above a minimum threshold.

The US estate tax is levied on the estates of US citizens and residents but also on certain US assets of foreigners, referred to as non-resident aliens (NRAs). The US estate tax rate is a whopping 40%.

So what assets of an NRA are subject to the US estate tax? Shares of stock in a company organised under US law (whether publicly or not publicly traded); debt instruments (such as bonds or notes) of US companies, the US federal government or state governments; and private debt instruments of US citizens. US real estate (such as land, houses or condos) and tangible personal property (such as home furnishings, cars and art works) located in the US are also subject to tax. Oddly though, cash held in a US bank is not subject to the tax.

A US citizen or resident's estate is granted a generous exemption of US$5.43 million for persons dying this year and is indexed for inflation.

However, estates of NRAs are granted only a paltry $60,000 exemption, and it is not indexed for inflation. Assets of the deceased passing to the spouse are fully exempt from the estate tax, but the spouse must be a US citizen or resident. Thus, an NRA's estate will not be entitled to the spousal exemption if the spouse is also an NRA.

Let us take an example. A Thai man passes away and leaves under his will all his assets to his Thai wife. Under the Thai inheritance tax, the wife will pay no Thai tax, but his assets include a house in the US worth $800,000 and stock in US companies worth $500,000. So his gross US estate is $1.3 million, less the exemption of $60,000, leaving a taxable estate of $1.24 million. Tax at 40% is $496,000. Note also the US tax is not creditable against the Thai inheritance tax, as the tax treaty between the US and Thailand covers only income tax and not estate tax.

Ironically, had he sold the stock before dying and put the proceeds into a US bank account, the $500,000 would not have been subject to the estate tax. Even more ironic is the fact that any capital gains he may have realised from the sale of the shares in the US markets would also not have been subject to US personal income or capital gains tax, as US income tax does not apply to capital gains realised by an NRA on sales of US securities. However, the same would not be true for the house. Under the US Foreign Investment in Real Property Tax Act, any gains on the sale of US real estate by an NRA is subject to US personal income tax. But if the after tax proceeds were put into a bank account, they would escape the estate tax.

Planning opportunities do exist for NRAs to avoid the US estate tax legally but must be acted upon before death. The best is rather than holding the US assets in the NRA's own name, put them instead in a foreign corporation such as a Hong Kong or Cayman Islands holding company. As stated above, only shares in a US-organised company is subject to the estate tax. Additionally, neither Hong Kong nor the Caymans will tax the assets or capital gains. Another strategy would be to gift the US assets before death. While the US does have a gift tax, it does not apply to NRAs. However, one must be mindful of the limits under the Thai gift tax before the gifts become taxable in Thailand.

The old saying that there are two things you cannot avoid -- death and taxes -- is not really true in the case of an NRA's US estate tax.

Proper planning can indeed avoid the tax, but failure to plan properly can be an expensive mistake.