# Tax Issues for Canadians with U.S. Real Estate Holdings

*Given the proximity of Canada to the U.S., it is not surprising that many Canadians own real estate south of the border. Some, especially those who are retired "snowbirds", also spend a good part of the year in the U.S. It is important to understand what the tax implications are – both in the U.S. and in Canada – when you own, rent out or sell your U.S. property. This article will provide a general overview of some of the tax issues that arise in these situations. In many cases, it is important that the tax implications be addressed prior to the purchase of the real estate.*

*Please note that the comments in this article apply only to Canadians who are not U.S. citizens or green card holders, i.e. you are regarded as a "non-resident alien" for U.S. tax purposes. This article does not discuss the various ownership options for Canadians who are planning to purchase, or who already own U.S. real estate and assumes that the property is held personally (in their own name).*

## Owning U.S. Real Estate Property

### U.S. Tax Implications

One issue that needs to be addressed by those individuals who own U.S. real estate **and** actually spend part of the year in the U.S., is whether your tax status changes for purposes of the Internal Revenue Code (IRC) by virtue of your time spent in the U.S. More specifically, are you still considered to be a "non-resident alien" for U.S. tax purposes or have you become a "resident alien" for U.S. tax purposes because you stayed in the U.S. too long?

In the eyes of the Internal Revenue Service (IRS), if you spend less than 31 days in the U.S. during the current year, you are considered to be a non-resident alien. On the other hand, you will be considered to be a U.S. resident for tax purposes if you meet the "substantial presence test". In brief:

- If you spend 183 days or more in the U.S. during the current year, you are considered a resident alien.
- If you spend between 31 and 183 days in the U.S. during the current year, you will need to determine the number of days you spend in the U.S. during a 3-year period (the current and 2 previous years) using what is often referred to as the "183-day test". The "183-day test" is calculated by adding the sum of (i) all of the days of physical presence in the United States in the current year, (ii) one-third of the days of physical presence in the first preceding year, and (iii) one-sixth of the days of physical presence in the second preceding year. If the total exceeds 182 days, then the substantial presence test has been met, and the individual will be treated as

a U.S. resident. If under this test you are considered a resident alien, you can still be treated as a non-resident alien if:

- You spend less than 183 days in the U.S. in the current calendar year;
- You maintain your "tax home" in Canada during the year; and
- You have a closer connection to Canada than to the U.S.

To claim that you have a closer connection to Canada, you need to file an IRS form, the *Closer Connection Exception Statement for Aliens (Form 8840)*.

The significance of the distinction between resident aliens and non-resident aliens is that:

1. Resident aliens are taxed in the U.S. on income from all sources worldwide, while non-resident aliens are generally taxed in the U.S. only on income from U.S. sources.
2. Resident aliens have to file a U.S. tax return to report worldwide income if their annual gross income exceeds certain U.S. dollar amounts.

### Canadian Tax Implications

Canadian residents who at any time during the year own foreign investment property (called "specified foreign property") costing more than $100,000 are required to file the Form T1135 *Foreign Income Verification Statement*.

"Specified foreign property" includes real estate situated outside Canada, but does not include personal-use property, that is, any property used mainly for personal use and enjoyment.

Therefore, if you own a condominium in Florida that costs over $100,000, but which is utilized purely for personal use and enjoyment, you would not need to report the condominium on a Form T1135. However, if the condominium is utilized for personal use for 4 months of the year and is rented out for 8 months of the year for profit, the property is considered to be an income-earning investment property not held primarily for personal use and enjoyment. As a result, you are required to report the property on a Form T1135.

## Renting out U.S. Real Estate Property

### U.S. Tax Implications

In general, non-resident aliens of the U.S. are subject to U.S. income tax on two categories of income:

- Income that is not effectively connected with a trade or business in the U.S. but is from a U.S. source (e.g. interest, dividends, rent); and
- Income that is effectively connected with a trade or business in the U.S. (e.g. income from sale of U.S. real property).

It is important to distinguish between these two types of income: "effectively connected income" (after allowable deductions) is taxed at the same graduated rates that apply to U.S. citizens and residents, whereas income that is not effectively connected is generally taxed at a flat 30% (or lower treaty) rate.

If you are a non-resident alien who receives rental income from your U.S. property, you are not normally required to file a U.S. tax return to report the rental income. The gross rent will simply be subject to a flat U.S. tax of 30% with no expenses or deductions allowed; and the tenant or management agent is required to withhold the 30% non-resident tax from the gross rent and remit the same to the IRS.

The advantage of this approach is that you do not have to file a U.S. tax return; however you will not be able to deduct any expenses either. Therefore, you may elect instead to pay U.S. tax on a net income basis, i.e. after all deductible expenses. You can do this by filing a U. S. Non-resident Alien Income Tax Return (Form 1040NR). Doing so enables you to claim related expenses and be taxed on the net rental income at your marginal tax rate. This generally results in a lower tax liability than having the gross rental income subject to the 30% withholding tax.

### Things to consider if you prefer to be taxed on a net rental basis

1) The deadline for filing the U.S. tax return is June 15th of the year following the calendar year in question. Despite the filing deadline, any balance of tax owing must be paid to the IRS by April 15 of the following year to avoid late interest charges.

   Note that if the property is jointly owned, each owner must file a separate tax return to report their share of the rental income and expenses.

2) Instead of filing Form 1040NR and then waiting for the refund of the excess U.S. tax paid, obtain an exemption from the 30% non-resident withholding tax by completing Form W-8EC1 (Certificate of Foreign Person's Claim that Income is Effectively Connected With the Conduct of a Trade or Business in the United States) and submitting it to the tenant or management agent.

### Canadian Tax Implications

If you are a Canadian resident, you must pay tax on your worldwide income. Accordingly, you must report your net foreign rental income in Canada on your Canadian income tax return. However, a foreign tax credit may be claimed to avoid double taxation. The tax credit is generally equal to the lesser of the U.S. tax paid and the Canadian tax on that income.

## Selling U.S. Real Estate Property

### U.S. Tax Implications

When a non-resident alien sells their U.S. real estate, the resulting gain or loss is required to be reported to the IRS by filing Form 1040NR. The purchaser is required to withhold 10% of the gross sale price if the sale price exceeds US $300,000. Withholding is not required where the purchaser acquires the property for use as a residence and the sale price is US $300,000 or less.

The tax normally required to be withheld on a disposition can be reduced or eliminated if you obtain a withholding certificate (Form 8288-B) from the IRS.

The IRS will issue the withholding certificate if the amount required to be withheld would be more than the maximum tax liability. Therefore, if you expect the tax liability on the sale of your U.S. property to be less than 10% of the gross sale price, you should request the withholding certificate and file it before the closing date of the sale. The certificate, if granted, will specify the amount of tax to be withheld instead of the full 10%.

### Canadian Tax Implications

On the Canadian side, a taxable capital gain may also result from the sale of the U.S. property. A foreign tax credit is generally available with respect to related U.S. tax paid to eliminate double taxation.

It may also be possible to claim the principal residence exemption for all or part of the gain on the sale. However, careful consideration should be made here, because if there is no Canadian tax payable (due to the exemption), the U.S. tax paid will not receive a tax credit in Canada.

Remember also that the gain or loss arising from foreign currency fluctuations between the time the property was purchased and its sale will be factored into the computation of the Canadian gain or loss.

## Tax Implications on Death

Please refer to the following articles, “U.S. Federal Estate Tax Implications for Canadians – Determining if you have any Liability” and “U.S. Federal Estate Tax Implications for Canadians – Strategies to Minimize U.S. Federal Estate Tax Liability” for information on the application of U.S. estate tax when a Canadian dies owning U.S. real property.

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