



Owning property in the United States: *Estate tax, probate and FIRPTA*

Owning property in the United States for personal use may seem straightforward, but planning should reflect the American legal and tax environment. For Canadian residents who are non-resident non-citizens of the United States, the main concerns are how U.S. succession duty tax at death (estate tax), local estate settlement procedures (probate) and FIRPTA withholdings are applied if the property is sold, all of which can have an immediate impact on cash flow.

This document provides an overview of the key points to consider and the various forms of ownership.

Table of contents

Death: when U.S. estate tax becomes an issue and what to file	2
Gift tax: transfers during one’s lifetime	2
Sale: FIRPTA – withholding, US \$300,000 exception and forms	2
Forms of ownership: common forms and practical effects	3
Conclusion	4

Note: In this document, the third-person pronouns “they”, “their” and “them” are used to include all individuals.

Death: When U.S. estate tax becomes an issue and what to file

For Canadian residents who are non-resident non-citizens of the United States, U.S. estate tax can become an issue if, at death, a person owns assets considered to be situated in the United States (U.S. situs assets), particularly when the assets are real property.

In practice, the question is simple: When the person died, did the estate have more than US \$60,000 in assets (such as real property) in the United States? If so, the estate will likely have to file Form 706-NA (*United States estate (and generation-skipping transfer) tax return – Estate of nonresident not a citizen of the United States*) to determine whether U.S. estate tax is payable and, if so, to apply for any available tax relief.

Form 706-NA is used to calculate tax and also to address administrative matters (e.g., payment options, representation authorizations).

Lastly, the Canada–United States Tax Treaty does not preclude the need to file a U.S. tax return, but it can reduce or eliminate the tax payable thanks to certain available credits, which explains why it may be necessary to file a final return when little or no tax is due.

Gift tax: Transfers during one’s lifetime

The United States clearly distinguishes between tax at death (estate tax) and tax on certain lifetime transfers (gift tax). For non-resident non-citizens, gift tax applies to gifts of U.S.-situated real estate and tangible personal property. In contrast, gifts of U.S.-situated intangible property are not generally subject to this tax (e.g., certain securities), which makes the type of property being transferred a determining factor. When a return must be filed, taxable gifts must be reported on Form 709-NA, which allows exemptions that can vary from year to year.

Sale: FIRPTA – Withholding, US \$300,000 exception and forms

When a foreign seller (including a non-resident non-citizen) sells real property situated in the United States, a withholding tax of 15% of the amount realized is theoretically payable under FIRPTA, which under American rules, is usually the sale price. The obligation to hold back and remit this tax typically falls on the buyer (or, in some cases, a closing agent), who could be held liable for failing to do so.

There is however an exception: no FIRPTA withholding tax is payable when the buyer acquires the property to use as a residence and the sale price does not exceed US \$300,000, provided that the buyer or a member of their family intends to live there at least 50% of the number of days the property is used by any person during each of the first two 12-month periods following the date of sale, not counting the days the property is vacant.

Forms of ownership: Common forms and practical effects

The ownership structure chosen when the property is acquired primarily influences how the property is transferred at death, whether local probate procedures may apply, and in some cases, the tax and administrative consequences of changing title or restructuring ownership later. It is therefore best to consider the structure at the time of purchase because a change down the road could result in additional formalities and may be treated as a transfer of value, depending on the circumstances.

Direct ownership

Direct ownership is often chosen for its simplicity and low set-up cost. However, it does not prevent U.S. laws from being applied at death and can require the estate to undergo a local estate settlement procedure (probate) allowing the executor to administer, transfer or sell the property. From a planning standpoint, this means ensuring that the estate and power of attorney documents (particularly in cases of incapacity) hold up under American rules.

Joint Tenancy with Right of Survivorship

Joint tenancy with right of survivorship is often used to simplify transfer at death since the deceased owner's interest will automatically pass to the surviving co-owner without it being necessary to go through all the steps involved in a full estate settlement for that asset. That said, adding a co-owner after the initial purchase requires careful analysis because putting another person on title may be treated as a transfer of value, which can create tax consequences, particularly when the goal is to "share" the property with a child or other family member.

Tenancy by the Entirety (ownership between married couples)

In some states, married couples can hold title as tenants by the entirety, which allows the property to pass automatically to the surviving spouse and can even provide enhanced liability protection in certain situations. This option depends on the law applicable in the state where the property is situated and must be confirmed at the time of purchase. It should also be coordinated with the overall estate plan to prevent an automatic transfer mechanism from producing a result that differs from the what the will provides.

Deed providing for transfer at death (e.g., Enhanced Life Estate Deed/Lady Bird Deed)

In some states, deeds permit property to be transferred upon the owner's death to designated beneficiaries while allowing the owner to retain significant control during their lifetime. The key concern is to reduce the administrative burden at death and, in many cases, to avoid some of the steps related to probate. Since the effectiveness of these deeds depends on local laws and their drafting, they should be reviewed by a professional in the state concerned or by a Canadian cross-border law professional, particularly if there are multiple heirs or the family situation is complex.

Revocable Living Trust (U.S. revokable trust)

A revocable living trust is commonly used in the United States to facilitate transfer of property at death and, in many cases, to avoid a full local estate settlement process. It can also help in the event of incapacity because a successor trustee can manage the property without interruption. For Canadian residents, this solution must be assessed in advance from a cross-border perspective because, depending on how the trust is structured and drafted, it can create additional Canadian tax considerations and reporting obligations.

Ownership through a corporation or similar structure

Holding property through a corporation or a limited partnership is sometimes considered for civil liability reasons as well as for tax, estate planning, and management purposes. In a Canada–U.S. context, however, this approach is more complex from both a tax and an administrative standpoint, particularly for issues such as income reporting, shareholder benefits, sale of the property, and the consequences of transferring ownership. In many situations, this form of ownership is best reserved for situations where a specific objective clearly justifies the added complexity, and it should be structured with advice from professionals experienced in cross-border taxation.

Points to remember

Regardless of the ownership structure chosen, the key is to ensure alignment between the title to the property, the estate documents and the owner's true intentions. Issues often arise from inconsistency between documents or when the structure is later changed without a full assessment of cross-border impacts rather than from the tax rules themselves.

Conclusion

For Canadian residents who are non-resident non-citizens of the United States, buying, renting and selling a property in the United States requires sound planning from the outset. In the short and medium terms, there may be tax issues and impacts that must not be downplayed. In the long term, U.S. estate tax continues to be a transfer issue that should not be overlooked. Plus, the impact of the exchange rate must be kept in mind. Being able to count on experts in cross-border financial planning is the key.

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