

## ACQUISITION BY FOREIGNERS OF REAL ESTATE LOCATED IN MEXICO

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This article presents the Mexican legal framework dealing with ownership or lease of real estate in Mexico by foreign individuals or companies for residential, commercial, industrial or agricultural purposes, including taxation issues applicable to acquisition or sale of real estate.

### 1.1 General rule.

A foreign individual or company may directly own land in Mexico. This is provided for in the Mexican Constitution.

### 1.2 Exception.

Acquisition of real estate located in the prohibited zone.

The "prohibited or restricted zone" is the strip of Mexican territory 100 kilometers in depth from the borders and 50 kilometers in depth from the coast lines in which foreigners may not acquire direct ownership of land.

Foreigners (including individuals or companies) may not acquire direct ownership over land and water located within the restricted zone. This prohibition does not exclude the possibility that foreigners may use and enjoy real estate within this zone under legal titles other than ownership. (TRUSTS)

### 1.3 Procedures for the acquisition of rights over real estate in the prohibited zone.

Even if foreigners may not acquire direct ownership they can acquire other rights over real estate in the prohibited zone using various procedures.

- a) A 100% foreign owned Mexican company may directly acquire property within this zone to perform non-residential activities, that is, industrial, commercial or tourism activities. The acquisition must be recorded at the Ministry of Foreign Affairs.
- b) If the real estate is for residential purposes, foreign individuals or companies and Mexican companies with 51% or more foreign capital stock may acquire rights to use and benefit from the real estate through a trust.

In reality the trustee is only an intermediary complying with the precise instructions of the settler pursuant to the trust agreement. The beneficiary of the trust, even if he does not have in his patrimony the ownership of the property, acquires rights who enter into his patrimony. Said rights enable the beneficiary to use and enjoy the real estate as if such beneficiary were the owner, except for the right of disposition, which formally remains with the trustee, but said trustee must act strictly according to the instructions from the settler.

The duration of the trust shall be for 50 years maximum, when the beneficiary is a legal entity.

The trust must be registered at the Public Registry of Commerce that corresponds to its' location.

- c) Rights also may be acquired through a trust if the property will be used for non-residential purposes.
- d) Foreigners may lease without limitation real estate and other properties in Mexico.

If foreigners do not want to risk a large investment and prefer to pay monthly rent for the use of property, long-term leases may be advantageous.

## **2.1 Acquisitions by foreign individuals.**

Foreign individuals may acquire land for agrarian, livestock and forestry purposes, outside the restricted zone, subject to the following size limitations:

- 1) Individual agricultural property generally cannot exceed 100 hectares of irrigated land (247 acres). One hectare is equivalent to 2.4711 acres.

Land used for the production of cotton cannot exceed 150 hectares of irrigated land (371 acres) and land used for the production of a very few specialized crops, like coffee, bananas, cacao, fruit trees, etc., may not exceed 300 hectares of irrigated land (741 acres).

- 2) Individual property used to feed livestock cannot exceed an amount of land necessary to raise a maximum of 500 large farm animals or its equivalent in small farm animals.
- 3) Individual forest property can be any type of forestland, as long as it does not exceed 800 hectares (1977 acres).

## **2.2 Acquisition by foreign corporations.**

As a general rule a foreign company cannot directly own land in Mexico for agricultural, livestock or forestry purposes. However, there are options for foreign companies to consider when interested in land for these purposes:

- 1) The individual shareholders of a foreign company may acquire various parcels of land in their own name and then lease the land to the company.
- 2) Mexican stock companies may own agricultural, livestock or forestry land, in tracts no longer than twenty-five times the factor of individual landholdings (2.500 Has= 6.177. 75 acres).

The Mexican company owning land must have a specific number of individual stockholders to justify its total landholdings. For example, if the company owns 2500 hectares of irrigated land (6,178 acres), and the individual irrigated landholding is limited in size to 100 hectares (247 acres), the company must have at least twenty-five individuals as shareholders.

In addition, the capital stock of the company must include a special series of shares identified with the letter "T". Series "T" shares are equivalent in value to the capital contributed in agriculture, livestock or forestry land, or those funds destined for the acquisition of such land, depending on the value of the land at the moment of the contribution or acquisition. Foreigners, either companies or individuals, can acquire no more than 49% of series "T" shares; the remaining 51% must be held by Mexicans.

This 49% limitation placed on the acquisition of Series "T" shares by foreigners is restated in article 7, section III r) of the Foreign Investment Law.

Further, no individual, either directly or through a company, may hold more series "T" shares or social parts than those equal to one individual landholding.

All individual foreigners, independent of their immigration status, may acquire real estate in Mexico, directly or through an attorney-in-fact, without needing a permit from the Ministry of the Interior (which was required in the past). Moreover, they can carry out any other act of dominion over real estate, without need of a permit.

### **3.1 Mexican Law.**

#### **Income Tax on Sale of real estate**

- a) If a non-resident individual or company is the seller, the sale of real estate located in Mexico can be subject to a 25% capital gains tax on the gross amount of the operation.

If the purchaser is resident in Mexico or a non-resident with a permanent establishment in Mexico, he will have to withhold the tax. Otherwise, the seller shall pay the corresponding tax by means of a tax return filed to the Tax Administration Bureau within 15 days of obtaining the income.

- b) However, non-residents who conclude the sale through a public deed may choose to pay 29% tax on the net profit obtained. The notary public is responsible for calculating the income tax and pay it within 15 days following the execution date of the public instrument.

#### **Trusts**

- c) The Mexican Fiscal Code provides that a transfer of property has occurred when a trust is created, if the settlor designates or agrees to designate a beneficiary different from such settlor and does not reserve the right to reacquire the property placed in trust, or when the settlor loses the right to reacquire the property from the trustee, if such right was reserved.

In addition, when the beneficiary assigns rights granted or gives instructions to the trustee to transfer the property to a third party, a transfer of property is considered to take place upon the issuance of said instructions or the assignment of rights.

Therefore, when a foreigner acquires beneficiary rights through a trust and thereafter sells or assigns them, he will be subject to the payment of income tax in the terms mentioned above.

### **Income Tax on Acquisition**

If a non-resident is the purchaser, the tax authority may make an appraisal, and, if the value of the appraisal is greater than the purchase price by more than 10%, the purchaser will be required to pay a 25% tax on the difference between the two amounts. The taxpayer shall pay this tax within fifteen days following to the notification from the Tax Administration Bureau.

### **Local Acquisition Tax**

Individuals or companies purchasing real estate, consisting of land, or land and its structures located in Mexico, as well as the rights related to them, are subject to the payment of a state acquisition tax calculated at a rate between 2% and 4% of the value of the property depending on the state where the property is located.

Purchasers of real property, irrespective of the nature of their operations, must pay this tax. That is, the tax must be paid whether the acquisition is carried out through a purchase and sale agreement, donation, trust, merger of companies, payment in kind, etc.

### **Value Added Tax**

Value Added Tax shall be paid by the purchaser of buildings or constructions at the rate of 15% calculated on the amount of the operation which shall include taxes, other fees, interests or any other concept.

No value added tax is triggered in the sale of land used for any purpose and of constructions which are used for residential purposes. In the event that only part of the construction is used for this purpose, the tax will not be paid on this part.

### **Treaty between Mexico and other countries to avoid double taxation and prevent fiscal evasion.**

All tax treaties signed by Mexico with different countries provide that the profit obtained from the sale of real estate property located in Mexico is subject to taxation in this country, as well as the income or profit from lease of real estate property.