

NO.: **IT-437R**

DATE: February 21, 1994

SUBJECT: INCOME TAX ACT  
**Ownership of Property (Principal Residence)**

REFERENCE: Paragraph 54(g) and subsection 248(3) (also subsections 40(7), 248(22) and 248(23))

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## ***Contents***

*Application*

*Summary*

*Discussion and Interpretation*

General (¶s 1-17)

*Explanation of Changes*

## ***Application***

This bulletin cancels and replaces Interpretation Bulletin IT-437, *Ownership of Dwelling Property*, dated September 10, 1979.

## ***Summary***

This bulletin provides guidelines for determining ownership of property for purposes of claiming a principal residence exemption. The bulletin should be read in conjunction with the current version of IT-120, *Principal Residence*, which fully discusses the principal residence exemption, including the types of property which qualify for that exemption.

The concepts of "beneficial ownership" and "legal ownership" as recognized under the common law jurisdictions are discussed in this bulletin. Also discussed are provisions in the *Income Tax Act* which particularly relate to the province of Quebec because it is a civil law jurisdiction.

The bulletin also contains comments concerning membership in a corporation or association holding residential property (including co-operative housing corporations), as well as comments regarding condominiums, agreements for sale, lease-option agreements and other related topics.

The final two paragraphs of the bulletin briefly mention rules that are relevant if the property is held by a personal trust, including a spousal trust, and refer the reader to other materials published by the Department which set out those rules.

## ***Discussion and Interpretation***

### ***General***

¶ 1. Paragraph 54(g) of the *Income Tax Act*, which determines whether a property is a taxpayer's "principal

residence” for a particular taxation year, requires that the property be owned by the taxpayer at any time in the year. (All of the requirements, including this ownership requirement, that must be satisfied for purposes of claiming the principal residence exemption are discussed in the current version of IT-120, *Principal Residence*.) The Act does not define the term “owned”; however, for purposes of claiming the principal residence exemption, the ownership requirement in paragraph 54(g) is met where the taxpayer is the legal owner or the beneficial owner of the property. These terms are discussed in detail below.

¶ 2. In the common law jurisdictions, two forms of property ownership are recognized – legal and beneficial. Normally “legal ownership” exists when title is transferred to, recorded in, registered in or otherwise carried in the name of a person. Legal owners are generally entitled to enforce their ownership rights against all other persons.

¶ 3. One person’s legal ownership of a property may, however, be subject to another person’s beneficial ownership of that property. The term “beneficial ownership” is used to describe the type of ownership of a person who is entitled to the use and benefit of the property whether or not that person has concurrent legal ownership. A person who has beneficial ownership rights but not legal ownership can enforce those rights against the holder of the legal title. For example, beneficial ownership frequently arises when property is held in trust for a person in circumstances where, according to the terms of the trust, that person has authority to instruct the trustee to deal with the property as requested. (Where a personal trust, including a spousal trust, is involved, see also the rules mentioned in ¶s 16 and 17 below.)

¶ 4. Beneficial ownership must be distinguished, however, from the other types of physical possession of property which a person may enjoy. For example, a tenant of a property, or a person who is allowed to occupy it only because the true owner has no objection, is not the beneficial owner of the property. In determining whether a person has beneficial ownership, one should consider such factors as the right to possession, the right to collect rents, the right to call for the mortgaging of the property, the right to transfer title by sale or by will, the obligation to repair, the obligation to pay property taxes and other relevant rights and obligations. Not all of these incidents of ownership need occur concurrently before it is concluded that the person has beneficial ownership of the property, which is a question of fact in each particular case (subject to any determination under the law regarding beneficial ownership such as, for example, in the manner described in ¶s 6, 8 or 9 below).

¶ 5. Since in most cases the same person has both legal and beneficial ownership, determining ownership on the basis of beneficial ownership alone is not often required. Comments below deal with some situations where a taxpayer is considered to own, and other situations where a taxpayer is considered not to own, a property for purposes of the principal residence exemption.

¶ 6. Because the province of Quebec is a civil law jurisdiction, not a common law jurisdiction, subsection 248(3) of the *Income Tax Act* provides a special set of rules for income tax purposes in relation to that province. Subsection 248(3) deems

- (a) a usufruct (see ¶ 7 below);
- (b) a right of use or habitation; or
- (c) a substitution (see ¶ 7 below);

to be a trust. The trust is deemed to be created by will where (a), (b) or (c) was established by will. The property subject to (a), (b) or (c) is deemed to have been transferred to, and to be held in trust by, the trust. The transfer is deemed to have occurred on, and as a consequence of, the death of the testator where (a), (b) or (c) arises on the death of that person. If the property is the type of property that can otherwise qualify as a principal residence (i.e., a housing unit, leasehold interest or co-operative housing corporation shares – see the current version of IT-120 and also ¶ 10 below), the deemed trust may be able to use the rules referred to in ¶ 17 below to claim the principal residence exemption to reduce or eliminate any gain that would otherwise occur (for tax purposes) as a result of a disposition of the property. Subsection 248(3) also deems any person who has a right (whether immediate or future and whether absolute or contingent) to receive all or any part of the income or the capital in respect of property subject to (a), (b) or (c) to be a person who is beneficially interested in the deemed trust. Finally, subsection 248(3) deems property in relation to which any person has, at any time,

- (d) the right of ownership;
- (e) a right as a lessee in an emphyteutic lease (see ¶ 7 below); or
- (f) a right as a beneficiary in a trust (including a right as a deemed beneficiary of a deemed trust described above);

to be beneficially owned by that person, whether or not the property is subject to a servitude. Thus, if a person sells his or her rights with respect to property which is subject to (a), (b), (c), (d) or (e) above and the property itself is a property that can otherwise qualify as a principal residence (i.e., a housing unit, leasehold interest or co-operative housing corporation shares), that person might be able to use the principal residence exemption to reduce or eliminate any gain that would otherwise occur (for tax purposes) as a result of that disposition of rights. In order for this to occur, of course, all the other requirements of paragraph 54(g), as described in the current version of IT-120, would have to have been met. (For example, the “ordinarily inhabited” requirement could have been satisfied by the person who sold the rights with respect to the property having inhabited the property during the relevant years.)

¶ 7. Some of the legal terms used in ¶ 6 above are briefly explained as follows:

- An **emphyteutic lease** is a lease of real property for a relatively long period of time – as of the date of issuance of this bulletin, there may be emphyteutic leases in

existence in the province of Quebec with terms ranging anywhere from “more than 9 years” to 100 years in length. During the term of the emphyteutic lease, the lessee has the full benefit and enjoyment of the real property and undertakes to make improvements to the property and, generally, to pay annual rent to the owner. The current version of IT-324, *Capital Cost Allowance – Emphyteutic Lease*, discusses this matter in greater detail.

- Under a **usufruct**, the **usufructuary** has a right to enjoy all the benefits, advantages and profits of property that is owned by another person.
- Under a **substitution**, a designated person, called the **institute**, inherits property under a will, or acquires it as a gift *inter vivos*, but with a directive that he or she shall pass it over to another designated person, who is called the **substitute**.

¶ 8. For purposes of claiming the principal residence exemption for a property, paragraph 54(g) requires that the taxpayer own the property “jointly with another person or otherwise”. These words include sole ownership, joint tenancy, tenancy-in-common and co-ownership. Provincial laws relating to marital property are often relevant in determining the ownership of property for this purpose and should, therefore, be considered along with the comments in this bulletin. In the province of Quebec, the question as to whether spouses own real property “jointly with another person or otherwise” may depend upon

- (a) the matrimonial property regime which applies to them (e.g., involving community of property);
- (b) the family patrimony (if applicable); or
- (c) the terms of their marriage contract.

It should be noted, however, that subsections 248(22) and (23) of the *Income Tax Act* contain provisions that can “deem” (determine) for purposes of the Act which spouse is the owner of a property at any particular time after July 13, 1990 if the property is or was the subject of a matrimonial property regime in Quebec (or another civil law jurisdiction) involving some common interest between the spouses, such as community of property. For further discussion on these provisions, see the current version of IT-325, *Property Transfers After Separation, Divorce and Annulment*.

¶ 9. When a taxpayer’s ownership of property is in dispute or in doubt, he or she may resort to the courts for a resolution of the question. In a situation involving a marriage dissolution, for example, one spouse may request the courts to resolve the ownership of property considered to be owned by the other spouse. In such a case, where the first-mentioned spouse acquires ownership pursuant to a court order, such ownership will generally be considered to have been acquired on the effective date specified in the court order regardless of the legal basis or reasons for the order, or on such other date as is considered reasonable if no effective date is specified in the order.

¶ 10. A share in the capital stock of a co-operative housing corporation can qualify as a principal residence property provided that the share was acquired for the sole purpose of obtaining the right to inhabit a housing unit owned by the corporation and the other requirements of paragraph 54(g), as discussed in the current version of IT-120, are met. In any event, where a corporation or an association formed solely to hold residential property is really a bare trustee of the property and the terms of the trust arrangement give the beneficiary, i.e., shareholder of the corporation or member of the association,

- (a) the same rights of possession and use of a particular housing unit as the beneficial owner of any housing unit would normally enjoy, and
- (b) the right to require the corporation or association to deal with the housing unit (e.g., sell or mortgage it) as instructed by the shareholder or member,

the shareholder or member is considered to be the beneficial owner of the housing unit. These comments do not apply to ownership of a condominium unit that usually vests in the person acquiring it. However, see ¶ 12 below concerning the time of acquisition of ownership of a condominium unit.

¶ 11. A purchaser’s interest in property under an enforceable agreement for sale will, subject to ¶ 12 below, be considered to constitute ownership of the property. A purchaser’s interest in a house bought under the *Veterans Land Act* will also be considered to be ownership of property. In these instances, the taxpayer has made a down payment and entered into an obligation to make monthly payments. When the total purchase price is paid, the taxpayer is entitled to acquire title in his or her name.

¶ 12. When acquiring a residential condominium unit, it is not unusual for a taxpayer to make a down payment, to enter into an agreement of purchase and sale, to enter into an occupancy agreement and to take possession prior to the registration of the condominium. The occupancy agreement may provide for payments which reflect the carrying costs of the condominium until the purchase transaction can be completed. Normally in such a situation, the taxpayer does not own (either beneficially or legally) the condominium unit until the condominium is registered under the relevant provincial legislation and the purchase transaction has closed.

¶ 13. A taxpayer may in some cases be considered to own, for purposes of the principal residence exemption, a housing unit situated on land not owned by the taxpayer in circumstances where, by reason of the law or according to the terms of the lease, he or she has a leasehold interest in the land. This can occur, for example, in any of the following circumstances:

- (a) the taxpayer is assigned the leasehold interest in government-owned land and pays a builder to construct a house on the land,
- (b) the taxpayer builds a house on leased land, or

(c) the taxpayer “purchases” (i.e., pays what amounts to a purchase price for) a house on leased land.

¶ 14. A taxpayer who occupies a housing unit under a genuine lease-option agreement is not considered to be the owner of the housing unit. On the other hand, the taxpayer is considered to be the beneficial owner of the housing unit where the agreement is a conditional sales contract. It is always a question of fact, based on the written terms of the agreement as well as the circumstances under which it is made and the manner in which it is executed, as to whether the agreement is actually a lease for the property with an option to buy or an agreement for sale. The current version of IT-233, *Lease-Option Agreements; Sale-Leaseback Agreements*, discusses this subject in greater detail.

¶ 15. A taxpayer acquires ownership of property by way of gift or inheritance on the date he or she obtains a right to possess the property for his or her enjoyment.

¶ 16. Where a personal trust, including a spousal trust, distributes a property to a beneficiary who subsequently

disposes of the property, the beneficiary may be deemed by subsection 40(7), for the purposes of claiming the principal residence exemption, to have owned the property since the trust last acquired it. An illustration of how this provision works is contained in the current version of IT-120.

¶ 17. As indicated in ¶ 1 above, the ownership requirement for the principal residence exemption contained in paragraph 54(g) can be met by the legal owner of the property. This is so even where the legal owner, e.g., a trust, is not the beneficial owner. However, as discussed in the current version of IT-120, there are other requirements that must be satisfied for a taxpayer to be able to claim the principal residence exemption. There are special provisions in the Act which make it possible for any personal trust, including a spousal trust, to claim the principal residence exemption if it disposes of the property. For more information on these rules, see Form T1079, *Designation of a Property as a Principal Residence by a Personal Trust*.

## *Explanation of Changes*

### **Introduction**

The purpose of the *Explanation of Changes* is to give the reasons for the revisions to an interpretation bulletin. It outlines revisions that we have made as a result of changes to the law, as well as changes reflecting new or revised departmental interpretations.

### **Overview**

This bulletin discusses ownership of property for purposes of claiming the principal residence exemption.

We have revised the bulletin primarily:

- because of changes, in S.C. 1991, c. 49 (formerly Bill C-18), to provisions in the *Income Tax Act* that pertain to the ownership of property in the province of Quebec; and
- to discontinue the discussion of ownership of property as it pertained to the Registered Home Ownership Savings Plan (RHOSP) rules, which have been repealed.

The comments in the bulletin are not affected by proposed amendments to the *Income Tax Act* contained in Bill C-9, which received first reading in the House of Commons on February 4, 1994, or in the draft legislation released on August 30, 1993 (a Bill for this legislation will likely be introduced in the House in the current session of Parliament).

### **Legislative and Other Changes**

New ¶ 1 (replaces old ¶ 1): The introduction in new ¶ 1 replaces the introduction found in old ¶ 1 and part of the first sentence of old ¶ 2. The old introduction indicated that the term “ownership” in the *Income Tax Act* should be given the meaning of “beneficial ownership”. This position was particularly important in applying the RHOSP rules. In new ¶ 1, we have removed the reference to the repealed RHOSP provision and have now indicated that the ownership requirement under the principal residence rules is met where the taxpayer is the legal owner or the beneficial owner of the property. (The reference to “legal ownership” is significant when the property is held by a personal trust, as briefly mentioned later in the bulletin.)

New ¶s 2 to 5 (replace old ¶ 2): We have split up old ¶ 2 into new ¶s 2 to 5 for easier reading. These paragraphs describe and compare “legal ownership” and “beneficial ownership” as those two terms are used in common law jurisdictions. We have made some wording changes and rearranged some of the sentences for purposes of clarification only, without changing the substance of what was said in old ¶ 2.

New ¶s 6 and 7 (replace most of old ¶ 3): These paragraphs replace the major part of old ¶ 3. New ¶ 6 discusses the principal residence exemption in relation to a residence property which is subject to subsection 248(3) as amended under Bill C-18. That provision specifically governs the income tax treatment of property subject to certain types of legal relationships in the province of Quebec, which is a civil law jurisdiction. The explanations found in new ¶ 7 of three of these types of legal relationships are essentially the same as found in old ¶ 3.

New ¶ 8 (replaces old ¶s 11 and 14 and the second sentence of old ¶ 3): The first three sentences of new ¶ 8 are similar to old ¶s 11 and 14 except that they do not contain a reference to the repealed RHOSP provision and they now tie in more specifically with the principal residence rules. The fourth sentence of new ¶ 8 is similar to the second sentence of old ¶ 3. The last part of new ¶ 8 mentions provisions added to the *Income Tax Act* under Bill C-18 that can deem which of two spouses is the owner of certain property in Quebec and refers the reader to another bulletin which discusses these provisions in detail.

New ¶ 9 (replaces old ¶ 13): The words in the last sentence of old ¶ 13 “or on the date on which the order is made if no effective date is specified in the order” reflected an administrative position that was favourable to some taxpayers for purposes of the RHOSP rules. However, as the RHOSP legislation has been repealed and the above-mentioned administrative position could actually be unfavourable in some cases for purposes of claiming the principal residence exemption, it is replaced in new ¶ 9 with the words “or on such other date as is considered reasonable if no effective date is specified in the order”.

New ¶ 10 (replaces old ¶ 4): This paragraph has been revised to more specifically tie in with the principal residence rules. Also, the comments in old ¶ 4 that were particularly relevant for the repealed RHOSP rules have not been continued in new ¶ 10.

Old ¶ 5: This paragraph is not continued in the new bulletin because the RHOSP legislation has been repealed and because the paragraph now has little, if any, relevance with respect to principal residences because of the rules mentioned in new ¶s 16 and 17 that can apply where the property is held by a personal trust.

New ¶s 11 to 14 (replace old ¶s 6 to 9): We have made some wording changes for purposes of clarification only.

Old ¶ 10: This paragraph was written specifically with regard to the repealed RHOSP provisions and is therefore not included in the new bulletin.

New ¶ 15 (replaces old ¶ 12): There have been some wording changes for purposes of clarification only.

New ¶s 16 and 17: These paragraphs briefly mention rules, enacted under Bills C-72 and C-92, that can apply for purposes of the principal residence exemption where the property has been held by a personal trust, including a spousal trust. The reader is then referred to other materials published by the Department that set out these rules.

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