

LAND HOLDING COMPANY STRUCTURE

Companies as a vehicle to own land for a foreigner is not allowed under Thai law

Thai law allows land ownership by a legitimate partly foreign owned Thai company if the foreign shareholding does not exceed 49% in number of shareholders and percentage of shares. It is not allowed for foreigners to use **nominee Thai shareholders** to create a majority Thai owned company for the purpose of land ownership. The use of nominee shareholders to circumvent the Thailand Land Code Act or Foreign Business Act is illegal and any foreigner setting up a company with nominee shareholders is violating foreign ownership restrictions and creates an unlawful foreign ownership, irrespective the number of shares he owns in the company.

Up to the May 2006 Land Office guidelines aimed at preventing the use of Thai nominee shareholders by foreigners, it was common practice for foreigners to purchase land or condominium beyond the foreign ownership quota through a nominee structured majority Thai owned foreign controlled Thai limited company. As long as the company had a majority Thai shareholdings there were no practical restrictions when purchasing a property and the partly foreign owned company was treated as any other Thai company. Currently the government has issued new regulation preventing circumvention of the law by foreigners through Thai companies and currently this structure is only possible by circumventing the law and regulations.

Is the company foreign or Thai?

In the Land Code Act a company is defined as '**foreign**' or 'alien' if more than forty-nine per cent of its capital is owned by foreigners or more than half of whose shareholders are foreigners. Since July 2008 the private limited company must have a minimum of 3 shareholders at all times, and to be considered **Thai** under the Land Code Act the company must have **2 Thai shareholders opposite 1 foreign shareholder** who may hold up to 49 of the shares.

Under the Foreign Business Act a company is deemed **foreign** if half or more of the juristic person's shares held by foreigners or a juristic person having foreigners investing with a value of half or more of the total capital of the juristic person. A company is still considered Thai under the Foreign Business Act if the company has only **1 Thai shareholder** as long as he owns the majority of the shares in the company.

If it is deemed that the partly foreign owned company is using **Thai nominee shareholders** the company could be deemed **foreign** irrespective the number of shares held by the foreigner. **Currently the bar on the use of nominees lies in the source of the capital investments.**

The main drawbacks and requirements:

- Setting up a company with the purpose to circumvent the laws prohibiting foreign ownership of land or condominium exceeding the foreign ownership quota has an illegal purpose and this structure will in court be deemed void pursuant to sections 150 and Section 172 of the Civil Code and its ownership on behalf of the foreigner is illegal or unlawful.
- Foreigners are restricted from using Thai nominee or proxy shareholders partners in the company. The use of nominees by foreigners is illegal and will lead to unlawful foreign land ownership or unlawful engagement in protected businesses under the Foreign Business Act.
- The foreigner will be a director of a Thai Limited company and will thus be obliged to fulfill his duty as a director, comply with the Foreign Business Act and Alien Employment Act. A foreigner acting on behalf of a company without a work permit could be prosecuted and deported out of Thailand.
- The company must comply with the law and money should pass through the company books, shareholder meetings must be held, minutes of meeting prepared, and yearly accounting must be filed or the director could be liable for fines and even removal from the register of companies.
- The company formation must have a legitimate business purpose which are stated in the company objectives registered with the Business Registration Department and be considered active. A dormant company can be removed from the register for companies.
- The company structure is not immune for future changes in the law or enforcement of existing laws.

New Regulations

Until the May 25 2006 guidelines and July 21 2006 Standard Practice Letter (how to deal with a partly foreign owned company) the practice of the local Land Offices in the tourist resort areas was to investigate only the number of shares held by the foreigner and if the majority of the shareholders were Thai nationals.

New regulations restricting the use of Thai nationals as nominee or proxy shareholders:

In case of foreign involvement in a company applying registration of land the land officer must under the new Land Office Guidelines investigate the Thai shareholders. The Thai shareholders must present themselves at the land office and among others supply proof of income and monthly salary they earned. The Thai shareholders must be financially able to actually invest the amount of capital in the company. In case the purchase price is higher than the registered capital of the company this shall mean the source of the capital used for the purchase of the land and not only the registered capital of the company.

Under the new regulations a shareholder can't be the cleaner from the law office setting up the company.

The guidelines order the officials to enforce **Section 74 of the Land Code**:

Section 74 of the Land Code 'In recording rights and legal acts by the competent authority under Section 71, the competent authority shall have the power to interrogate the parties and summon persons concerned to give oral testimony or send relevant written evidence as may be necessary and then proceed as may be appropriate under the circumstances. If there is reason to believe the recording of such rights and legal acts is in evasion of the law or there is reason to believe the purchaser is purchasing on behalf of an alien, instructions shall be asked of the Minister whose word shall be final'.

The **Business registration rules** preventing the use of Thai nominee shareholders also order the Department of Business officials to investigate the Thai shareholders when dealing with registration of a company with more than 40% foreign ownership or when the company has a foreigner managing director. When submitting the application for registration the Thai shareholders must in this case submit evidences showing the source of their investment together with the business registration application.

The planned **Foreign Business Act amendments** did not yet pass, but the idea was to include voting rights and management as a criterion in defining partly foreign owned companies foreign. Juristic persons incorporated under Thai law which are deemed foreign are not allowed to own land and land owned must be disposed of by the foreigner.

There is still no general restriction on the nationality of directors in a Thai company and foreigners are allowed to control a Thai company, but as every year (section 1152 Civil and Commercial Code) one third or the number nearest to one-third of the directors must retire from office **the amendments would also affect existing partly foreign and foreign controlled companies**. It would simply make a foreign director ineligible for re-election or ineligible for re-election as the sole director of a Thai company. In case of re-election it would make itself **automatically a foreign company!**

Beware of the dodgy advice you get in Thailand

Most of the local property law and accounting offices in the tourist areas of Thailand aiming their services at foreigners have the same interest as the real estate agents and fully depend for their income on property sales or have a direct interest in the real estate market. Can you trust them? Not really. They still suggest loopholes as it generates income, but it is not using a loophole when you transfer land to a 100% Thai owned company and the next day transfer 49% or 39% of the (preference) shares to the foreigner. If the company uses nominees (currently defined in the Land Office guidelines and Business registration rules) or is not in operation or set up to circumvent the law the foreigner is violating the law and could on investigation at a later date be forced to sell the land and will be liable for severe penalties.

The only reason to set up the company without a foreign shareholding is obviously because the land office would not allow registration as the structure is illegal. Despite the complicated lengths some will go to suggest ways around the law, it is all doubtful if not obviously illegal.

Section 100 Land Code Act: 'If a juristic person who acquired land while not within the scope of the provisions of Section 97 and 98 (meaning foreign), but later comes within their scope, the provisions of Section 95 shall apply mutatis mutandis'

Local corruption

The recent land registration rules from the Land Department and Ministry of Interior must effectively prevent the use of nominee structured limited companies by foreigners for land purchase. Though, local land officials may turn a blind eye because of corruption and pressure from leading figures with a financial interest in the property market. The law is actually applied in different ways and you could say that because of corruption on a local level the law and latest regulations are not fully enforced. It is well known that several high-end officials were involved in land transactions or have a direct financial interest in the property market. Just look at the alleged involvement of Thai Rak Thai politicians in forest encroachment and land speculation on the Samui island or a recent Samui land scam involving government men and ranking civil servants. There are many more examples where the officials who must apply the law allow a breach of the law because they have a financial interest in the deal where land is in fact sold to foreign investors operating through a Thai company.

This latest policy change by the government is not the closing or removing of a loophole but enforcement of existing laws. Even though offered by local law and accounting firms, setting up companies with nominee shareholders to own land on behalf of foreigners is and always has been an unlawful evasion of the law. Law enforcement and procedures may change rapidly in Thailand and selective or poor law enforcement in the past is no guarantee for the future.

Work permit

Under present law a foreign managing director acting on behalf of the company (like opening a company's bank account, applying for telephone lines, registering a land transfer, filing balance sheets, applying for updated company documents) may in addition to a passport be required to show a **work permit** issued by the Alien Employment Division of the Labour Department before any signed document will be accepted. Any document signed by the foreign director **could be rejected until a work permit has been issued**. It is in the Bangkok area not possible for a foreign director to open a bank account without a work permit.

To comply with the requirements to obtain a work permit could be impossible for a foreigner director of a practically dormant company. Approved and pending amendments (May 2007) to the Alien Employment Act in Thailand will make it even more difficult for foreigners to obtain a work permit.

Work is defined very broadly in the law; 'engaging in work by exerting energy or using knowledge whether or not in consideration of wages or other benefit' (section 5 Alien Working Act). The foreign director acting on behalf of the company without a work permit could in the worst case face criminal charges and even deportation out of Thailand.