

SOLUTIONS TO FOREIGN OWNERSHIP PROBLEMS

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Most foreign investors doing business in Thailand are aware of the 49% limit on foreign ownership in reserved businesses under the Foreign Business Act (FBA). A wide range of common businesses, including trading and services, are reserved under the lists annexed to the FBA. Lacking proper legal advice on legitimate solutions, investors commonly take the easy path by engaging Thai nominees to hold a 51% stake in the business on their behalf. Granting that this structure can circumvent the foreign ownership restriction--allowing the company to carry out any business and even own land--yet such structure is in violation of the FBA and involves risks. Therefore, aliens should first explore other possible solutions that could help them lawfully hold a majority stake or even full ownership from the outset.

Some foreigners do not know that the 49% limit in certain reserved businesses can be exceeded or exempted if an Alien Business License (ABL) is granted. Even if an ABL application is a time-consuming process with an unpredictable outcome, foreigners should consider it as a means to get full foreign ownership lawfully. If the desired business is unique, does not compete with Thai businesses, or involves dealings among members of affiliated companies, the chance of getting approval is more probable. Of course, there are conditions attached to ABL such as minimum capital requirement and transfer of technology and reporting requirements which can be points of concern.

From the FBA perspective, there are four common types of business that most foreigners wish to engage in, i.e. manufacturing, trading, export, and service. Aside from the ABL, a few other solutions to have 100% foreign ownership in these businesses are available.

Most manufacturing is not reserved; therefore, foreigners can have full ownership. The goods produced in Thailand can be sold in both domestic and export markets. Foreign-owned manufacturing businesses should note that providing financial credit to their customers, technical services and after-sales services with costs charged to customers such as maintenance and repairs, is considered providing services and is not allowed unless an ABL is granted. There are some manufacturers who also engage in small trade of finished goods produced by others not knowing that it is prohibited. Foreign majority-owned or wholly-owned companies cannot own land unless they receive approval from a competent authority such as the BOI or IEAT.

Buying finished goods for resale is considered as trading. If the goods are sold only to the export market, it would be considered an export business which is not prohibited to

foreigners. In contrast, trading of goods in the domestic market could be characterized as either wholesale or retail, which are businesses reserved under the FBA. In the Ministry of Commerce's interpretation, wholesale is extended to the selling of any quantity of goods to a buyer who uses them to produce other goods, which may seem strange from a business standpoint. The FBA permits foreigners to have 100% ownership in wholesale or retail business with a minimum capital of Baht 100 million. With that capital, retailers can have up to 5 retail outlets; additional stores will require a capital increase of Baht 20 million per store. With that capital, wholesalers can have 1 wholesale office; additional offices will require a capital increase of Baht 100 million per office. In any case, this is not a privilege allowed to retail shops selling food or beverages. Foreign-owned export businesses should beware not to carry out other reserved businesses, including services.

The service business will probably be the last business in which the Thais will be ready to compete, opening it to foreigners. At present, there is no other solution for foreigners to have 100% ownership in a service business except to be promoted by the BOI. However, only qualifying services that fall under prescribed promotional categories such as hotel, hospital, international school, and public utility can avail of this privilege. Many foreigners may be fascinated to learn that there is an infamous catch-all promotional category named "Trade and Investment Support Office" (TISO) which permits a variety of services including monitoring/servicing affiliates, consultancy services, engineering and technical services, and activities related to machinery, engines, tools and equipment which cover training, installation, maintenance and repairs, calibration, software design and development, etc. The difficulty with TISO is not getting permission but maintaining it due to the key condition of sales and administrative expenses (displayed in the audited financial statements) of at least Baht 10 million every year. Moreover, a TISO is not qualified for any tax benefits.

It is common for investors from the U.S. to instead seek protection under the Thai-U.S. Treaty of Amity and Economic Relations which allows Americans to own and operate almost all reserved businesses in Thailand. Treaty-protected companies must have a capital of at least Baht 3 million. However, to comply with WTO principles, the Treaty will most likely be terminated by both countries in the future. Parliament approved the first amendment to the 1940 Bankruptcy Act in 15 years in 1998, making further amendments in both 1999 and 2000. These amendments reduce the bankruptcy period from ten years to three years and allow for the restructuring or reorganization of a company, similar to Chapter 11 provisions in the United States. The law sets forth the process of maintaining the viability of a distressed company by setting up a legal structure to maintain the debtors' assets and to rehabilitate its business on the one hand, while protecting the interests of the creditors, old and new alike, on the other. It had long been of concern that Thai courts, which until 1999 had no specialized branch to deal with business restructuring, may not have had the capacity or expertise to take on the immense volume of work. As has been shown in the relatively swift resolution of complicated bankruptcy cases, however, this concern was largely unfounded.

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