

Foreign Business Investment in Thailand – The Foreign Business Act

In 1999 Thailand enacted the Foreign Business Act (“FBA”), which regulates business by foreigners in Thailand. [It should be noted that certain business activities, for example banking, insurance and telecommunication are regulated—and generally more stringently—by legislation specific to them.] Three “negative lists” annexed to the FBA group businesses restricted to foreigners:

Annex one lists “businesses not permitted to be operated by aliens for special reasons”. Foreigners are strictly prohibited from majority ownership of businesses engaging in these activities.

Annex two lists business activities that relate to “national safety or security, or affecting arts, culture, tradition, local handicrafts or natural resources and environment.” These may be majority owned by a foreigner, but require approval of the Prime Minister’s Cabinet. As far as we are aware, no such approval has ever been granted.

Annex three, lists “businesses in which Thai nationals are not yet ready to compete with aliens.” Foreigners may own and operate these businesses if they obtain a license or certification to do so from the Ministry of Commerce. Annex three is quite extensive and includes most common business activities.

In sum, there are very few business activities that are not covered by the FBA, manufacturing and exporting being two of the notable very rare exceptions.

The FBA defines a non-Thai as:

“(1) a foreigner natural person;

(2) a juristic person not registered in Thailand;

(3) a juristic person registered in Thailand and having the following characteristics:

(a) a juristic person at least one-half of whose share capital is held by persons under (1) or (2), or a juristic person at least one-half of whose total amount of capital is invested by persons under (1) or (2);

(b) a limited partnership or a registered ordinary partnership whose managing partner or manager is a person under (1).

(4) A juristic person registered in Thailand at least one-half of whose share capital is held by persons under (1), (2) or (3), or a juristic person at least one-half of whose total amount of capital is invested by persons under (1), (2) or (3).

For the purpose of this definition, shares of a private limited company that has bearer certificates shall be regarded as shares of aliens, unless otherwise provided by ministerial regulations.”

It is also very important to note that it is illegal under the FBA for both the Thai and foreigner benefiting therefrom, for any Thai to be “nominee” (in other words, in name only and not actual) shareholder. Section 36 of the FBA states:

“A Thai national or a juristic person who is not an alien under this Act who assists, supports or jointly engages in a business prescribed in the Annexes belonging to an alien and in which business the alien is not permitted to engage, or jointly engages in the business of an alien by showing that the person is the sole owner of the business, or holds shares on behalf of an alien in any partnership or private limited company or any juristic person so that the alien can evade or violate the provisions prescribed in this Act, including an alien who allows a Thai national or a juristic person which is not an alien under this Act to conduct such acts, shall be punished by imprisonment for not more than three years or a fine from Baht one hundred thousand to Baht one million or both, and the Court shall order the termination of the assistance or support, or the termination of the joint business operation, or the termination of the holding of shares or being a partner in the partnership, as the case may be. If the alien violates the Court’s order, the alien shall be liable to a fine from Baht ten thousand to Baht fifty thousand per day throughout the violation period.”

But there are several exceptions of this stringent rule. For example, specific countries—such as the United States, Australia and Japan—are allowed certain exceptions to FBA under treaties with Thailand. Furthermore, there are also exceptions to these foreign ownership restrictions available to all nationalities under investment promotion legislation in Thailand.

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