

Is it now ok for foreigners to own land via a Thai company?

John Howard, Managing Director of Thailand's oldest, and leading Phuket law firm Tilleke and Gibbins International suggests, the answer to that question is categorically no.

"There has been a misperception over the past years and even before the 2006 government directives that it is OK for foreigners to own land by way of a Thai company, where, for example, foreigners have 49% of the shareholding in the company and Thai's the balance of 51%, with those Thai shareholders being nominees or persons with no direct interest in the company or the asset the company is acquiring".

It is a common misnomer among many prospective foreign buyers to believe that they can secure effective ownership of land in Thailand by means of a minority shareholding in a company, backed by preferential voting rights and supported by a majority of Thai nominee shareholders. In reality this often proposed method of ownership has never been legal, something which stems purely from the prohibited use of nominee's. As John clarifies, "Thai law requires a minimum of seven promoters or shareholders to incorporate a company. While the law does not define the term "nominee", Thai nationals that in essence 'make up the numbers' for this required shareholding have always been at risk of criminal prosecution, as indeed are the foreign shareholders".

This issue is not about control of the company, whether by preferential voting rights or other means, but rather, as John indicates, "about Thai nationals being used as a front to do something they are not allowed to do. I am not aware of any proposal by either the current government or indeed any political party to allow for nominee shareholders".

So is it legal for a foreigner to acquire land by using the vehicle of an incorporated company in Thailand? It is, provided that you remain within the law. There is currently no law stating that preferential voting rights are illegal, "while the past use of nominee shareholders

is still illegal, a foreign minority owned Thai company that does not have nominee Thai shareholders remains a legal vehicle capable of owning land" says John. Indeed even if preferential shareholder voting was a basis to deem a company as 'alien', the same result can usually be achieved by amending the quorum requirements.

Of course this entire issue relates solely to land ownership, as it always has been and still remains perfectly legal for foreigners to directly own the physical structure of a building without encumbrance, be it a villa, a commercial building or any other type of structure. However, as John suggests, the reality is that "this could be seen to be a distinction without a difference as in most cases the building goes with the land".

Foreigners can of course register the freehold quota of a condominium development in their own name, and the market is now quite accepting of land acquisition via long term leases. "These leases are registered for 30 year periods with renewals provided for in the contract documents. A carefully crafted lease to cater for survivorship and over market value buy back should the lease not be renewed for any reason, can go a long way to protecting a foreign lessee of land" says John.

With new democratic elections fast appearing on the horizon, the Democrat Party has also stated that it will do away with the current 30% capital control mechanism, which imposes a 30% withholding, or mandatory reserve on capital inflows brought into Thailand. Whilst this does not apply to a property investment, the significance of such a measure for the property market has been apparent. "The significance in the proposal was not so much in the detail but rather as regards the image or perception that it created in the foreign investment community. Foreign money looks for a level playing field and exchange control mechanisms are viewed as not compatible with the current globalisation trends" John concludes.



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