

## Why you should NOT use a Thai company to buy a home in Thailand – PART 1

According to Section 1012 of the Civil and Commercial Code of Thailand (the “CCC”), the purpose of forming a limited liability company is to make profit. However, in Thailand, especially in its resort destinations, such companies have frequently been used for a different purpose. Many investors have chosen to use limited company as a vehicle to own a villa or condominium “holiday home” in Thailand. The choice of a Thai corporate holding vehicle is most often explained as being due to the stringent laws relating to freehold ownership in Thailand. The legality of such an undertaking will not be discussed in this article. Instead, in the following, we present Part I of a two part article in which we take a brief look at the, unfortunate and unnecessary tax consequences that may result by owning a holiday home in Thailand by means of the all too common but nonetheless ill-advised use of a Thai company limited.

Even though the said investor may set up and use a local corporate vehicle only for the purposes of owning a holiday home in Thailand, the Revenue Department does not see it that way. The Revenue Department will treat such a company as if its purpose is as provided in the CCC: making profit. The Revenue Department will, therefore, interpret all of the company’s actions in light of such purpose. And this, when combined with the Revenue Department’s power to upwardly assess income, can result in severe consequences not only for our investor’s company but also for investor personally. This is because the Revenue Department is empowered to tax our investor’s corporate home owning structure in two ways.

First, our investor will obviously use the asset as a holiday home. He will stay in the acquired villa during his holidays in Thailand. Typically such a person will not pay any rent to “his” company during his stay. However, if it is as typically the case that our investor is also a director of his corporate vehicle that owns the villa or condominium, it will be deemed that such company is providing accommodation to

its director. In such a case the Revenue Department has the power to assess such a rent free stay as taxable personal income for such a director. Section 40(1) of the Thai Revenue Code (“RC”) defines assessable income as “*monetary value of rent-free residence provided by the employer*”. The person liable for tax in Thailand that received the assessable income is required to report and remit income using the personal income tax return form PND 91 by the last day of March after the year in which the income was paid. If the director fails to do so, he might be assessed by the Revenue Department and penalized for failing to file an accurate return or any return at all. Apart from having to pay the assessed taxes, a penalty is payable in accordance with Section 22 of the RC in the amount equal to the tax payable. In event the failure to file any return at all, the penalty is twice the tax payable (RC: Section 26).

Second, not only the individual, but also the company might be penalized as result of the director’s rent-free accommodation. Please note that the company is required to deduct and remit a specified withholding tax on any assessable income, including such rent-free accommodation income. If the company fails to deduct and remit the relevant withholding tax, the company is jointly liable with the tax payer for the unpaid amount. Failure to report such income can result in an assessment by the Revenue Department resulting in a penalty equal to the amount of the additional tax payable and a surcharge of 1.5% per month on the tax payable (but not to exceed the total tax payable).

One might think that an obvious solution would be to ensure that the person that uses the company’s asset for a rent-free stay is not an employee of the company. However, such is not the case. This is because the Revenue Department has the right to assess rental income of the company. In case the asset of the company is used for a rent-free stay or a stay whereby only *apro forma* rental amount is declared, the Revenue Department is entitled to assess a higher rental amount. This might occur if such *pro forma* rental amount is below market rate. The company will be subject to corporate income tax on such assessed amount *even though such amount was not actually paid*.

Finally, it should be noted that a further tax, the house and land tax (“HLT”) is applicable to such holiday home rental income. In Part II of our article we will point out the additional unfortunate and unnecessary HLT liabilities that result from the all too common but nonetheless ill-advised use of a Thai limited company to own a holiday home.

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