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Why you should NOT use a Thai company to buy a home in Thailand – PART 2

In part 1 of this blog we outlined the potential negative corporate income tax consequences where a Thai company is used to own a holiday home in Thailand. We also detailed the potential personal income tax liability of a director using such holiday home as his residence as well as the potential withholding tax liabilities that the Thai company itself would incur as a result of such use. Income and withholding taxes are national taxes which are collected by the Thai Revenue Department pursuant to the Revenue Code of Thailand. However, there is also a local authority empowered to collect an additional tax payment for which such a Thai company may be liable. In this second part of our two part article, we take a closer look at this local tax, the House and Land Tax ("HLT") and its consequences for a Thai company owning a holiday home in Thailand. Also, since it seems to be a common belief that the way to avoid the tax liabilities to which a Thai company is susceptible is to use an off-shore company instead, we also take a look at whether that is true. Is the use of an off-shore vehicle, such as a BVI company, to own such a holiday home in the Kingdom, truly a tax free proposition?

As stated, the HLT, in contrast to corporate income tax, personal income tax and withholding tax, is a so called "local tax". Other local taxes are the Signboard Tax and the Local Development Tax. A local tax is not collected by the Thai Revenue Department. The municipality, or its equivalent depending on the location, is entitled to collect such local tax in order to use the proceeds to maintain and develop the area under its jurisdiction. The HLT is imposed at a rate of 12.5% on the owner of structures and land used in connection therewith if the owner of such structures and land receives, or should receive, rental income from these. In simplified terms: if a Thai company owns a holiday home in Thailand, that Thai company will generally be liable to pay HLT.

However, there are exemptions from HLT liability as provided by the House and Land Tax Act ("HLTA"). The most applied exemption is found under Section 10 of the HLTA. It is applicable if the "*houses or other structures (are) inhabited by the owners thereof or by the agent to protect the place (…)*. It is not unreasonable to think that this exemption might apply where the director of a Thai Company is the one staying in the house. And, indeed, the treatment of a Thai company that owns a holiday home in the Kingdom and whose director uses such holiday home in relation to this exemption from the HLT was legally disputed for quite some time.

One argument that the Section 10 exemption applies to a juristic person, like our Thai company, was made based on the juristic person's legal representative, like the director of our Thai company, being an "*agent to protect the place*". After all, the legal representative of a Thai juristic person is a legal agent of the said juristic person. Thus, it was argued, that by way of the legal representative living in the house the "agent" "protected" "the place". However, in 2006, the Supreme Court, in its ruling no. 1410/2549, did not concur with this reasoning. Instead, the Supreme Court ruled that an "*agent to protect the place*" requires that the said agent be actually assigned to protect the building and not just allowed to live there. Thus, a juristic person owning a structure and having its legal representative residing in the building for dwelling purposes is not eligible to that part of the Section 10 exemption.

Alternatively, it was also argued that the Section 10 exemption should apply where the legal representative of a juristic person inhabited the building because that was equivalent to the juristic person, *i.e.* owner of the building staying there itself. However, a year later in 2007, the Supreme Court, in its ruling no. 689/2550, disagreed. The Supreme Court held that a juristic person can use a structure it owns as, for example, a registered address and in the course of its business and that, therefore, it does not need its legal representative to dwell there. Moreover, since the individual legal representative of a juristic person is a distinct legal entity from the juristic person itself the legal representative dwelling in the building for residential purposes is not the equivalent of the juristic person itself inhabiting the building. Therefore, the "owner" exemption provided under Section 10 of the HLTA does not apply to such a case.

On the other hand, many holiday owners are using off-shore vehicles to own their holiday house or condominium unit in Thailand. The common belief is that such off-shore corporations are an efficient vehicle to avoid any taxation in the Kingdom to

which, for example, a Thai company is susceptible. However, this is often *not* the case with regard to rental income tax liabilities and generally *not* the case when it comes to HLT.

In the case of HLT, as stated it is imposed on the owner of structures and land. As such the HLT and the Supreme Court rulings detailed above are equally applicable to any off-shore vehicle owning a house or condominium unit in Thailand. Thus, such an off-shore vehicle is not shielded from the tax liability that arises in accordance with the HLTA when its director resides in the company's house/condominium unit. Like any Thai company that owns a holiday home in Thailand in which its director resides, the off-shore entity is liable to pay HLT. The purported off-shore tax saving structure thus fails in relation to HLT and that puts the users of these off-shore corporate structures in the same potentially expensive disadvantage as those using Thai companies for such purposes.
