

## Company Establishment

### 1. Forming a Company

#### Procedures for Establishing a Company

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##### 1.1 Company Registration

###### 1.1.1 Promoters

Company promoters are responsible for registering the company with the Ministry of Commerce (MOC). The promoters must be individuals (not juristic persons) who are 20 years of age or older, and they must be available to sign documentation during the registration process. There must be a minimum of 3 promoters for a private limited company and at least 15 promoters for a public limited company.

Each of the promoters is required to be among the company's initial shareholders immediately after the company's registration and is required to hold a minimum of one share upon the company's registration. However, they are generally free to transfer those shares to existing shareholders or third parties, thereafter, if they wish. It is not required for the individuals serving as promoters to reside in Thailand.

Promoters' potential legal liability is generally limited to the par value of the shares they will hold after registration is completed. The promoters are also responsible for paying expenses associated with the company's registration. After registration, however, the company may choose to reimburse the promoters for those expenses.

###### 1.1.2 Timing

Registration of the company occurs at the MOC and can be accomplished on the same day as the registration of the memorandum of association provided that:

All registered shares have been subscribed for;

A statutory meeting is held to transact the business with the presence of all promoters and subscribers, and all promoters and subscribers have approved the transacted business;

The promoters have handed over the business to the directors; and

The payment of at least 25% of the total shares has been paid by the shareholders.

If the company falls under the definition of "foreign" (as defined in the Foreign Business Act (FBA)), it will normally be required to obtain Cabinet approval or a Foreign Business License prior to commencing operations.

Applying for and obtaining the company's tax ID card and VAT certificate (if required) takes place after registration with the MOC and can normally be accomplished within seven to 10 days after providing all required information and documents to the Revenue Department.

### 1.1.3 Filings

All documents associated with the company's registration must be submitted to the registrar of the Department of Business Development of the MOC; or, if the company's office is to be located outside of Bangkok, they must be submitted to the filing office of the province where the office will be located.

All documents associated with the registration of the company's tax ID card and VAT certificate must be submitted to the Central Filing Office of the Revenue Department in Bangkok; or, if the company's office is to be located outside of Bangkok, to the Revenue Office of the province where the office will be located.

## 1.2 Registration Process

### 1.2.1 Corporate Name Reservation

The first step of the company registration process is name reservation. To reserve a name, one of the promoters is required to submit a signed Name Reservation Form to the Department of Business Development of the MOC.

The promoter is required to supply the requested company name together with two alternative names. The registrar will then examine the application in order to ensure that:

- a. No similar company names have previously been reserved; and
- b. The names do not violate any ministerial rules.

If the applicant's intended name is in conflict with either of the above, that name will be rejected and the registrar will consider the alternative names submitted. This process can normally be completed within two to three days. If all three names submitted are rejected, the applicant will be required to re-submit the form with three new names.

The registrar has considerable discretion with regard to the matter of company names. Many times, the first name or even the first two names are rejected for violating one of the two rules stated above. Once the name is approved, the corporate name reservation is valid for 30 days, with no extensions.

### 1.2.2 Filing a Memorandum of Association

After the name reservation has been approved, the company must then submit its Memorandum of Association (MOA). The MOA must include the name of the company, the province where the company will be located, the scope of the company's business, the capital to be registered, and the names of the promoters. The capital information must

include the number of shares and their par value. At the formation step, the authorized capital, although partly paid, must all be issued.

The memorandum registration fee is 50 baht per 100,000 baht of registered capital. The minimum fee is 500 baht and the maximum fee is 25,000 baht. Although there are no minimum capital requirements, the amount of capital should be respectable and adequate for the intended business operation. However, if the company falls under the definition of a foreign company, the following rules apply:

- If the company engages in activities specified in the FBA, its minimum registered capital would be the greater of 25% of the company's average per year expenses for its first three years of operation and 3 million baht (exceptions apply) fully (100%) paid up.
- If the company does not engage in activities specified in the FBA, its minimum registered capital would be 2 million baht fully (100%) paid up.

If the company is to employ foreigners, other minimum registered capital requirements may also apply.

### 1.2.3 Convening a Statutory Meeting

Once the share structure has been defined, a statutory meeting is called, during which the following are determined:

The adoption of the Articles of Association (by-laws)

Ratification of any contracts entered into and any expenses incurred by the promoters in promoting the company

Fixing the amount of remuneration, if any, to be paid to the promoters

Fixing the number of preferred shares, if any, to be issued, and the nature and extent of the preferential rights accruing to them

Fixing the number of ordinary shares or preferred shares to be allotted as fully or partly paid-up other than in money, if any, and the amount up to which they shall be considered as paid-up.

Appointment of the initial director(s) and auditor(s) and determination of the respective powers of the directors.

The promoters shall over the business to the directors.

### 1.2.4 Registration

Within three months of the date of the statutory meeting, the directors must submit the application to establish the company. If not registered within the specified period, the company statutory meeting shall be void and if would like to register to establish the company, shall arrange the meeting for persons who reserve to buy the shares again.

During the registration process, the promoters will be required to supply the name, license number, and remuneration of the auditor the company is planning to hire. The

company registration fee is 500 baht per 100,000 baht of registered capital. The minimum fee is 5,000 baht and the maximum fee is 250,000 baht.

The directors shall then cause the promoters and subscribers to pay forthwith upon each share payable in money such amount, not less than 25%, as provided by the prospectus, notice, advertisement, or invitation. The company is then registered as a legal entity (or juristic person).

If all necessary documents are complete and duly signed by all promoters, directors, and shareholders, the above steps can be completed in one day.

### 1.2.5 Registering for Tax Documents

Companies liable for income tax must obtain a tax ID card and number from the Revenue Department within 60 days of incorporation or the start of operations. Companies that have turnover in excess of 1.2 million baht must also register for VAT with the Revenue Department within 30 days of the date the annual turnover exceeded that threshold.

## 2. Accounting and Financial Reporting Requirements

### 2.1 Books of Accounts and Statutory Records

Companies must keep books and follow accounting procedures as specified in the Civil and Commercial Code, the Revenue Code, and the Accounts Act. Documents may be prepared in any language, provided that a Thai translation is attached. All accounting entries should be written in ink, typewritten, or printed. Specifically, Section 12 of the Accounts Act of 2000 provides rules on how accounts should be maintained:

"In keeping accounts, the person with the duty to keep accounts must hand over the documents required for making accounting entries to the bookkeeper correctly and completely, in order that the accounts so kept may show the results of operations, financial position according to facts and accounting standards."

### 2.2 Accounting Period

A newly established company should close accounts within 12 months of its registration. Thereafter, the accounts should be closed every 12 months. If a company wishes to change its accounting period, it must obtain written approval from the Director-General of the Revenue Department.

### 2.3 Reporting Requirements

All juristic companies, partnerships, branches of foreign companies, and joint ventures are required to prepare a financial statement for each accounting period. The financial statement must be audited by and subjected to the opinion of a certified auditor, with the exception of the financial statement of a registered partnership established under Thai

law, whose total capital, assets, and income are not more than that prescribed in Ministerial Regulations. The performance record is to be certified by the company auditor, approved by shareholders, and filed with the Commercial Registration Department of the MOC and with the Revenue Department of the Ministry of Finance (MOF) within 150 days of the end of the fiscal year.

## 2.4 Accounting Principles

In general, the basic accounting principles practiced in the United States are accepted in Thailand, as are accounting methods and conventions sanctioned by law. The Institute of Certified Accountants and Auditors of Thailand is the authoritative group promoting the application of generally accepted accounting principles.

Any accounting method adopted by a company must be used consistently and may be changed only with approval of the Revenue Department. Certain accounting practices of note include:

**Depreciation:** The Revenue Code permits the use of varying depreciation rates according to the nature of the asset, which has the effect of depreciating the asset over a period that may be shorter than its estimated useful life. These maximum depreciation rates are not mandatory. A company may use a lower rate that approximates the estimated useful life of the asset. If a lower rate is used in the books of the accounts, the same rate must be used in the income tax return.

**Accounting for Pension Plans:** Contributions to a pension or provident fund are not deductible for tax purposes unless they are actually paid out to the employees, or if the fund is approved by the Revenue Department and managed by a licensed fund manager.

**Consolidation:** Local companies with either foreign or local subsidiaries are not required to consolidate their financial statements for tax and other government reporting purposes, except for listed companies, which must submit consolidated financial statements to the Securities and Exchange Commission of Thailand .

**Statutory Reserve:** A statutory reserve of at least 5% of annual net profit arising from the business must be appropriated by the company at each distribution of dividends until the reserve reaches at least 10% of the company's authorized capital.

**Stock Dividends:** Stock dividends are taxable as ordinary dividends and may be declared only if there is an approved increase in authorized capital. The law requires the authorized capital to be subscribed in full by the shareholders.

## 2.5 Auditing Requirements and Standards

Audited financial statements of juristic entities (i.e. a limited company, registered partnership, branch, representative office, regional office of a foreign corporation, or joint

venture) must be certified by an authorized auditor and be submitted to the Revenue Department and to the Commercial Registrar for each accounting year.

However, for a registered partnership with registered capital of less than five million baht, total revenue of no more than 30 million baht, and total assets of no more than 30 million baht, financial statements need only be submitted to the Revenue Department and not to the Commercial Registrar.

Auditing practices conforming to international standards are, for the most part, recognized and practiced by authorized auditors in Thailand.

### 3. Types of Business Organizations

Thailand recognizes three types of business organizations: partnerships, limited companies and joint ventures.

#### 3.1 Partnerships

According to the Civil and Commercial Code (CCC), partnerships can be divided into 2 types:

- (1) Ordinary Partnerships
- (2) Limited Partnerships

##### 3.1.1 Ordinary Partnership

In an ordinary partnership, all the partners are jointly and wholly liable for all obligations of the partnership. An ordinary partnership may or may not register as a juristic person. Therefore, an ordinary partnership can be divided into 2 types:

- (1) Non-registered Ordinary Partnership - has no status as a juristic person and is treated, for tax purposes, as an individual.
- (2) Registered Ordinary Partnership - is registered with the Commercial Registrar as a juristic person and is taxed as a corporate entity.

##### 3.1.2 Limited Partnership

Limited partnerships can take two forms:

- (1) One or more partners whose individual liability is limited to the amount of capital contributed to the partnership, or
- (2) One or more partners who are jointly and unlimitedly liable for all the obligations of the partnership.

Limited partnerships must be registered and are taxed as a corporate entity.

##### 3.1.3 Partnership Registration

When two or more people agree to invest in one of the aforementioned types of partnership, the appointed managing partner is responsible for registering the partnership with the commercial registration office of the province that the head office of the partnership is located in.

A limited partnership must be only managed by a partner with unlimited liability.

The fee for registering a partnership is 1,000 baht for every 100,000 baht of registered capital. The minimum fee is 1,000 baht and the maximum fee is 5,000 baht.

### 3.2 Limited Companies

There are two types of limited companies: private limited companies and public limited companies. The first is governed by the Civil and Commercial Code and the second is governed by the Public Limited Company Act.

#### 3.2.1 Private Limited Companies

Private Limited Companies in Thailand have basic characteristics similar to those of Western corporations. A private limited company is formed through a process that leads to the registration of a Memorandum of Association (Articles of Incorporation) and Articles of Association (By-laws) as its constitutive documents.

Shareholders enjoy limited liability, i.e. limited to the remaining unpaid amount, if any, of the par value of their shares. The liability of the directors, however, may be unlimited if stipulated as such in the company's MOA.

Limited companies are managed by a board of directors in accordance with the company's charter and by-laws. All shares must be subscribed to, and at least 25% of the subscribed shares must be paid up. Both common and preferred shares of stock may be issued, but all shares must have voting rights. Thai law prohibits the issuance of shares with a par value of less than five baht. Treasury shares are prohibited.

A minimum of three shareholders is required at all times. Under certain conditions, a private limited company may be wholly owned by foreigners. However, in those activities reserved for Thai nationals, foreigner participation is generally allowed up to a maximum of 49%. The registration fee for a private limited company is 5,500 baht per million baht of capital.

The 49% limit in certain reserved businesses can be exceeded or exempted if a Foreign Business License is granted. If the desired business is unique, does not compete with Thai businesses, or involves dealings among members of an affiliated company, the chance of approval is more probable. Conditions, such as minimum capital, transfer of technology and reporting requirements, may be attached to Foreign Business License

#### 3.2.2 Public Limited Companies

Subject to compliance with the prospectus, approval, and other requirements, public limited companies registered in Thailand may offer shares, debentures, and warrants to the public and may apply to have their securities listed on the Stock Exchange of Thailand (SET).

Public limited companies are governed by the Public Limited Company Act B.E. 2535 (A.D. 1992), as amended by Public Limited Company Act No. 2 B.E. 2544 (A.D. 2001) and Public Limited Company Act No. 3 B.E. 2551 (A.D. 2008). The rules and regulations concerning the procedure of offering shares to the public is governed by the Securities and Exchange Act B.E. 2535 (A.D. 1992) and the amendments thereto, under the control of the Securities and Exchange Commission (SEC). All companies wishing to list their shares on the SET must obtain the approval of and file disclosure documents with the SEC, and then obtain SET approval to list their shares.

For public limited companies, there is no restriction on the transfer of shares (except to satisfy statutory or policy ceilings on foreign ownership); director's proxies are not allowed; circular board resolutions are not allowed; directors are elected by cumulative voting (unless the MOA provides otherwise); at least 50% of the directors must reside in Thailand; and board meetings must be held at least once every three months. Directors' liabilities are substantially increased.

A minimum of 15 promoters is required for the formation and registration of a public limited company, and the promoters must hold their shares for a minimum of two years before they can be transferred. The Board of Directors must have a minimum of five members, at least half of whom are Thai nationals. Shares must have a face value of at least five baht each and be fully paid up.

Restrictions on share transfers are unlawful, with the exception of those protecting the rights and benefits of the company as allowed by law and those maintaining the Thai/foreigner shareholder ratio. Debentures may only be issued with the approval of three quarters of the voting shareholders. The registration fee is 2,000 baht per million baht of registered capital.

The qualifications for independent directors of listed companies and securities companies that have initial public offerings was amended in April 2009, as follows:

At least one-third of the board's complement should be independent directors, and in any case, the number should not be fewer than three. This will apply for listed companies Companies' annual general shareholders' meetings from the year 2010 onwards. In the case of an IPO, the requirement for independent directors has to be complied with from 1 July 2008 onwards.

The independent director must not have any business or professional relationship with the head office, subsidiaries, associates, or jurist person in his own interest, whether directly or indirectly, as outlined in the Thai Securities and Exchange Commission Circular No.



Kor Lor Tor Kor (Wor) 11/2552 Re: the Amendment of the Regulation regarding the independent director.

### 3.2.3 Scrutinization of Thai Shareholders in Limited Companies

In 2006, the Commercial Registrar prescribed new rules for the registration of both public and private limited companies. The rules require that sources of investment by Thai nationals in the following two categories of new companies be scrutinized:

- (1) A company in which foreigners hold between 40% and 50% of the shares.
- (2) A company in which foreigners hold less than 40% of the shares but a foreigner is a director with the power to bind the company.

All Thai shareholders must disclose the source of their funds to the MOC.

An application for the incorporation of a limited company must now be accompanied by at least one of the following documents evidencing the source of funds of each Thai shareholder:

- \* Copies of deposit passbooks or bank statements disclosing transactions over the past 6 months
- \* A letter issued by a bank certifying the financial position of the shareholder
- \* Copies of other documents evidencing the source of funds (i.e. loan documentation)

In addition, the MOC has issued internal guidelines in support of the rules, which set out the following matters:

- \* The amounts shown in the documents of each Thai shareholder evidencing the source of funds must equal or exceed the amount of funds invested by that Thai shareholder.
- \* The rules do not apply if a foreign national(s) has joint authority with a Thai national(s) to act on behalf of the limited company.
- " Copies of deposit passbooks or bank statements disclosing transactions that are less than six months old may be submitted to the MOC provided that entries on at least one day identify a balance that is equal to or exceeds the funds invested by the relevant shareholder.

Thai shareholders must provide evidence of their sources of funds regardless of the value of their shares.

### 3.3 Other Forms of Corporate Presence

#### Branches of Foreign Companies

Foreign companies may carry out certain business in Thailand through a branch office. Branch offices are required to maintain accounts only relating to the branch in Thailand.

There is no special requirement for foreign companies to register their branches in order to do business in Thailand. However, most business activities fall within the scope of one or more laws or regulations that require special registration (e.g., VAT registration, taxpayer identification card, Commercial Registration Certificate, Alien Business

License, etc.), either before or after the commencement of activities. Therefore, foreign business establishments must follow generally accepted procedures.

It should be borne in mind that the branch is part of the parent company and therefore the parent retains legal liability for contracts, and for tortious acts done. For tax purposes, a branch is considered a permanent establishment, and its revenue is subject to Thai tax. It is important to clarify beforehand what constitutes income that is subject to Thai tax because the Revenue Department may consider revenue directly earned by the foreign head office from sources within Thailand to be subject to Thai tax.

A condition for approval of a Foreign Business License for a branch of a foreign corporation is that minimum capital amounting to no less than five million baht be brought into Thailand within four years of start-up. The branch may be allowed to operate for a period of five years, unless a shorter period is applied for. Extension of the original duration of the license to operate may be granted, provided that the working capital to be brought into Thailand requirement is met.

#### Representative Offices of Foreign Companies

A representative office is defined as an office in Thailand of a foreign company engaged in the business of international trading. A representative office in Thailand cannot engage in any profit-seeking or profit-making enterprise. The scope of activities of a representative office must be limited to approved activities, or significant Thai tax liabilities can arise. The risk of exceeding the scope of activities is that the income of the parent or affiliated companies may be deemed earned in Thailand and subject to taxation.

If the representative office engages in other activities for which permission is not granted, such as buying or selling goods on behalf of the head office, it will be regarded as doing business in Thailand and may be subject to Thai taxation on all income received from Thailand. Also, the representative office may not act on behalf of third persons. Any such business or income-earning activities could amount to a violation of the conditions of the license to establish and operate a representative office, which in turn could result in revocation of that license.

A representative office which undertakes one or more of the approved activities in Thailand without rendering any service to any other person, and which refrains from prohibited activities, is not subject to Thai taxation. Such a representative office is understood to be receiving a subsidy from the head office to meet its expenses in Thailand. Gross receipts or revenues received by a representative office from the head office are not characterized as revenue to be included in the computation of juristic person income tax.

Even though they are not subject to taxation in Thailand, all representative offices are still required to obtain a Corporate Tax Identification number and submit income tax returns and audited financial statements to the Revenue Department. They are also required to submit the same to the Department of Business Development.

## Scope of Representative Office Activities

“International trading business” means activities concerning:

Sourcing of goods or services for head office

Checking and controlling the quality and quantity of goods purchased or hired to manufacture in Thailand by the head office

Giving advice concerning goods of the head office sold to agents or consumers in Thailand

Dissemination of information concerning new goods or services of the head office

Reporting on business trends in Thailand to the head office.

The above international trading business is regarded as a service activity under Schedule 3 of the Foreign Business Act, and thus the establishment of a representative office requires an alien business license from the Director-General of the Department of Business Development.

## Fees for Representative Office

Application fee (nonrefundable) is THB 2,000. If the application is approved, the government fee will be set at the rate of THB 5 for every THB 1,000 or a fraction thereof of the registered capital, with a minimum of THB 20,000 and a maximum of THB 250,000.

## Tax Position of Representative Office

The representative office is required to obtain a corporate tax identification number and submit income tax returns and balance sheets, even if nil.

Individual aliens and all local staff are required to obtain taxpayer cards and pay personal income tax.

## 3.4 Regional Operating Headquarters (ROH)

A Regional Operating Headquarters (ROH) is a juristic company or partnership organized under Thai law to provide managerial, technical, or other supporting services (see below) to its associated companies or its domestic or foreign branches.

### Supporting Services

- (1) General administration, business planning, and coordination
- (2) Procurement of raw materials and components
- (3) Research and development
- (4) Technical support
- (5) Marketing control and sales promotion planning
- (6) Training and personnel management
- (7) Corporate financial advisory services
- (8) Economic or investment research and analysis
- (9) Credit control and administration
- (10) Any other services stipulated by the Director-General of the Revenue Department

Associated Company A juristic company or partnership that is related to the ROH in one of the following manners:

A. Shareholding basis:

- i. A juristic company or partnership holding shares in the ROH worth not less than 25% of total capital
- ii. A juristic company or partnership in which the ROH is a partner or holds shares worth not less than 25% of total capital
- iii. A juristic company or partnership in which a juristic company or partnership under (i.) is a partner or holds shares worth not less than 25% of total capital

B. Control basis:

- i. A juristic company or partnership that has the power to control or supervise the operation and management of the ROH
- ii. A juristic company or partnership that the ROH has the power to control or supervise the operation and management
- iii. A juristic partnership that a juristic company or partnership in (i.) has the power to control or supervise the operation and management

Incentives The government provides tax breaks and incentives to attract foreign companies to set up in the Kingdom.

A. Reductions/exemptions on Corporate Income Tax

- i. Business income - ROH will be taxed at the reduced corporate rate of 10% on income derived from the provision of qualifying services to the ROH's associated companies or branches.
- ii. Royalties - Royalties received from associated companies or branches arising from R&D work carried out in Thailand will be subject to tax at a reduced corporate rate of 10%. Royalties received from a non-related company can also enjoy this reduced rate.
- iii. Interest - Interest income derived from associated companies or branches on loans made by an ROH and extended to its associated companies or branches will be subject to tax at a reduced corporate rate of 10%.
- iv. Dividends - Dividends received by an ROH from associated companies will be exempt from tax. Dividends paid to companies incorporated outside of Thailand and which do not carry on business in Thailand will be exempt from tax.

B. Accelerated Depreciation Allowances

25% of asset value is allowed as an initial allowance and the remaining can be deducted for over 20 years for the purchase or acquisition of buildings used in carrying out the operations of the ROH.

C. Expatriates

- i. An expatriate who is assigned by the ROH to work outside of Thailand is exempt from personal income tax in Thailand for services outside of Thailand. However, the said income must not be borne by the ROH or its associated company in Thailand.

ii. An expatriate who works for an ROH may choose to be subject to withholding tax at the rate of 15% for up to 4 years. By doing so, the expatriate is allowed to omit such income in the calculation of their annual personal income tax liability.

Requirements In order for an ROH to be eligible for tax benefits, it must fulfill the following conditions:

- \* The ROH must be a juristic company or partnership incorporated under Thai law
- \*The ROH must have at least 10 million baht in paid-up capital on the closing date of any accounting period
- \* The ROH must provide services to its overseas affiliated companies and/or branches in at least three countries excluding Thailand
- \* At least half of the revenue generated by the ROH must be derived from service provided to its overseas affiliated companies and/or branches, although this requirement will be reduced to not less than one-third of the ROH's revenue for the first three years
- \* The company must submit the notification to the Revenue Department
- \* Other requirements may be imposed by the Director-General of the Revenue Department

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