

## *Proof of financing and its implications*

**A** new government directive that took effect on Aug 15 has implications for Thai nationals who are partners or shareholders with foreigners in a contemplated partnership or company.

The directive was issued by the Office of Central Company and Partnership Registration of the Commerce Ministry. Known as Directive No 102/2549 re: Documentation in Support of Application for Partnerships and Limited Companies Registration, it applies to entities with the following structure or description:

- ◆ Partnership or company with the foreign partner or foreign shareholder investing or holding from 40% but not exceeding 50% of the registered capital or shares.
- ◆ Partnership or company with the foreign partner or foreign shareholder investing or holding less than 40% of the capital or shares but being the authorised person to act on behalf of the partnership or the company.

The directive requires each and every Thai partner or Thai shareholder in such partnership or company seeking registration to submit proof of financial sources that shall correspond with their investment in the partnership or the company. Proof of financial sources may come in the following forms:

- ◆ copy of bankbook or bank statement within the last six months; or
- ◆ letter issued by the bank certifying and confirming the financial status of the partner or shareholder; or
- ◆ evidence of source of funds for investment in the partnership or holding shares in the company.

After the directive was announced, the question that was repeatedly asked was what the authorities would do with existing partnerships or companies that have the structures mentioned in the directive. Will they audit those partnerships and companies and require each and every Thai partner or shareholder to provide proof of their financial sources?

It is anybody's guess what the ministry will do with existing partnerships or companies with foreign shareholders. We anticipate that it may conduct a random check and ask the Thai partners

or shareholders to provide the documents stipulated in the new directive supporting their investment ability.

We must reiterate here that the investment structure of 51% Thai and 49% foreign, or the division of shares into preferred and common shares with different voting and dividend rights, is not "illegal" per se. The said structure is totally in compliance with the law as long as the Thai partner or shareholder is a real investor, not a nominee of the foreign investor.

According to the new directive, the ability to make an investment does not necessarily mean that the Thai partner or shareholder needs his/her own money. Borrowing (financial) is another viable source for the Thai partner or shareholder. In such case, a loan document is acceptable as evidence. Nonetheless, the Thai partner or shareholder should be able to prove that he/she has sufficient income to honour the loan agreement.

Even though this is called a "new" directive, the principle is not new. Thai foreign investment law has, for many years now, reserved certain businesses in which Thais are not able to compete with foreigners, for Thais.

First, there was the Announcement of the National Executive Council No 281 in 1972. This was repealed and replaced in 1999 by the current Foreign Business Act, which, in addition to stipulating the businesses reserved for Thais, contains provisions prohibiting Thais from acting as nominees for foreign investors to enable foreigners to engage in reserved activities as well as prohibiting foreigners from allowing or asking Thais to be their nominees. Violation of such provision is punishable by a fine or imprisonment or both, and an order from the court for the stoppage of the joint business operation or the nominee arrangement.

It remains to be seen whether such directive will have an impact on the decisions of foreign investors in Thailand.

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