

That Damn Thirty Percent

*by: Nilobon Tangprasit & James Finch
of
Chavalit Finch & Partners, Ltd.*

Have you tried to bring money into Thailand recently? Here are a couple of cases that illustrate the frustration. First, we recently worked with a foreign couple purchasing a house. They sent the money by wire from overseas to their account in Thailand. The bank wouldn't release it, though, saying they had to see a draft of the contract for the house. We sent it to them and scheduled the closing for the following week. But the bank next said the bank's head office had told them they needed to examine an executed copy of the contract before they would release the money.

Well, that's something a little different. How do you think the house owner, a developer, felt about signing over the house before he'd been paid? We explained to the owner that the deal couldn't take place without executed contracts going to the bank first. Next the broker stepped up to the plate. Since the broker had sold a lot of the owner's real estate in the past, the owner finally agreed to give signed documents to the broker, who gave the owner the assurance that nothing would be given to the buyer until the money changed hands. This is a variation on the concept of escrow, which can be useful in these transactions. The owner went along.

But wait a minute. The head office of the bank said that now just the contract of sale wasn't enough and wanted all supporting documentation, and all originals.

What's going on, anyway?

What's going on is that the Thai Exchange Control Act empowers the Bank of Thailand (BOT) to regulate exchange transactions. On 18 December 2006 the BOT, by regulation, added a 30% withholding requirement to inward remittances that couldn't be proved to be in

certain permissible categories. Examples of these categories are professional service fees, the price of goods purchased and direct investment. Included in "direct investment" would be shares, land and houses.

In fact, the 30% withholding is called a "reserve" by the BOT, since it may be refunded if the person doing the remitting applies for a refund of it more than one year but less than two years after it has been withheld. More importantly, if you have remitted the remaining 70% out of Thailand in the one year following the withholding, the BOT will only refund two-thirds of the amount withheld. If you wait past two years to apply for the refund, you will lose the entire 30% withheld.

The stated reason for the regulation is to prevent short-term speculation in the Thai economy, especially in the baht. The idea is that if speculators can't get all of the 30% back if they send the money out within a year after sending the money in, they will be discouraged from speculating at all. But the result is a lot red tape for those of us who aren't speculating.

What happened with our client was that the owner ended up giving a full set of documents to the broker, who promised to give the bank, but not the buyer, copies of everything. Once this was done the money came in and both parties got what they wanted, too. But the hassle factor was pretty high.

Having just spent lots of time trying to get money released from an account we could have spent walking on the beach, when another client called

about bringing in a similar sum of money for a business deal, we were pretty negative. We told him to be ready to spend a week trying to please some faceless guy in a glass office. He said the money had already been sent (to another bank), so there was no alternative but to hope for the best. The next day he went to the bank to begin the procedure. The money was already in his account.

The banks are now trying to comply with the above regulation, but there are great differences between banks and between the policies of local branches and head offices on the subject. The two cases above show how two different banks deal with the problem. Some are using overkill; others haven't gotten around to defining policies. And this is what lawyers hate. It gives petty bank functionaries huge amounts of discretion, but scares them that later somebody might say they did the wrong thing. What they do then, to protect themselves, is nothing.

But they're supposed to be doing their jobs and aren't allowed to do nothing—right? So what do they do instead? Ask you for a copy of your birth certificate, your passport, your wife's driver's license, and they better make sure the bank policy that all corporate resolutions must be dated less than 30 days before the date of submission is followed to a "T", etc. etc. Eventually they'll hit on something you don't have right. "Oh, what a shame," they say. "Why don't you just come back another day." The result? You guessed it. They've done nothing.

All of means that if you want to remit funds to Thailand you now have to understand a few of the ins and outs of how it all works.

The guideline is that inward remittances of foreign currency in the amount of less than US\$20,000 or the equivalent will not be questioned, on the theory that such transactions are too small for the BOT to be worrying about from the point of view of speculation. So what if you break a payment into parts and do a little at a time? This is what lawyers call structuring. Here's an example. If you want to fund an investment of the equivalent of US\$100,000 in Thailand but the contract isn't signed yet, you break it into six parts, each less than \$20,000, and send them in individually every couple of days until the whole amount is in your account. The answer about this isn't completely clear. The \$20,000 is only a guideline and lesser amounts could also be questioned, though this hasn't happened yet.

But there's another problem with structuring. If the amounts are large, it's pretty inconvenient. Let's say you're long-leasing a house for 20 million baht, for example. That's something around US\$590,000 and would mean you would have to break it into thirty separate payments and remit each one separately. Just the bank charges to do all this would run you a pretty penny.

At present, the structuring situation is looser in connection with foreign exchange accounts. Thus, if a foreigner opens one there is no limit on how much may be sent into the account. The above regulation applies to foreign exchange accounts only when the foreign currency is converted into baht when being withdrawn. A structured transaction, withdrawing, say, the equivalent of less than \$20,000 periodically, may, in practice, not be questioned at present, particularly at the bank branch level. Such a series of transactions might later be questioned at the head office level, however.

Foreign clients often ask if they can get around all this by remitting to a Thai person such as a local lawyer and then having the local remit to them. The above regulation, however, applies no matter whom the recipient is. Thus even if the recipient is a Thai lawyer, the same rules apply. If one sends the funds to a Thai lawyer for "professional service fees" (one of the permissible categories, mentioned above) there will be no thirty percent withholding, but the lawyer would have to issue an invoice for the amount and then be taxed on it. This isn't any solution at all because the taxes might well be more than the thirty percent withholding. In fact, at present, some lawyers have the capability, without documents, of convincing the banks that the funds are for direct investment, but this isn't guaranteed to last.

Of course, the real way to get around the regulation is to prove that the remittance is legitimately in one of the exempt categories discussed above. As also discussed about direct foreign investment, though, the problem may be one of chicken and egg. The bank won't allow the money to come in without the thirty percent withholding unless there is executed documentation proving the remittance is for a direct foreign investment.

On the other hand, documentation that proves it's a direct foreign investment can't be executed until the money comes in.

There are two solutions to the chicken and egg problem. One is that the buyer buys baht outside Thailand and then the baht, not foreign currency, is remitted into Thailand. The reason this works to avoid the 30% withholding is that the withholding applies only for the inward remittance of foreign currency, not baht. The disadvantage of this solution is that the exchange rate for the purchase of baht in a country outside Thailand will be unfavorable.

The other solution is that the seller and the buyer can first enter into a preliminary agreement, delivering this to the local bank, for (i) the purchase of a condominium unit, (ii) 49% of the shares in a Thai company, also showing that the buyer will be a director of the company, or (iii) a lease and construction agreement on a piece of land. Next, after the funds are released into the buyer's bank account, the local bank will also need

evidence—final agreements—reflecting the fact that the above transactions were carried out.

The BOT regulations may be changed at any time, so be sure to check to make sure the above is current before entering into a deal of any kind.

Chavalit Finch & Partners, Ltd. are lawyers specializing in real estate and business transactions. They can be contacted on the web at www.chavalitfinchlaw.com, by email at finch@chavalitfinchlaw.com or by telephone at 032 522237, 032 522273. Their offices are located at 19/51 Hua Hin Soi 19, (Wat Klaikangwon), Petch Kasem Road, Hua Hin, Prachuab Kirikhan 77110, Thailand.