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BusinessINSIGHT

BRINGING THAI HOTEL BUSINESS IN LINE WITH THE AEC ERA

The Asean Economic Community (AEC) initially set the time frame to achieve its goal of economic integration by the beginning of 2015. However, the plan has been postponed, tentatively to the end of 2015. The AEC aims to increase competitiveness by reducing the cost of cross-border trade and trade in services, and by enhancing labour mobility through greater harmonisation of rules and regulations.

In this regard, one of the issues of concern about doing business in the run-up to AEC economic integration is whether domestic rules and regulations in Asean member states are ready to be brought into line with the requirements of the forthcoming AEC era and how Thailand would cope with such difficulties.

Several domestic rules and regulations continue to bar foreign direct investment.

Although government bodies are preparing to encounter big changes in preparation for the AEC, so as to make the most of the investment environment in Thailand, it is possible that regulations responsible by different authorised bodies will be inconsistent.

This article will illustrate the possibility that foreign investors may encounter conflicting new rules and regulations that may be applied by Thai governmental organisations in the AEC era, particularly in the hotel business.

The opening of a regional market may result in immense growth in the tourism sector, and Thailand will be hoping to be one of the top destinations to attract foreign direct investment in the hotel business.

According to the Foreign Business Act 1999 (FBA), the law that regulates business operation by foreigners in Thailand, non-Thai persons – including a company having non-Thai persons holding a majority of shares – are prohibited from engaging in restricted businesses. In general, the hotel business is a restricted business under List Three (17) of the FBA and it is therefore closed to foreigners unless permission is granted by the Department of Business Development (DBD). According to the interpretation of the FBA, the ceiling percentage for foreign shareholding in a Thai Company is less than half of the capital – 49.99 per cent.

In the case that the foreign stake goes beyond this ceiling, such enterprise will be governed by the FBA. However, the upcoming AEC framework is going to change perception of foreign investors towards environmental investment in Thailand.

With respect to the regulations controlling the businesses of foreigners, there will be three channels provided for foreigners wishing to operate a hotel business in Thailand.

1. Asean shareholding under AFAS and FBA

The Asean Framework Agreement on Services (AFAS), under the AEC Framework, calls for an increase in the percentage of foreign share ownership by persons of Asean nationalities to 70 per cent for hotel businesses rated as "six stars-plus" (in the tourism sector). Therefore, Asean nationals who are qualified in terms of such criteria will be exempted from the requirement to apply for permission from the DBD as a result of the treaty to which Thailand is a party or by which it is obligated.

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In this regard, the Ministry of Commerce will automatically enforce the terms and conditions.

Such Asean national needs merely to notify the Director General of the DBD in order to obtain a certificate in accordance with Section 11 of the FBA when it satisfies the conditions prescribed by the government or the treaty.

2. Foreign Business Licence under FBA

Foreigners who are not Asean shareholders are prohibited from operating a hotel business if they own shares amounting to 50.01 per cent or more of the total, unless per-

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mission is granted on a case-by-case basis.

However, there are three cases that apply to Asean shareholders, who will also be subject to terms and conditions under this second channel, provided that:

1) Asean nationals hold more than a 70 per cent stake; or

2) The hotel business does not meet the specified criteria according to AFAS; e.g. a hotel is rated below six stars; or

3) The status of such Asean nationals falls within both categories 1) and 2) above.

3. Hotel activity under BOI privilege

Another channel to facilitate foreigners making a greater investment is via investment promotion as approved by the Board of Investment (BOI).

The BOI is another governmental body that takes part in promoting investment in Thailand. Investment promotion in specific sectors allows a more flexible percentage of foreign shares ownership, regardless of the FBA regulations.

By virtue of the Investment Promotion Act, promoted investors are eligible to enjoy (tax and/or non-tax) privileges, depending on the type of promoted activities and the criteria stipulated by the BOI.

Recently, the BOI has launched a plan to implement a new list of promoted activities and a new strategy to overhaul the privileges currently provided to investors. One of the given reasons for revising investment promotion strategies refers to the effects of the AEC era.

The hotel business is currently, under Category 7.4.3 of the BOI promoted activities, under which the BOI provides rights and benefits other than non-tax privileges, as follows.

- For BOI projects located in Zone 3, the promoted person shall receive an exemption from import duty on machinery and other tax privileges.

- For projects located in Kalasin; Nakorn Phanom; Narathiwat; Nan; Buri Rum; Pattani; Phayao; Phare. Maha Sarakham; Yasothon; Yala; Roi Et; Sisa Ket; Sakon Nakhon; Satun; Surin; Nongbualumphu; Chaiyaphum; Nonkhai; Ubon Ratchathani; Udon Thani; and Amnat Charoen, the promoted person shall be entitled to rights and benefits concerning corporate income tax (CIT) exemption, and other related tax (based on zone incentives) according to the BOI's Announcement No. 1/2543 dated 1 August, 2000.

However, the new BOI strategies propose to scrap the zone-based incentives and promote a new regional cluster by cutting down any tax privileges for the hotel industry.

The hotel business will therefore be eligible only to enjoy non-tax privileges.

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