Move Money and Property Out of China

Description

Moving money, assets and property out of China is quite a sensitive matter in China, though such moves take place every day across the Chinese borders. It is a known secret that a bulk of the money so moved is illegal proceeds generated by corrupt officials and their cronies. While we see a great deal of illegal transfer across the border, for ordinary people, moving money and fund out of China may be a big headache, and many foreigners will be willing to attest to the very headache: "how to transfer money out of China".

This post is discussing the money transfer out of China in general terms. China has put in place many detailed rules regarding transfer or repatriation of their money out of China, in particular money earned through their work or business activities in China. But still there are cases foreigners (including immigrant Chinese) may feel puzzled in regard of transferring their fund and property out of China.

1. **Transfer of Money in the case of Inheriting Estates in China**

(1) ***General Rules***

In the case of inheriting estates in China, the inheritor will have to consider how he or she can move the estates out of China. China has stepped up a piece of regulation, *Provisional Administrative Measures on Sale and Wiring of Foreign Exchange In respect of Transfer of Personal Properties*, concerning foreigners, and people from Macau, Hong Kong and Taiwan transferring money out of China that is generated from cashing in on their inherited estates. These Measures set out in details what documents shall be submitted and what formalities shall be undergone in order to transfer out of China the money stemming from inheritance of estates in China.

(2) ***Inheritance of Bank Deposits/Personal Properties***

Due to the complication of possibly applying foreign laws in the course of inheriting personal properties, it can be a real trouble. Please refer to the post: Inheritance of Personal Properties/Chattels in China: a Real Headache

However, through one of the cases I handled on behalf of my foreign clients in getting their money out of China, I come to learn that some of the rules in the Measures are not enforced in practice. In this case, my client was an American lady, the administrator of estates appointed by US court, who inherited a sum of bank deposit of more than RMB 500,000 sitting in HSBC Shanghai branch. The money is earned by the deceased through his job in Shanghai. According to the Measures, transfer of RMB 500,000 and more shall be subject to the approval of China State Administration of Foreign Exchange (the "**SAFE**"), which means the bank will convert the RMB into foreign exchange and wire the same to inheritor's bank account abroad without such an approval. Because of the bureaucracy, it is quite disappointing to have to obtain this approval from top central agency which will certainly take a long wait. To my great surprise, after I explain the facts of the case to the official at SAFE, I was told that the approval can be dispensed with. The reason is that money to be transferred is salary earning by a foreigner only and transfer salary earned in China is always allowed without approval. The official then added such approval will be necessary in the case of a foreigner inheriting money from a Chinese national (though the regulation does not specify this in it). You got it? My understanding is that SAFE is more concerned about foreigners taking “Chinese” money out of China.

That said, emigrant Chinese who may inherit estates left by their family member at home will be disappointed by this.

Another point worth a note in this case, though not much related to the topic here, is that the HSBC bank has agreed to send the money out of China to the inheritor without asking the inheritor to do any legal work in China to prove his inheritance right to the bank deposit. Instead, HSBC simply took the legal documents proving the client’s administrator status made by the American court as necessary to establish my client’s right to inherit the bank deposit. I am not saying HSBC is doing anything wrong. I actually do agree with such practice which alleviates foreigner inheritors’ burden in China. However, it will be a question whether other banks (remember, that was HSBC in my case) esp those home-grown banks such as Bank of China, will follow such suits. It is very likely those banks will request the foreigner inheritors to prove their inheritance right in such bank deposits in accordance with Chinese inheritance law.

If the money is seated in a bank account opened with a China domestic bank, things won’t be as easy as described above.

(2) ***Inheritance of Corporate Shares***

Corporate shares or equity interests are considered as personal property under China laws, the problem mentioned in the quoted post will arise as well.

Here our recent inquiry (end of 2018) to the foreign exchange authority in Beijing city found out that foreign exchanges authority won’t entertain application for approval to take the money proceeds out of sale of inherited shares or equity interests. Instead, they said once a foreign heir completes inheritance of shares, the sale will be governed by rules regarding sale of foreign investment in foreign-invested companies. This apparently goes against our finding from local commerce department that a company may remain as a domestic company even if some shares are inherited by foreign heirs.

It is really an area of law and practice fraught with confusion and ambiguity.

2. How Can a Foreigner Spouse Take Out His or Her Share in the Community Property in China

This is an interesting situation. The client is en emigrant Chinese who is now Canadian citizen. This man emigrated to Canada in nineteen nineties but left his family in Shanghai. The couple have bought a villa in Shanghai a couple of years ago which is however registered in the wife’s name only. Now the husband, believing the Shanghai property market is going to collapse soon, wishes to sell the property. He knows that in China property bought during life of their marriage belongs to the community property of the couple, which means he is entitled to half of the sale proceeds of the property though it is registered only in the name of his wife. So his question is: how to get his share of the property sale proceeds out of China to Canada?

It is quite an interesting question. I don’t have an immediate answer for him, though I have handled a number of matters of helping foreign clients to sell their property in Shanghai, China. In those cases, it is straightforward in that the property was originally bought by and registered in the name of the foreign client, and he can just sell the property and get all the money out smoothly. The problem here in this case is that the Canadian client needs to rely on the community property rule in Chinese family law to establish his ownership in the property. So whether and how he could get his share of sale proceeds out of China require further legal research on it.

My finding is that the confusion is caused by different legal implications of the ownership concepts in Chinese Marriage Law and Chinese Property Law. People tend to think that because of the Chinese community property rule, one spouse will automatically become the owner of real estate purchased by and registered in the name of the other spouse, and that he will be regarded as the legal owner of the said property. While such understanding holds true to some extent, it does flaw in taking the ownership concept in Chinese marriage law as equal to the ownership concept in Chinese Property Law. In fact, they are different in that without proper registration, the co-owner as created by Chinese family law is not recognized as the legal owner of the property in question by a third party (unless he knows the co-ownership) who will simply rely on the title deed of the property to ascertain and judge who is the legal owner of the property.

In that sense, the SAFE will not recognize the husband's ownership share in the property (though community property) registered in his wife's name only. Literally speaking, the husband has no way to take his share of the sale proceeds out of China.

BUT, this does not mean he has not way to circumvent the rule. The core issue is to get the husband's name onto the title deed of the property before sale of the property. As a couple, the husband can get his name also registered as an owner on the title deed (for more in this regard, please refer to: Add your name onto the title deed of the property registered in the name of your spouse.

After getting the name onto the title deed of the property, then the husband will have no problem in getting his share in the sale proceeds out of China.

There seems to be another interesting question to be answered yet: how can the husband take more than half of the sale proceeds out of China?

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