SPC Guiding Case No. 61: Case of Ma Le for Trading Using Undisclosed Information

Dan Young Business Consultancy — www.danyoungcpa.com

Unofficial English translation prepared for reference only. The official Chinese text prevails.

Discussed and adopted by the Judicial Committee of the Supreme People's Court; issued on June 30, 2016.

Keywords

Criminal / crime of trading using undisclosed information / reference to statutory sentence / especially serious circumstances

Holding

The situation in which the crime of trading using undisclosed information under Article 180, paragraph 4 of the Criminal Law references the statutory sentence should be a reference to the entire statutory sentence of the crime of insider trading and leaking insider information under paragraph 1, that is, the crime of trading using undisclosed information should have two circumstances and two sentencing levels of "serious circumstances" and "especially serious circumstances."

Basic Facts

From March 9, 2011 to May 30, 2013, the defendant Ma Le served as the securities investment manager of the Boshi Select Equity Securities Investment Fund under Boshi Fund Management Co., Ltd., with full responsibility for investing the fund in the stock market, and came to possess undisclosed information such as the target stocks, trading times, and trading quantities traded by the Boshi Select Equity Securities Investment Fund. During his tenure, Ma Le used the above undisclosed information under his control to engage in securities trading activities related to that information, operating three stock accounts, "Jin Mou," "Yan Moujia," and "Yan Mouyi," under his control, placing orders through temporarily purchased anonymous Shenzhouxing telephone cards, and, ahead of (by 1 to 5 trading days), at the same time as, or slightly after (by 1 to 2 trading days) the "Boshi Select" fund account under his management, bought and sold 76 identical stocks, with a cumulative transaction amount of more than RMB 1.05 billion and illegal gains of RMB 18,833,374.74. On July 17, 2013, Ma Le voluntarily surrendered to the Shenzhen Municipal Public Security Bureau, and after being brought to justice was able to truthfully confess the crimes he had committed, constituting voluntary surrender; Ma Le had a good attitude toward admitting guilt, the illegal gains could be fully returned from the seized and frozen property, and the imposed fine could also be paid in full.

Judgment

The criminal judgment (2014) Shen Zhong Fa Xing Er Chu Zi No. 27 of the Shenzhen Intermediate People's Court of Guangdong Province held that the defendant Ma Le's conduct had already constituted the crime of trading using undisclosed information. However, the Criminal Law did not provide for the circumstance of "especially serious circumstances" for the crime of trading using undisclosed information, so Ma Le's conduct could only be found to be "serious circumstances." Ma Le surrendered voluntarily and could be given a lighter punishment in accordance with the law; Ma Le had a good attitude toward admitting guilt, the illegal gains could be fully returned, the fine could be paid in full, and he indeed showed remorse; in addition, upon investigation and assessment by the Community Correction and Resettlement Assistance Education Section of the Futian District Justice Bureau of Shenzhen, the announcement of probation for Ma Le would have no major adverse impact on the community where he lived, meeting the conditions for the application of probation. Therefore, Ma Le was sentenced to fixed-term imprisonment of three years, with a five-year probation period, and a fine of RMB 18.84 million for the crime of trading using undisclosed information; the illegal gains of RMB 18,833,374.74 were recovered in accordance with the law and turned over to the state

Source: https://www.danyoungcpa.com/spc-guiding-case-61-china/

treasury.

After the judgment was pronounced, the Shenzhen Municipal People's Procuratorate protested, arguing that the defendant Ma Le's conduct should be found to be especially serious criminal circumstances and punished according to the sentencing level of "especially serious circumstances." The first-instance judgment applied the law erroneously and the sentence was clearly inappropriate, and should be revised in accordance with the law.

The criminal ruling (2014) Yue Gao Fa Xing Er Zhong Zi No. 137 of the Higher People's Court of Guangdong Province held that Article 180, paragraph 4 of the Criminal Law provides that, where the circumstances of trading using undisclosed information are serious, punishment shall be imposed according to the provisions of paragraph 1, and that paragraph did not provide for the circumstance of "especially serious circumstances" for the crime of trading using undisclosed information; while according to the provisions of Article 180, paragraph 1, where the circumstances are serious, the sentence shall be fixed-term imprisonment of not more than five years or criminal detention, and a fine of not less than one time and not more than five times the illegal gains, either concurrently or separately. Therefore, Ma Le's trading using undisclosed information was serious criminal circumstances, and the sentence should be imposed within that sentencing range. The original judgment imposed an appropriate sentence, and the protest organ's grounds for protest were not established and were not adopted. Therefore, it ruled to dismiss the protest and affirm the original judgment.

After the second-instance ruling took effect, the Guangdong Provincial People's Procuratorate requested the Supreme People's Procuratorate to protest to the Supreme People's Court in accordance with the trial supervision procedure. The Supreme People's Procuratorate protested, arguing that Article 180, paragraph 4 of the Criminal Law was a situation of reference to the statutory sentence and should reference all the provisions for punishment in paragraph 1; that the crime of trading using undisclosed information and the crime of insider trading and leaking insider information had equivalent degrees of illegality and responsibility, and their statutory sentences should also be equivalent; and that Ma Le's conduct should be found to be especially serious criminal circumstances, and the application of probation to him was clearly inappropriate. The final ruling in this case degraded the evaluation of Ma Le's criminal conduct on the ground that Article 180, paragraph 4 of the Criminal Law did not provide for the circumstance of "especially serious circumstances" for the crime of trading using undisclosed information, which was indeed an erroneous application of law, resulting in an inappropriate sentence, and should be corrected in accordance with the law.

The Supreme People's Court formed a collegial panel in accordance with the law to directly retry the case and held a public hearing. The facts ascertained in the retrial were basically the same as those in the original trial; the original trial's finding that the defendant Ma Le's illegal gains were RMB 18,833,374.74 contained a calculation error, the actual amount being RMB 19,120,246.98, which should be corrected in accordance with the law. The criminal judgment (2015) Xing Kang Zi No. 1 of the Supreme People's Court held that the conduct of the original-trial defendant Ma Le had already constituted the crime of trading using undisclosed information. Ma Le traded 76 stocks using undisclosed information, with a cumulative transaction amount of more than RMB 1.05 billion and illegal gains of more than RMB 19.12 million, which constituted especially serious circumstances. Given that Ma Le had the statutory mitigating circumstances of voluntarily returning from abroad to surrender himself, turning stocks into cash and depositing them in the three accounts involved without being under control and voluntarily explaining the situation to the China Securities Regulatory Commission, returning all the illegal gains, having a good attitude toward admitting guilt and remorse, not squandering the illicit gains, and fully performing the fine imposed in the original judgment, and other discretionary mitigating circumstances, a mitigated punishment could be imposed on Ma Le. The first-instance judgment and the second-instance ruling ascertained the facts clearly, the evidence was reliable and sufficient, and the conviction was accurate, but due to an erroneous understanding of the legal

provisions, the sentence was inappropriate and should be corrected. In accordance with Article 180, paragraph 4 and paragraph 1, Article 67, paragraph 1, Articles 52, 53, and 64 of the Criminal Law of the People's Republic of China, and Article 389, item (3) of the Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China, the judgment was as follows: 1. The conviction part against the original-trial defendant Ma Le in the criminal ruling (2014) Yue Gao Fa Xing Er Zhong Zi No. 137 of the Higher People's Court of Guangdong Province and the criminal judgment (2014) Shen Zhong Fa Xing Er Chu Zi No. 27 of the Shenzhen Intermediate People's Court was affirmed; 2. The sentencing and recovery of illegal gains parts against the original-trial defendant Ma Le in the criminal ruling (2014) Yue Gao Fa Xing Er Zhong Zi No. 137 of the Higher People's Court of Guangdong Province and the criminal judgment (2014) Shen Zhong Fa Xing Er Chu Zi No. 27 of the Shenzhen Intermediate People's Court were revoked; 3. The original-trial defendant Ma Le committed the crime of trading using undisclosed information and was sentenced to fixed-term imprisonment of three years and a fine of RMB 19.13 million; 4. The illegal gains of RMB 19,120,246.98 were recovered in accordance with the law and turned over to the state treasury.

Reasoning

The effective judgment held: In this case, the facts were clear and the conviction was accurate; the focus of the dispute was how to correctly understand the reference in Article 180, paragraph 4 of the Criminal Law to paragraph 1, and how to grasp the standard for determining "especially serious circumstances" of the crime of trading using undisclosed information.

I. On the understanding and grasp of the reference in Article 180, paragraph 4 of the Criminal Law to the sentencing circumstances of paragraph 1

Article 180, paragraph 1 of the Criminal Law provides for the crime of insider trading and leaking insider information: "Where a person with knowledge of insider information concerning securities or futures trading, or a person who illegally obtains such insider information, before the information concerning the issuance of securities, securities or futures trading, or other information that has a major impact on the price of securities or futures trading is made public, buys or sells the securities, or engages in futures trading related to the insider information, or leaks the information, or expressly or impliedly instructs another person to engage in the above trading activities, if the circumstances are serious, the sentence shall be fixed-term imprisonment of not more than five years or criminal detention, and a fine of not less than one time and not more than five times the illegal gains, either concurrently or separately; if the circumstances are especially serious, the sentence shall be fixed-term imprisonment of not less than five years but not more than ten years, and a fine of not less than one time and not more than five times the illegal gains." Paragraph 4 provides for the crime of trading using undisclosed information: "Employees of securities exchanges, futures exchanges, securities companies, futures companies, fund management companies, commercial banks, insurance companies, and other financial institutions, as well as staff of relevant regulatory authorities or industry associations, who use undisclosed information other than insider information obtained by taking advantage of their positions, in violation of regulations, to engage in securities or futures trading activities related to that information, or who expressly or impliedly instruct another person to engage in related trading activities, if the circumstances are serious, shall be punished in accordance with the provisions of paragraph 1."

There are different understandings in judicial practice as to how the phrase "if the circumstances are serious, shall be punished in accordance with the provisions of paragraph 1" in paragraph 4 should be understood. One view holds that paragraph 4 only provides for the circumstance of "serious circumstances" and does not provide for the circumstance of "especially serious circumstances," so "if the circumstances are serious, shall be punished in accordance with the provisions of paragraph 1" can only mean punishment according to the sentencing level of "serious circumstances" in paragraph 1. Another view holds that the "serious circumstances" in paragraph 4 is only an incrimination clause, meaning that, once the circumstances reach or exceed serious, punishment shall be imposed in accordance with the provisions of paragraph 1. As to the

specific punishment, it should be determined based on whether the circumstances conform to “serious circumstances” or “especially serious circumstances” in paragraph 1, with punishment imposed separately according to the circumstances. Where the circumstances are serious, “fixed-term imprisonment of not more than five years” applies; where the circumstances are especially serious, “fixed-term imprisonment of not less than five years but not more than ten years” applies.

The Supreme People’s Court held that the situation in which Article 180, paragraph 4 of the Criminal Law references the statutory sentence should be a reference to the entire statutory sentence of paragraph 1, that is, the crime of trading using undisclosed information should have two circumstances and two sentencing levels of “serious circumstances” and “especially serious circumstances.” The specific reasons for this understanding are as follows:

(1) It conforms to the legislative purpose of the Criminal Law. Because acts of trading using undisclosed information are relatively frequent in China’s fund, securities, futures, and other fields, the actor uses the huge funds invested by the public as backing to obtain huge illegal benefits by buying in advance or selling in advance, transferring risks and losses to other investors, which not only damages the property interests of the entity where the actor is employed, but also seriously undermines the principle of an open, fair, and equitable securities market, seriously harms the interests of customer investors or retail investors in an information-weak position, seriously harms the reputation of the financial industry, and affects investors’ trust in financial institutions, thereby having a serious impact on the healthy development of asset management and the fund, securities, and futures markets. For this reason, the Amendment (VII) to the Criminal Law of the People’s Republic of China newly added the crime of trading using undisclosed information, and placed it in the same article as the crime of insider trading and leaking insider information, indicating that the degrees of illegality and responsibility of the two crimes are equivalent. The crime of trading using undisclosed information should also apply “especially serious circumstances.”

(2) It conforms to the literal meaning of the article. First, the “serious circumstances” in Article 180, paragraph 4 of the Criminal Law is an incrimination clause. The Provisions (II) of the Supreme People’s Procuratorate and the Ministry of Public Security on the Standards for Filing and Pursuing Criminal Cases under the Jurisdiction of Public Security Organs provides for the circumstances standards for pursuing the crime of trading using undisclosed information, indicating that the crime must reach “serious circumstances” before it can be pursued. The crime of trading using undisclosed information is a circumstance-based crime; for the legislation to clarify its circumstance-based attribute, it must rely on the expression “serious circumstances” to avoid acts with “non-serious circumstances” from being criminalized. Second, the “serious circumstances” in that paragraph does not simultaneously have the nature of a sentencing clause. There are a large number of situations in the articles of the Criminal Law where “serious circumstances” has both the nature of an incrimination clause and a sentencing clause, but without exception a specific statutory sentence is listed thereafter. After the “serious circumstances” in Article 180, paragraph 4 of the Criminal Law, no specific statutory sentence is listed; instead, reference is made to the statutory sentence of the crime of insider trading and leaking insider information. Therefore, the “serious circumstances” in this paragraph only has the nature of an incrimination clause and does not have the nature of a sentencing clause.

(3) It conforms to the understanding of the legislative technique of reference to the statutory sentence. Reference to the statutory sentence refers to not providing for an independent statutory sentence for a certain crime, but referencing the statutory sentence of another crime as the statutory sentence of that crime. The purpose of the reference to the statutory sentence in Article 180, paragraph 4 of the Criminal Law is to avoid duplication of textual expression, and does not belong to the situation where the legal provision is unclear.

In sum, although Article 180, paragraph 4 of the Criminal Law does not clearly express “especially serious circumstances,” based on the legislative purpose, the literal meaning of the article, and the legislative

technique established by this paragraph, it should include the circumstance and sentencing level of "especially serious circumstances."

II. On the standard for determining "especially serious circumstances" of the crime of trading using undisclosed information

At present, although there is no special provision on the standard for determining "especially serious circumstances" of the crime of trading using undisclosed information, given that the Criminal Law provides that the crime of trading using undisclosed information is punished by reference to the provisions on the crime of insider trading and leaking insider information, and the Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Specific Application of Law in Handling Criminal Cases of Insider Trading and Leaking Insider Information determines circumstances such as a transaction amount of RMB 2.5 million or more and gains of RMB 750,000 or more as the standard for "especially serious circumstances" of the crime of insider trading and leaking insider information, the crime of trading using undisclosed information should also follow the same standard. Ma Le used undisclosed information to conduct trading activities, with a cumulative transaction amount of more than RMB 1.05 billion and illegal gains of more than RMB 19.12 million, far exceeding the above standard, and at the time the case was discovered he was the person with the largest amount of such crimes uncovered nationwide. By reference to the Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Specific Application of Law in Handling Criminal Cases of Insider Trading and Leaking Insider Information, Ma Le's criminal circumstances should be "especially serious circumstances."

Relevant Legal Provisions

Article 180 of the Criminal Law of the People's Republic of China.

Disclaimer: This translation is provided for reference and informational purposes only. In the event of any discrepancy, the official Chinese text issued by the Supreme People's Court shall prevail. This translation does not constitute legal advice.