SPP Guiding Case No. 188: Case of Sang Mou for Bribery, Abuse of Power as Personnel of State-Owned Companies, and Trading on Undisclosed Information

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

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Keywords

Crime of bribery / crime of abuse of power by personnel of state-owned companies / crime of trading on undisclosed information / beneficial rights to equity / determination of loss

Holding

When handling bribery cases in the investment and financing field, the procuratorial organ shall accurately determine the nature of the act of transmitting benefit, and focus on examining evidence such as the background of the investment or financing, the manner of investment or financing, the authenticity of the financing need, whether the actor is required to bear risk, and whether the risk corresponds to the proceeds obtained. When handling cases of abuse of power by personnel of state-owned companies, the scope of loss to public property caused by the act shall be objectively determined; anticipated gains that the state-owned company should have obtained but did not may be determined as the amount of loss. When handling cases of trading on undisclosed information, for the determination of key elements such as the scope of inside information and undisclosed information and the amount of profit from correlated trading, determination opinions issued by professional institutions such as the securities regulatory authority and stock exchanges shall be obtained, and the case shall be examined and judged on the basis of the whole-case evidence.

Basic Facts

The defendant Sang Mou, male, former assistant to the president and general manager of the investment banking division of Company A Asset Management Co., Ltd. (a state-owned non-bank financial institution, hereinafter "Company A"), and former general manager and chairman of Company B Investment Management Co., Ltd. (a wholly owned subsidiary of Company A, hereinafter "Company B").

(I) Crime of bribery. From 2009 to 2017, the defendant Sang Mou, taking advantage of his positions as general manager of the investment banking division of Company A and as general manager and chairman of Company B, provided assistance to relevant companies or individuals in matters such as enterprise financing, and accepted equity interests and money given by companies and individuals totaling the equivalent of more than RMB 105 million.

Among these, from 2015 to 2017, Sang Mou, taking advantage of his position, provided assistance to a Quanzhou-based company actually controlled by Guo Mou in matters such as listing through a reverse merger with a Heilongjiang-based company and obtaining financing support from Company B. After the successful reverse-merger listing, the shares of the Heilongjiang-based company were renamed as shares of the Quanzhou-based company. In September 2016, Sang Mou arranged for his friend Jiang Mou to sign an equity-beneficial-rights holding agreement with Guo Mou, stipulating that Guo Mou would transfer, at a low price, the beneficial rights to 5 million shares of the Quanzhou-based company to Jiang Mou at the pre-listing price of RMB 7.26 per share, that the agreement would be valid for at least one year, that the repurchase amount would be calculated at 90% of the average price over the 20 trading days preceding the

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exit date, and that Jiang Mou would pay Guo Mou RMB 36.3 million. In March 2017, before the validity period of the agreement had expired, Jiang Mou, seeing that the market was performing well, signed an agreement with Guo Mou stipulating that Guo Mou would repurchase the beneficial rights early at a total repurchase price of RMB 62 million. From April to July of the same year, Guo Mou transferred the RMB 62 million to Jiang Mou in two installments. Jiang Mou actually profited RMB 25.7 million, which he agreed to split evenly with Sang Mou.

(II) Crime of abuse of power by personnel of state-owned companies. In June 2015, a fund project managed by Company B was established. Sang Mou had a Yunnan-based company of his friend Wen Mou invest more than RMB 161 million as the subordinated tranche of the fund, of which RMB 130 million was later transferred to Company B, leaving the Yunnan-based company with a subordinated-tranche share of RMB 31.3255 million. In order to help the Yunnan-based company transfer the remaining share early and profit, in February 2018, Sang Mou found Zhu Mou to take over the share, and, without research and decision by Company B's business decision-making committee and board of directors, improperly arranged for Company B to issue a letter to a Shanghai-based company actually controlled by Zhu Mou, stating that Company B was aware that the Shanghai-based company had contributed RMB 101 million to purchase all of the Yunnan-based company's remaining subordinated-tranche share, and promising that shares would in future be distributed based on its capital contribution rather than on the fund share. In March 2018, after the Shanghai-based company contributed RMB 101 million to take over the Yunnan-based company's subordinated-tranche share, the Yunnan-based company exited the fund project earlier than Company B and profited more than RMB 70 million. Because of the Yunnan-based company's early exit, the floating-return distribution rules stipulated in documents such as the subordinated-partner distribution agreement were changed, resulting in differences in the annualized returns of fund shares; as calculated by an accounting firm, Company B received RMB 19.8699 million less in investment income.

The remaining facts of Sang Mou's other acts of abuse of power as personnel of state-owned companies are omitted.

(III) Crime of trading on undisclosed information. From June 2015 to September 2016, Sang Mou, taking advantage of his position, obtained undisclosed information such as the names of the stocks invested in, the trading times and the trading prices of the securities accounts of Company B and of a fund actually controlled by Company B. As determined by the China Securities Regulatory Commission, the above information constituted other undisclosed information other than inside information. During this period, Sang Mou, in violation of relevant provisions, used the above undisclosed information to operate securities accounts in the name of a company controlled by himself and under the names of others to conduct correlated trading, illegally profiting RMB 4.4166 million.

This case was transferred for prosecution after the conclusion of the investigation by the Beijing Municipal Supervisory Commission. On March 3, 2020, the Second Branch of the Beijing Municipal People's Procuratorate prosecuted Sang Mou in accordance with law for the crimes of bribery, trading on undisclosed information, and abuse of power by personnel of state-owned companies. On August 27, 2021, the Beijing No. 2 Intermediate People's Court rendered a first-instance judgment, sentencing Sang Mou to life imprisonment for the crime of bribery, with deprivation of political rights for life and confiscation of all personal property; to three years' fixed-term imprisonment and a fine of RMB 4.5 million for the crime of trading on undisclosed information; and to five years' fixed-term imprisonment for the crime of abuse of power by personnel of state-owned companies; and deciding to impose life imprisonment, deprivation of political rights for life, and confiscation of all personal property. After the first-instance judgment, Sang Mou appealed. The Beijing Higher People's Court ruled in second instance to dismiss the appeal and affirm the original judgment.

Procuratorate Performance of Duties

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(I) Early intervention. The procuratorial organ intervened early in examination at the request of the supervisory organ, and, focusing on Sang Mou's subjective intent in the crime of trading on undisclosed information and the determination of undisclosed information, put forward specific opinions on supplementing evidence, comprehensively consolidating key evidence. First, the trading instructions of Company B were obtained, and Company B explained the relevant trading instructions signed by Sang Mou, thereby ascertaining Sang Mou's subjective knowledge of the undisclosed information. Second, the professional determination opinion of the China Securities Regulatory Commission was obtained, confirming that the information possessed by Sang Mou by taking advantage of his position concerning the securities accounts of Company B and a certain fund — including investment decision-making, trade execution, positions, capital amounts and changes, and investment scale — constituted "other undisclosed information other than inside information."

(II) Examination for prosecution. During the examination-for-prosecution stage, the procuratorial organ examined all of the criminal facts and evidence involved in Sang Mou's case in accordance with law. In response to the financial professional issues involved in the bribery, it consulted securities industry practitioners and criminal-law experts to understand the nature and transaction forms of a normal equity-beneficial-rights holding financing agreement, clarify the differences from the agreement involved in this case, and reveal that the agreement involved was a means for the bribe-giving and bribe-taking parties to transmit benefit. In response to the issue of determining the amount of profit in the crime of trading on undisclosed information, it heard the opinions of institutions such as stock exchanges, determined the "five days before and two days after" comparison principle for correlated-trading stocks, the method of calculating transaction amounts and profits, namely the "first-in-first-out method," and the formula for calculating profit amounts; ultimately, based on the transaction data provided by the Shanghai and Shenzhen Stock Exchanges, it determined that Sang Mou had illegally profited a total of RMB 4.4166 million.

(III) Charging and proof of crime. At trial, in response to the opinions raised by the defendant and his defender that the equity-beneficial-rights holding financing agreement signed among Sang Mou, Jiang Mou and Guo Mou constituted a normal commercial investment, and that the fund project involved had not caused loss to public property, the procuratorial organ conducted targeted cross-examination and rebuttal.

On the fact of accepting bribes from Guo Mou, the public prosecutor pointed out that this was bribery in the form of an equity-beneficial-rights holding financing agreement, and did not constitute normal investment and financing behavior in the capital market. First, the background to the signing of the agreement was abnormal. When Sang Mou arranged for Jiang Mou and Guo Mou to sign the agreement, Guo Mou's company had no significant financing need, and the company had already been listed, with its share price in an upward range; Guo Mou's transfer of the beneficial rights to 5 million shares to another person was a relinquishment of highly certain expected benefits, which was contrary to common sense. Second, the transfer price was abnormal. When the two parties signed the agreement, the company had already been listed, yet Sang Mou's side calculated the amount payable based on the company's pre-listing price, which was clearly inconsistent with the normal transaction price. Third, the repurchase timing was abnormal. The agreement stipulated that it would be valid for at least one year, meaning that Sang Mou's side could not require Guo Mou's company to repurchase the beneficial rights until at least one year later; however, about six months after the signing, Sang Mou's side, in order to realize the gains, required Guo Mou to repurchase early, contrary to the main terms of the agreement. In addition, Sang Mou took advantage of his position to provide assistance to the company actually controlled by Guo Mou in matters such as reverse-merger listing and obtaining financing support from Company B. In sum, the agreement involved was false in nature and was actually a means of trading power for money and transmitting benefit.

On the fact of abuse of power, the public prosecutor pointed out that Sang Mou, without deliberation by the board of directors and the business decision-making committee, arbitrarily decided to issue a commitment letter to the Shanghai-based company in the form of countersignature, based on which Zhu Mou agreed to

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have the Shanghai-based company acquire the subordinated-tranche fund share of the Yunnan-based company at a high price. Because the Yunnan-based company exited the fund project early, the floating-return distribution rules stipulated in documents such as the partnership agreement were directly changed, causing the annualized return on the fund share held by Company B, which was likewise a subordinated limited partner, to decrease, thereby harming Company B's interests. There is a causal relationship between Sang Mou's abuse of power and the resulting loss to public property.

Guiding Significance

(I) When handling duty-crime cases in which bribes are accepted through investment and financing, the evidence such as the background, manner, authenticity and risk of the investment or financing, and whether the risk corresponds to the return, shall be comprehensively examined, so as to judge whether the essential characteristics of a power-for-money transaction of the crime of bribery are present. For bribery cases in which benefit is transmitted through investment and financing means such as equity-beneficial-rights holding financing, the procuratorial organ shall focus on examining the background of the investment or financing, whether the requesting party has a genuine financing need, the specific manner of investment or financing, whether the bribe-taker pays consideration and whether it is required to bear investment risk, and whether the risk corresponds to the proceeds obtained. Where the capital operation or relevant transaction deviates from normal market investment, the bribe-taker's official act is closely linked to the illegal gain, the consideration paid by the bribe-taker is clearly disproportionate to the proceeds obtained, and the characteristics of a power-for-money transaction of bribery are present, it shall be determined in accordance with law to constitute the crime of bribery.

(II) The scope of loss to public property caused by dereliction-of-duty crimes includes loss of gains that a state-owned unit should have obtained but did not, caused by missing transaction opportunities, compressing profit margins, or relinquishing due rights and interests. In practice, the scope of loss to public property caused by dereliction-of-duty crimes is generally the actual loss of existing property of a state-owned unit; however, in financial-sector dereliction-of-duty cases, factors such as changes in transaction rules and adjustments to income-distribution methods may cause a state-owned unit to compress profit margins or relinquish due rights and interests, thereby causing anticipated gains of the state-owned unit to become due but unobtained. The procuratorial organ shall focus on examining whether the cause of the loss is a market factor or the dereliction-of-duty act, the irregularity and unlawfulness of the dereliction-of-duty act, and whether there are elements such as practicing favoritism. The portion of anticipated-gain loss caused by the dereliction-of-duty act rather than by market factors shall generally be included in the scope of loss to public property.

(III) When handling securities- and futures-related criminal cases, for the determination of key elements such as the scope of inside information and undisclosed information and the amount of profit from correlated trading, determination opinions issued by professional institutions such as the securities regulatory authority and stock exchanges shall generally be obtained and examined and judged in accordance with law. For crimes of insider trading and trading on undisclosed information committed by an actor taking advantage of his position, the determination of key elements such as inside information and undisclosed information, as well as the determination of important circumstances such as the amount of profit from correlated trading, is highly professional and shall be based on determination opinions issued by professional institutions such as the securities regulatory authority and stock exchanges; if a professional determination opinion is found to be missing during examination, the procuratorial organ shall promptly communicate with the supervisory organ to supplement and improve the relevant evidentiary materials.

Relevant Legal Provisions

Article 168, Article 180, Article 383, Article 385 and Article 386 of the Criminal Law of the People's Republic of China

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Article 5 of the Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in Handling Criminal Cases of Trading on Undisclosed Information

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