SPP Guiding Case No. 189: Case of Li Mou et al. for Embezzlement of Public Funds

Dan Young Business Consultancy — www.danyoungcpa.com

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

Decided at the 6th meeting of the 14th Procuratorial Committee of the Supreme People's Procuratorate on June 9, 2023; issued on July 31, 2023.

Keywords

Crime of misappropriation of public funds / for personal use / recovery of illegal gains

Holding

When handling cases of misappropriation of public funds in the financial field, elements such as "for personal use" shall be grasped in substance. Where public funds of a unit are used in violation of provisions for an individual to engage in profit-making activities, thereby creating risk to the safety of the public funds, and the public funds are formally used by the unit but are substantively used for personal purposes, the misappropriation of public funds may be determined to be "for personal use." Where a third party directly profits from the actor's crime of misappropriation of public funds, and although the third party does not constitute a crime or is not pursued for criminal responsibility, it has subjective awareness of the illegality of the benefit, the third party's direct profit shall be determined to be illegal gains; the procuratorial organ may make a recommendation to the supervisory organ to recover them or order restitution in accordance with law.

Basic Facts

The defendant Li Mou, male, former president of State-owned Bank A, and formerly vice president of State-owned Bank A.

The defendants Wang Mou, Shao Mou and Yu Mou, former staff members of the capital operation center of State-owned Bank A.

The defendants Zhao Mou and Qian Mou, former staff members of the fixed-income securities department of Securities Company B.

In 2006, a policy bank issued the subordinated-tranche product of the "Third Tranche of 2006 Yellow River Credit Asset-Backed Securities" (hereinafter the "Yellow River 3C Securities"). Securities Company B was one of the underwriters. After Zhao Mou, deputy general manager of the fixed-income securities department, and Qian Mou, business manager, learned the information that the securities were extremely likely to be profitable, they, pursuing personal interests, discussed having Zhao Mou contact State-owned Bank A to issue a tiered wealth-management product linked to the securities. Zhao Mou then contacted Li Mou, then vice president of State-owned Bank A, Wang Mou, deputy general manager of the capital operation center, and others. After discussion, Li Mou decided that State-owned Bank A would issue a wealth-management product and then use the funds raised by the product, through a trust contract, to purchase the "Yellow River 3C Securities." In June 2008, State-owned Bank A issued the "Tianshan No. 5" wealth-management product, raising RMB 425 million, and invested in the "Yellow River 3C Securities" through a trust plan issued by Trust Company C. The wealth-management product was divided into a stable tier and an aggressive tier; the stable tier raised RMB 365 million and was subscribed by financial institutions such as commercial banks; the aggressive tier raised RMB 60 million and was subscribed by more than 70 persons including Li Mou, Zhao Mou and Wang Mou. State-owned Bank A collected investment management fees.

Source: https://www.danyoungcpa.com/spp-guiding-case-189-china/

At the end of 2008, to maximize personal interests, Zhao Mou and Qian Mou, after discussion, proposed to Li Mou, Wang Mou and others to redeem the “Tianshan No. 5” wealth-management product early, and to set up a separate wealth-management platform with lower returns for the stable tier and higher returns for the aggressive tier for investment in the “Yellow River 3C Securities.” In July 2009, when the conditions for early termination were not satisfied and the “Yellow River 3C Securities” had good expected returns, Li Mou, at a special meeting, rejected the opinions of the bank’s risk-control department and strongly advocated early termination of the “Tianshan No. 5” product; at a president’s office meeting he fabricated the fact that the “Yellow River 3C Securities” carried relatively high risk and concealed the true purpose of early redemption being to obtain greater personal interests, thereby prompting the state-owned bank to make the early-redemption decision; the meeting did not study the redemption method or the source of funds. Because sufficient funds could not be raised from other channels in the short term, upon Zhao Mou’s proposal and with Li Mou’s consent, Wang Mou, Yu Mou and Shao Mou approved or handled the matter, and more than RMB 480 million of State-owned Bank A’s reserve funds were used in violation of provisions to redeem the “Tianshan No. 5” product early.

In August 2009, after discussion with Wang Mou and others, Li Mou, by signing a transfer agreement, transferred the beneficial rights to the “Yellow River 3C Securities” held by State-owned Bank A at a price of more than RMB 485 million to a trust plan separately established by Trust Company D, and used the funds raised by the trust plan to repay the misappropriated funds of State-owned Bank A. Upon investigation, the separately established trust plan raised RMB 490 million; the six defendants and 15 relevant personnel of State-owned Bank A and financial regulatory institutions introduced by Li Mou, Wang Mou, Shao Mou and Yu Mou subscribed to aggressive-tier products totaling RMB 60 million. By the maturity and redemption in October 2010, the above 21 persons profited a total of more than RMB 126 million, of which the six defendants including Li Mou profited more than RMB 80 million and the remaining 15 persons profited more than RMB 40 million.

This case was transferred for prosecution after the conclusion of the investigations by the Supervisory Commission of City A and the Supervisory Commission of District B of City A. On October 12 and November 8, 2019, the People’s Procuratorate of City A prosecuted the six persons including Li Mou for the crime of misappropriation of public funds in two cases in accordance with law. On October 13, 2020, the Intermediate People’s Court of City A rendered a first-instance judgment, determining that the six defendants constituted the crime of misappropriation of public funds, and that they respectively had mitigating circumstances such as voluntary surrender and being accessories; they were sentenced to fixed-term imprisonment ranging from five years and six months to one year and two months. After the first-instance judgment, Li Mou and Zhao Mou appealed; on August 31, 2021, the Higher People’s Court of Province C ruled in second instance to dismiss the appeal and affirm the original judgment.

Procuratorate Performance of Duties

(I) Early intervention. At the request of the supervisory organ, the procuratorial organ sent personnel to intervene early, carrying out work on fact-finding, application of law and the direction of investigation and evidence collection.

First, discussion of the characterization of the case. One view held that after State-owned Bank A used its reserve funds to redeem the wealth-management product, it obtained the beneficial rights to the “Yellow River 3C Securities,” and Li Mou’s decision to transfer the beneficial rights to a trust plan separately established and in which he participated encroached upon the gains that State-owned Bank A should have obtained, which satisfied the characteristics of the crime of embezzlement. Another view held that Li Mou and others’ conduct caused State-owned Bank A to lose due gains and caused loss to state interests, which should be characterized as the crime of abuse of power by personnel of state-owned companies. After study, the procuratorial organ held that Li Mou, to maximize personal interests, used public funds in violation of provisions, and his subjective intent was misappropriation rather than encroachment; as to the use of bank

Source: https://www.danyoungcpa.com/spp-guiding-case-189-china/

reserve funds to redeem an unmatured wealth-management product early, whether the bank could gain after maturity was uncertain, and what the bank lost was merely the opportunity to possibly gain, which did not satisfy the elements of the crime of embezzlement. The misappropriated funds were all returned before the case was discovered, causing no loss of the bank's property interests, so it was also inappropriate to characterize the matter as the crime of abuse of power by personnel of state-owned companies. Li Mou and others, to engage in profit-making activities, used bank reserve funds in violation of provisions to redeem the wealth-management product early, causing the bank to bear securities-investment risk that it should not have borne, which satisfied the characteristics of the crime of misappropriation of public funds; this opinion was accepted by the supervisory organ.

Second, opinions on supplementing evidence. To further ascertain the facts of the whole case, the procuratorial organ suggested obtaining the basic materials and relevant samples on which Qian Mou's analysis of the "Yellow River 3C Securities" was based, to ascertain the source and nature of the information; supplementing the testimony of the bank's financial personnel and documentary evidence such as rules and regulations and meeting records, to ascertain the bank's reserve-fund management provisions and approval procedures; and obtaining the testimony of other aggressive-tier investors and relevant bank statements, to ascertain the above persons' participation in the investment and acquisition of benefits. The supervisory organ adopted all of these.

(II) Examination for prosecution. The procuratorial organ further examined the facts and evidence of the case and argued that the conduct constituted the crime of misappropriation of public funds; in sorting out the case it further discovered that, among the 21 persons who subscribed to the aggressive tier in the separately established trust plan, in addition to the six defendants who profited more than RMB 80 million, there were 15 persons who profited more than RMB 40 million. Upon examination, it held that the above 15 persons were senior managers of banks or staff of regulatory institutions, with the corresponding professional knowledge and qualifications; their subscription information and channels all came from Li Mou and others, and they had subjective awareness of the illegality of the huge gains; their actual profits all came directly from the investment gains generated after Li Mou and others' crime of misappropriation of public funds. Although they were not pursued for criminal responsibility due to a lack of subjective culpability, their gains should all be determined as illegal gains. The procuratorial organ then made a recommendation to the supervisory organ to recover them in accordance with law, and the supervisory organ adopted the recommendation and recovered them.

(III) Charging and proof of crime. At trial, the defendants Li Mou and Zhao Mou and their defenders raised the following defenses and opinions: first, the use of public funds was decided upon after collective research by the leadership; second, Li Mou and others' conduct did not belong to "for personal use"; third, the misappropriation did not place the public funds at risk.

In response, the public prosecutor rebutted as follows. First, in this case Li Mou, to achieve his personal purpose, insisted on his own opinion despite strong opposition from the bank's risk-control department, fabricated facts and concealed the truth when the matter was discussed at the president's office meeting, and guided the decision to terminate the wealth-management product early. Afterwards, Li Mou took advantage of his position to improperly sign and approve the use of bank reserve funds for redemption, and directed Wang Mou and others to approve or handle the matter. It can thus be seen that the use of public funds was a manifestation of Li Mou's personal will and his abuse of authority. Second, although the subject using the misappropriated funds was State-owned Bank A, after the bank redeemed the wealth-management product, the misappropriated reserve funds were actually transferred to the original subscribers, and State-owned Bank A obtained the beneficial rights to the "Yellow River 3C Securities," that is, State-owned Bank A became the investing subject of the "Yellow River 3C Securities," improperly shifting securities-investment risk that should have been borne by unspecified investors onto the bank, causing a huge amount of public funds to leave the unit's control and harming the unit's rights to manage and use the

public funds. Third, Li Mou and others' use of bank reserve funds in violation of provisions to redeem the wealth-management product early was preparation for subsequently using a trust plan to take over the "Yellow River 3C Securities," with the ultimate purpose of pursuing personal interests. In sum, Li Mou and others' conduct constituted misappropriation of public funds "for personal use," satisfying the elements of the crime of misappropriation of public funds.

Guiding Significance

(I) In punishing crimes of misappropriation of public funds in the financial field in accordance with law, the essential characteristics of "individual decision" and "for personal use" shall be accurately grasped. The procuratorial organ shall closely combine the crackdown on duty crimes in the financial field with the prevention and resolution of financial risks; for crimes of misappropriation of public funds involving internal-external collusion and complex, concealed means, the elements of the crime shall be grasped in substance. Where the conduct was preparatory groundwork for the individual's subsequent unauthorized misappropriation of public funds, and the relevant responsible person, during collective research, fabricated facts and concealed the truth to guide the formation of an erroneous decision, this shall not affect the determination of individual responsibility. For conduct of using a unit's public funds in violation of provisions for an individual to engage in profit-making activities, the examination shall focus on elements such as the purpose of using the public funds, the flow and destination of the public funds, the potential risk to the public funds, and the attribution of illegal gains; where the public funds are formally used by the unit but substantively used for personal purposes, the misappropriation of public funds "for personal use" may be determined.

(II) Where property and fruits are obtained from profit-making activities conducted after misappropriating public funds "for personal use" in the crime of misappropriation of public funds, if acquisition in good faith can be excluded, they shall be recovered in accordance with law. The illegal profits obtained from the actor's commission of the crime of misappropriation of public funds shall be recovered in accordance with law as criminal proceeds. Under specific circumstances, other relevant persons who do not constitute a crime or are not pursued for criminal responsibility may also profit from the actor's commission of misappropriation of public funds; if it can be proved that the profit was directly generated by the criminal act of misappropriation of public funds, and the relevant persons have subjective awareness of the illegality of the benefit and it does not constitute acquisition in good faith, the procuratorial organ may recommend that the supervisory organ, in accordance with the provisions of the Criminal Law of the People's Republic of China, the Supervision Law of the People's Republic of China, the Regulations for the Implementation of the Supervision Law of the People's Republic of China and other relevant laws and regulations, confiscate and recover such profits as illegal gains in accordance with law.

Relevant Legal Provisions

Article 25, Article 64 and Article 384 of the Criminal Law of the People's Republic of China

Article 46 of the Supervision Law of the People's Republic of China

Article 208 of the Regulations for the Implementation of the Supervision Law of the People's Republic of China

Article 6 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 Embezzlement and Bribery

Article 1 and Article 8 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Specific Application of Law in the Trial of Cases of Misappropriation of Public Funds

Source: https://www.danyoungcpa.com/spp-guiding-case-189-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 Procuratorate shall prevail. This translation does not constitute legal advice.