
China Private Wealth Succession and Applicable Laws

China has adopted various laws to protect private wealth although wealth planning and management is still a quite new input in China. The laws governing private wealth are The Civil Law, The Property Law, The Company Law, The Marriage Law, The Succession Law and The Foreign Investment Enterprise Law.

Private Wealth

China's deposit rate is 20% which is 10 times over US's deposit rate. It has created a tremendous pressure on Chinese banks which have to pay interests when depositors do not have many choices on investment or wealth management. The assets value is over US\$ 3000 Billions excluding the immovable owned by families. Cash in total assets is decreasing which makes assets management need increases. The government has realized the fact that private wealth needs planning and vehicles in maintain or investment. The supervision of Government on assets management will be relaxed or changed accordingly. For instance the QDII (Qualified Direct Investment Institution) is a relaxation to private wealth management crossing the boarder or abroad.

Sources from Citibank show China's wealth management market is from US\$300Billions to US\$2000Billions. It includes funds, pension and insurance which are be the main investment vehicles in China

China is the second largest assets management market in Asia. According to Shanghai Security Daily over 3million families hold US\$100,000.00 cash and among this 3million, 300,000 hold over US\$1 million cash, security, property-for rent. The total current assets will increase to US\$1700 Millions in 2008.

Wealthy People's Worries

Along with the increase of private wealth, wealthy people in China compared with the poor have more pressure on social responsibilities. It takes for granted that wealthy people must provide relief to the people in a disaster area or provide social relief facilities or help the needy and relief the distressed or even donate money. The wealthy people are worried about personal information disclosed by banks, property developers, phone companies, land and house authorities etc. Mainland China now has not adopted a law like HK's Ordinance of Privacy. They are facing unfair competitions by using political influence in some areas. They lack financial vehicles in wealth management. High taxation is also what they are worried about, e. g. 3-20 business tax, 33% corporate income tax (it will be 25%

in 2008), 10% withholding tax, 17% VAT, 5%-45% individual income tax and various fees charged by authorities. The wealthy people still keep the traditional way of deposit in banks or lend money by taking high interests which are insecure ways in assets arrangement. China keeps control on assets or capital floating out of China. It makes wealthy people at risks to float money outside China through illegal agents. The wealthy people are lack of a sense of risk control in most situations.

Misunderstandings on Wealth Planning and Management

The Chinese like to hold what they can feel or see. They rely too much on bank deposit. This is why the deposit rate is 20% and banks feel a lot of pressure in paying interests. Some have the sense of putting monies in insurance, funds, and stock exchange. This is always their understanding of wealth management. There is no planning except those staff working for banks, insurance companies. Consulting to lawyers, CPAs and wealth planning practitioners are as few as a person kisses his foot. Most companies or individuals do not plan wealth and are lack of sense of urgency in planning of wealth until the risks occur, e.g. disputes on assets delivery, sue in wealth because of devoice and succession, political involvement in private wealth, illegal possession by business partners or other parties etc. It happens when wealthy people do not have the mind of seeking legal guide in planning of wealth such as tax, risk control and succession. Wealthy people have no concept of trust, private foundation and offshore vehicles in wealth planning. They are afraid of losing control on wealth if wealth is transferred to a trustee or a private foundation and managed by a trustee and council members of private foundation. Offshore companies are comparatively easier to be taken by wealthy people in China if the bank account is controlled by the wealth owners.

Wealth Management

So far wealth management is operated by domestic and foreign banks in China where the Banking Supervision Committee has strict rules on the sum that is managed by banks. But those who have ideas of wealth planning and management may make use of oversea financial institutions such as banks, trust companies, law firms or CPAs to manage their wealth. To release the pressure on deposit, China has arranged the QDII to encourage the direct investment in stock market in Hong Kong but within certain limitations. For those who are in business of cross-boarder investment and trade, their mind might be updated. They should use the advantages of wealth planning and management abroad where assets are under a better legal protection.

Different Culture in Wealth Planning and Management

Of course the wealthy Chinese have the traditional understanding on the control of their wealth such as control as the shareholder and director of the companies' assets, bank account holder, safety box key and code keeper, decision maker in family business and wealth. They seldom trust a person rather than themselves in taking care of wealth. Trust arrangement in their mind is losing control. We should not blame them as China's trust law does not regulate private trust services. People like to use in most situations banks owned by the state, e.g. Bank of Industry and Commerce (that is why it is the biggest one in China). Business deals and payment in cash is popular in China although authorities try to persuade people to transact via banks. The worry of disclosure authorities of transaction records and deals is strong in wealthy people's mind and they refuse to accept it. Trend of using foreign banks in or outside China is coming because it makes wealthy people believe the wealth information is well kept somewhere in the world rather than in China. They have to update the mind on how to keep control assets if the asset is being kept overseas by foreign banks or trustees. It takes time for them to understand it and education is necessary.

Trust or Private Foundation Illustration

To solve the problem in understanding trust, we introduce the private foundation and offshore companies to Chinese wealthy people in wealth planning. We have realized that it is working well with these people. The advantage of private foundation is that the assets owner needs not necessarily the founder of the foundation, He may assign any third party to be the foundation founder. It is like to assign a subscriber to set up a company while trust is in a different situation. In asset transferring, owner's assets are transferred to the foundation itself and controlled by the owner by acting as a council member, protector or beneficiary nevertheless assets are transferred to the trustee who is a not a person whom the asset owner is unable to control comparing to the private foundation as the owner is not the trustee or it is hardly to be arranged as the protector. Beneficiary is the role the owner plays in a trust and he has the right of benefit in terms of equity law but in foundation the owner indirectly has the right in controlling the assets and it makes a sense that the owner never loses the right in it. It is based on the concept of continental law's sole ownership of a property which is against the dual ownership of a property in common law. (一物一权或双所有权)。

How People Leave Their Assets to Successor

There are three ways of succession in China, statutory succession, will and legacy. The Succession Law of the PRC regulation on successors are the successor first in order: husband or wife, children, parents and the successor second in order: brothers or sisters, grandfather and grandmother. If there is a will or legacy, it has the priority effect in succession. A successor

under 6 years old or a person without civil capacity, the estate is delivered by a legal agent; a successor under 18 years old but older than 6 years old, without full civil capacity, the estate is delivered by a legal agent or ask for permission from the legal agent for delivery.

The court may decide if the successor loses the right in succession under the following situations:

- Intentional killing of the decedent
- Killing any other successor in fighting over the estate
- a serious act of abandoning or maltreating the decedent kill other heirs in order to receive assets
- a serious act of forging, tampering with or destroying the will

The time limit for institution of legal proceedings pertaining to disputes over the right to inheritance is two years, counting from the day the successor became or should have become aware of the violation of his right to inheritance. No legal proceedings, however, may be instituted after the expiration of a period of 20 years from the day succession began.

Succession begins at the death of decedent. No disputes shall occur even if the property owner is declared of disappearance. Disappearance of the property owner is not defined death of the property owner. This will only lead to the issue of property entrusting.

If there are no successors or legatees, it is only a matter of dispose of assets
The assets and debt is inherited together. Heirs are only liable to the inherited part

Property succession is a means of transfer of personal lawful property before the death of the property owner. It happens in the following situations:

- a legacy-support agreement
- testamentary succession and legacy
- statutory successor(s)
- disposing of an estate which is left with neither a successor nor a legatee

Assets for Succession. No all the assets may be the estate for succession, Article 3 Succession Law of PRC identifies the followings:

- Income
- House or apartment, deposit, cash, securities or stock and articles of

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- everyday use, trees, livestock and poultry
 - antique collection, books and information
 - other productive materials
 - copyright and patent
 - other legal assets

Assets not for succession. The law identifies clearly assets not for succession:

- Personal rights that are closely related with decedent himself is not heritable, such as the right of personal name, the right of reputation, the right of honour, and the right of portrait.
- The debt and credit that are related with a citizen himself: this type of credit and debt confirms a given person's acts as object which concerns closely with the creditor's and debtor's personal rights, thus this credit and debt is not heritable.
- The right of use of state-owned resources: such as mining right, hunting right, fishing right, right of use of water resource, marine, and space. All the users are designated to enjoy the right of use by a given procedure, so these rights can not be regarded as the estate that can be inherited. If the successor(s) shall use these rights, he must apply for the re-use of these rights with the permission by the state.
- Management right of collective ownership
- Article 4 in Law of Succession of PRC stipulates: "Personal benefits accruing from a contract entered into by an individual are heritable in accordance with the provisions of this Law. Contracting by an individual, if permitted by law to be continued by the successor, shall be treated in accordance with the terms of the contract." However, the capital invested by the decedent during the validity of the contract and the personal benefit from the investment shall be regarded as the estate that is heritable; the right of management of collective ownership is not the estate which will not be heritable.
- The right of use of residential land: a citizen's residential land is not heritable but it can be transferred but with the right of use of the building on it. The right of use of residential land can be obtained when inheriting the ownership to the building on this land.

Chinese Succession out of China and Chinese Succession to foreign assets in China

Article 36 in Law of Succession of PRC stipulates: "For inheritance by a Chinese citizen of an estate outside the People's Republic of China or of an estate of a foreigner within the People's Republic of China, the law of the place of domicile of the decedent shall apply in the case of movable property; in the

case of immovable property, the law of the place where the property is located shall apply.” The provision is made to apply in the foreign succession cases. Foreign succession cases are the ones that the successor and the decedent are both of or one of them are foreigners, or the decedent died in a foreign country and the whole or part of the estate is in a foreign country.

According to the above, when a Chinese citizen inherits the estate outside People’s Republic of China, or the estate in People’s Republic of China with the non-Chinese nationality decedent, PRC’s succession law and the related foreign succession laws will apply in accordance with the nature of the estate, that is, movable property or immovable property.

Immovable property refers to the property which can not be moved, without changing the original nature and shape, such as land, buildings; movable property refers to property which can be moved with no need to change the original nature and shape, such as cash, gold and silver, jewelry.

If the estate inherited is movable property, the law of the decedent country of domicile is applied. But it doesn’t specify which domicile of the decedent will be. In the international communication, a person’s residence may always change or one person may have several residence places. In this case, Article 149 in Chapter VIII Application of Law in Civil Relations with Foreigners in General Principles of the Civil Law of the People’s Republic of China stipulates: “In the statutory succession of an estate, or movable property shall be bound by the law of the decedent’s last place of residence.” Thus, the residence of the decedent refers to the residence where the decedent’s death occurs. “and immovable property shall be bound by the law of the place where the property is situated.”

Foreigner’s Succession in China and Foreigner’s succession of Chinese Assets out of China

Article 36 of Law of Succession of the PR stipulates: For inheritance by a foreigner of an estate within the People’s Republic of China or of an estate of a Chinese citizen outside the People’s Republic of China, the law of the place of domicile of the decedent shall apply in the case of movable property; in the case of immovable property, the law of the place where the property is located shall apply.” This is another “governing law” by China on foreign succession cases.

With this provision, PRC laws shall apply for the inheritance by a foreigner of an estate within the PRC and the decedent is a Chinese or not if the decedent’s domicile is inside PRC.

If the decedent is a Chinese citizen but his last place of domicile is not inside PRC, the laws of PRC shall not apply whereas the laws of the last place of domicile of the decedent shall apply, in the case of movable property inside PRC. The laws in PRC shall only apply in the case of the immovable property.

This provision is equal to the provision for a Chinese citizen who inherits the estate outside PRC and a foreigner's estate inside PRC. This is the governing law made according to the principle of territory and the principle of nationality.

However, according to the provision that special law derogates general law, where treaties or agreements exist between the People's Republic of China and foreign countries, matters of inheritance shall be handled in accordance with such treaties or agreements, which shall not apply in the case of special rules concerning foreign succession cases in Law of Succession of People's Republic of China.

The Application of law

The reason why Chinese law of succession has made a specified provision about the foreign succession cases is that such cases always involves two or more different laws from different countries. The application of law will lead to the conflict of those laws concerned. Adjustments on governing law will be a must and make sure which country's succession law will be applicable.

The governing law is practiced internationally as "Principle of Territory" and "Principle of Nationality". The first one is that an estate shall be bound by the law of the place where the estate is situated; the second one is that the application shall be bound by the law of the last place of the decedent's domicile.

With this governing law to the conflicts, the law applied in foreign succession cases is called "governing law". On the one hand, the countries concerned now have jurisdiction over some foreign succession cases whereas the countries without the jurisdiction will not be involved in such cases. The court decisions on these cases of the countries without the jurisdiction will not be recognized internationally.

On the other hand, these principles have offered the countries with the jurisdiction a clear law reference when dealing with the foreign succession cases, and the court decision from these countries with the jurisdiction has enforced the law concerned in cases concerning foreign countries.



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