Crime of embezzlement of corporate funds/assets

Description

Embezzlement of corporate property is quite a common crime in work place.

Article 271 of China Criminal Code provides that:

"In cases where a person of a company, enterprise, or any unit, takes over the unit's property by taking advantage of his office, and the amount involved in quite large, he is to be sentenced to not more than five years of fixed-term imprisonment, or criminal detention; when the amount involved is huge, the sentence is to be not less than five years, and may be in addition to confiscation of property".

Constitution of the crime of embezzlement of a unit's property requires that the criminal suspect has the intent of taking over the corporate properties as his own, a critical point to distinguish this crime from the crime of misappropriation of corporate funds where the misappropriated funds are just temporarily misused and are to be returned.

There are countless ways for an employee (low or high level personnel, from cashier to manager or director) to embezzle corporate funds or assets. When the amount embezzled is large enough, a crime of embezzlement is constituted. Among those numerous acts of embezzlement, there has been one type of embezzlement that takes place quite often but is difficult to deal with. The difficulty is not only theoretical in proving the constitution of the crime but also practical in that such an offence is often considered as a civil dispute by police department which refuses to act on investigating such activities.

The difficult situation often goes like this: with respect to a foreign invested company/enterprise, the Chinese manager of a foreign invested company arranges deals with another one or more companies which are invested or controlled by the manager himself or his or her family members. In such deals, prices are set higher than market average to the detriment of the foreign invested company but to the benefits of the company in which the Chinese manager has stakes. In this curvy way, the Chinese manager manages to devour a bulk of profit at the price of the foreign invested company to which he owes the obligation of loyalty and diligence under China Company Law.

For example, in one of cases we have handled, the Chinese manager of the foreign invested company directed the suppliers of the company to sell the products/materials to a trading company first at usual prices and then this trading company sells the products/materials to the foreign invested company at much higher prices. The trading company gulped a big amount of profits at the cost the foreign invested company. Later it was found that this trading company is invested and operated by the family members of the Chinese manager. As a matter of course, foreign investors dismissed the manager upon discovery of scam. Ironically, the manager sued the foreign invested company based on labor issue asking for a huge amount of compensation. In response to this insatiable greed of this Chinese manager, we on the one hand actively do the best to defend the company and on the other hand, we perceived the likelihood of pursuing criminal liability on the Chinese manager to leverage the situation, and then we managed to get the police to file a criminal case on the account of crime of embezzlement of corporate property. The police intervention served our purpose perfectly. The Chinese manager gave in completely in the end by withdrawing from his lawsuit against the company but also voluntarily disgorged a handsome amount of money back to the Company.

To file the criminal case with police, we were actually initially rejected on the ground that was an economic dispute rather than a criminal offense. Chinese police were mostly lazy and inactive. Generally, police refuses to entertain a criminal filing if there is a civil lawsuit ongoing. We finally got the police into action by resorting to our social resources. We don’t like it, but for client’s interests, we sometimes are compelled to do.

Foreign investors shall be careful when choosing your Chinese management. Besides trust, it is always very important that well-drafted agreements are put in place with your Chinese managers stipulating the obligations of the management with a view to ensuring that you are fully informed with the operation of your invested company in China. Further, foreign investors who are not personally involved in the daily operation of the foreign invested company should consider periodic auditing of the financial conditions of the company, which is an effective way of knowing whether there are any sneaking, secretive activities happening.

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