

## Shall I sell my share in a FIE before I fully pay up the registered capital

### Description

Due to various reasons, a foreign investor wants to quit his investment by selling his share of equity interests in the foreign invested enterprise/company even before he pays up its subscription to the registered capital of the company.

#### 1. Can the unpaid share be transferred?

Yes, you can transfer the share that has not been paid up.

In China, a shareholder may contribute the registered capital in installments within two years of the formation of the company. For a foreign shareholder, the first installment shall be made within three (3) months of establishment of the company, accounting for at least 15% of the total registered capital and in an amount of not less than RMB 30,000.

After the first payment of contribution, an investor may want to transfer his percentage of share/equity interests in the company to others. Although, he has not paid up his subscription, the law allows him to sell his subscribed share to others.

#### 2. How should it be done?

In addition to those documents generally required for transfer of foreign invested equity interests, the shareholder shall submit documents specially addressing the portion of his unpaid subscribed registered capital. According to a notice from MOFCOM, upon sale of his share, if the shareholder forgoes its right to pay up his subscribed registered capital and the transferee shareholder is willing to take over that responsibility to making contribution to registered capital, the transferor shareholder shall issue a statement in writing to the effect that he forsakes its right to the unpaid portion of his subscribed registered capital. If the post-transfer shareholders of the company revise their joint venture contract which embodies the shift of responsibility of paying up the registered capital to the new shareholder, the aforesaid written statement shall dispense with.

#### 3. Problems that may emerge later

Parties to the transfer of equity interest part of which has not been paid up yet shall be very careful about their arrangement of the deal.

According to the third judicial interpretation of China Company Law issued by China Supreme Court on January 27, 2011, where a shareholder transfers his equity interest before paying up his subscribed registered capital and the transferee knows or ought to know the situation, the company has the right to ask both the transferor and the transferee to bear joint and several liability in making full contribution to the registered capital of the company.

Moreover, creditors of the company may also request the transferor and the transferee to bear joint and several liability to the extent of the unpaid subscribed registered capital (including interests accruing thereon) in paying off debts owed by the company in case that the company has no asset to

discharge those debts.

Problem may also arise where the company is doing very well. We have advised a client in a dispute relating to unpaid portion of equity interest that was sold. Transferor and transferee without the assistance of lawyers concluded an equity transfer agreement under which the transferor sold to the transferee his equity interest in a company part of which has yet to be paid up in full. Later, the company asked both parties to make contribution to the unpaid portion of registered capital. The transferor insisted that the consideration received from transferee was for this paid-in part of his equity interest in the company because at the time of that transaction his paid-in part of equity interest was worth the price paid by the transferee due to the strong performance of the company. The transferee on the other hand insisted that he had paid that price for all the equity interest including the unpaid portion, which explained why he had paid a price higher than the paid-in part of equity interest of the transferor. Therefore, buyer of equity interest should always do some due diligence investigation work to understand what he is really buying into.

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**Date Created**

November 1, 2011

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