

China Estate Planning I: How to deal with your China assets generally

Description

I have observed one interesting thing in my legal practice in family law area. While Chinese people within China are not much interested in making their estate plan, those overseas Chinese are however more keen to prepare for their late years of life and post-demise affairs.

With so many Chinese migrating to foreign countries across the globe, many of them don't really liquidate their China assets, so it is inevitable for their estate plans to deal with their assets in China.

In my decade of experience, the main types of estate assets in China are real properties, corporate equities/shares, bank deposits and fund units.

1. Real Properties

This is primarily the most common estate that is left behind by Chinese people.

In real world, the title of real estate properties takes multiple forms such as sole ownership (we are actually now advising two clients in dealing with properties held by companies, and the main objective is to transfer the properties finally to the heirs of the corporate owners), joint tenancy, tenancy in common or corporate ownership, and sometime, upon the death of the owner, property title has not been issued yet leaving behind the purchase contract only.

Real estate properties are very special kind of assets or estates. As a universal rule in the world, if there is no will duly made by the owner during life time, upon owner's death, the inheritance rules applicable thereby shall be the local rules of the place where the properties are located.

So if you don't want the local government to distribute your estate properties, you'd best make your own will stating how you want your estate properties to be succeeded, and who will receive your estate.

For people living in common law countries like USA, UK, Canada, Australia, and New Zealand and the like, if you want to set up a trust (living or testamentary, revocable or irrevocable), be careful that your trust may not work out in China. Read the prior post: "[Legal Implications on the choice of trustees for properties in China](#)". Choice of trustee can be critical in carrying on real properties for next generation after demise of decedent. When you set up your trust or help your clients in setting up a trust involving real estate in China, then seek professional legal help from lawyers within China.

What about gifting the real properties to your beloved ones? Sounds good, and indeed, it is probably a good idea to transfer the properties as gift to your children or other beneficiaries. However, in this regard, you will need to consider tax implications related to this gift. In light of China's current tight measures for curbing property market, indeed, some cities in China simply [don't allow foreign individuals to receive property gift if the recipients are not qualified for purchasing properties in China](#) like Beijing.

With regard to real properties, it is a must to take into account the issue of cashing in on those

properties. Again, not straightforward in China (many posts on this blog are about property sale in China), esp when it comes to repatriation of sale proceeds out of China. It is not that your bank in China can directly send the money out to foreigner owners' accounts in their home countries.

2. Corporate Shares/Equity Interests

Corporate shares are another type of assets or estates in the world. As the world's factory, China are home to millions of enterprises and companies, public or private.

Many Chinese rich people while migrating to foreign countries and naturalized, still keep one foot in China as their businesses are operated in China. It is quite common in China that the wife and children have migrated and become foreign citizens and the husband and father in the family is still Chinese citizen (probably holding a foreign green card).

My team have represented the foreign heirs in dealing with estates left by their late Chinese father who has been successfully operating a high-tech company listed on China Nasdaq.

In the case we dealt with, the lesson learned therefrom is profound. The decedent father died out of sudden heart attack and had never done anything for his own estate plan, there is not even a will prepared in place, not to mention trusts. The children have tried to fight for control over the company but encountered fierce resistance from the company's management.

There is a lot of work to be planned when the settlor is thinking of settling his or her shares on trust, such as premeditating some addition or revisions to the current articles of association of the company, restructuring corporate shareholdings, or reorganizing the companies with a view to keeping control of the company within the hands of the descendants.

Rich Chinese migrants with substantial corporate business in China may have to think of a way to settle their corporate shares into offshore trusts as it is not possible to set up private trusts with corpus of those corporate shares under Chinese trust law. For more information on how Chinese entrepreneurs should and can make use of trusts in offshore jurisdictions such as Hong Kong, BVI, Cayman, you may wish to read our recent post: [China Foreign Investment Law and Cross-Border Inheritance and Estate Planning](#).

A particular worthy note here: for foreigners that are supposed to receive shares in China listed companies (listed on Shanghai or Shenzhen stock exchanges) as a result of either divorce or inheritance, good news is that just lately China government has now allowed certain foreigners from certain countries to purchase China stock, which is not permitted in the past. According to a draft regulation prepared by China Securities Regulatory Commission, the watchdog of China stock exchanges, shows that two types of foreigners will benefit from the policy change: (1) foreigners that are legally working within China, and (2) foreigners not in China but work for China listed companies and are offered stock option or other incentives.

3. Green Card and Citizenship

For Chinese emigrants, this can be a serious problem to ponder over. The main concern is related to taxes.

Indeed, so far China is probably one of the countries in the world that has been very mild towards taxes on individuals (citizens). Penalties for tax violations are relatively lenient partly due to lax implementation.

When issued the green card in USA for example, one will be considered as permanent resident subject to the duty of reporting his or her worldwide income to USA, failure of which will attract serious punishment like jail terms.

We did have a client who had obtained the green card from USA (not properly relinquished) but later on moved to China to start his business which was a huge success, but he had neglected his American tax duty till the day he suddenly died in China. In dealing with his millions of dollar estate, we have to seek tax advice from American experts, and we were astonished to learn so many taxes and penalties hanging over his head which was a big burden even on his heirs.

To the best of my knowledge, it seems that if the decedent didn't have the green card, he will not be caught by American taxes at all (so far as his China estate is concerned), and his heirs may benefit from the step up in tax basis treatment under American tax laws.

So pros and cons of having foreign green card and citizenship shall have to be examined closely by attorneys from both countries.

4. Applicable laws

It is almost cliché to emphasize on this point. Every time we discuss cross-border legal issues, we need to be careful of about what laws are applicable to the pertinent issues. It is important and may often be neglected.

For example, under China Law regarding Choice of Laws in Foreign-related Civil Relationships, there are rules that must be abode by.

(1) Article 9: Foreign laws applicable to foreign-related civil relations do not include the Law of the Application of Law of this foreign country.

(2) Article 17: The parties concerned may choose the laws applicable to trust by agreement. If the parties do not choose, the laws at the locality of the trust or of the fiduciary relation shall apply.

Interesting enough, due to the lack of clarity between trust relationship and nominee ship and agency, people may be confused as to whether the given relationship is of trust or other legal relationship. In a divorce case in Hong Kong, PRC legal opinion were sought by HK court on a trust agreement whereby husband was alleged to hold shares on trust for his brother, so both plaintiff and defendant engaged two PRC lawyers (as you know, i am one of the two) to for the opinions. In the end, the other lawyer just disregarded the trust nature of the arrangement, and cited rules of corporate laws regarding nominee shareholder arrangement, which is apparently besides the point.

(3) Article 24 As for the property relation between husband and wife, the parties concerned may choose the applicable laws at the habitual residence, of the state of nationality or at the locality of the main properties of one party by agreement. If the parties do not choose, the laws at the mutual habitual residence shall apply; if there is no mutual habitual residence, the laws of the mutual state of

nationality shall apply.

Bearing this rule in mind could save a lot of trouble in the case of inheritance of estates left by one spouse whose marital properties are governed by foreign laws.

(4) Article 31 The laws at the habitual residence at the time of death of the deceased shall apply to legal inheritance, but the laws at the locality of the real estate shall apply to the legal inheritance of a real estate.

This is a particularly important provision in case of inheritance of estate in China. For real properties, it is pretty clear. But for corporate shares and bank deposits and other personal properties, things can be problematic, as Chinese notary offices (the institution most likely to be involved in completing inheritance in China) may well shun from such cases where foreign laws are applicable due to their incapability of applying foreign laws.

There are a lot more to talk about when working out estate plan for clients who have assets in two or multiple jurisdictions.

We will further write other posts on the top of estate planning catering to surging demand of Chinese emigrants to foreign countries.

Date Created

July 2018

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