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Legal Evaluation and Legislative Significance of Equity Assets Transfer

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Abstract

In recent years, some enterprises have been using equity transfer to achieve the purpose of actual transfer of ownership of real estate or intangible assets, and the transfer of assets under the name of equity transfer has become a practical and straightforward way of tax avoidance. However, tax authorities' attitude towards this kind of tax evasion is unclear and inconsistent, and so far, there has been no basic legal standard that identifies property rights transactions as asset transfer, making it a hotspot for tax planning anti-avoidance research. This paper defines the scope of asset transfer and equity transfer and the taxation and exemption of equity-style asset transfer through the analysis of the equity-style asset transfer transaction system, combined with the regulatory situation of equity transfer at home and abroad. This paper also makes relevant suggestions to the government and enterprises to help corporations plan their taxation in compliance with the law, improve their financial management, and help the country establish a coordination mechanism between tax law and other sectoral laws, so as to realize the prosperity and stable development of China's market economy and related tax law system.

Keywords

Assets transfer; Equity transfer; Equity-type asset transfer; Anti-tax avoidance.

1. TAX AVOIDANCE PRINCIPLE OF EQUITY ASSETS TRANSFER

There are some differences between the transfer of assets and equity transfer in property, legal norms, and tax treatment. Compared with the transfer of assets, equity transfer has a less restrictive condition, tax and flexible operation. Therefore, there are many enterprises in the form of equity transfer to achieve the actual transfer of assets to simplify transactions, circumvent regulations, and evade taxes in real life [1].

Because of the significant difference in regulatory control methods between equity transfer and assets transfer, especially tax policy. Therefore, some enterprises can use the state policy dislocation, in the way of equity transfer, in essence, real estate, land asset transactions, and tax avoidance [2]. Especially in 2016, after the full implementation of the reform, the tax burden between the two transaction methods is further widened, and the problems discussed in this paper are more and more prominent [3].

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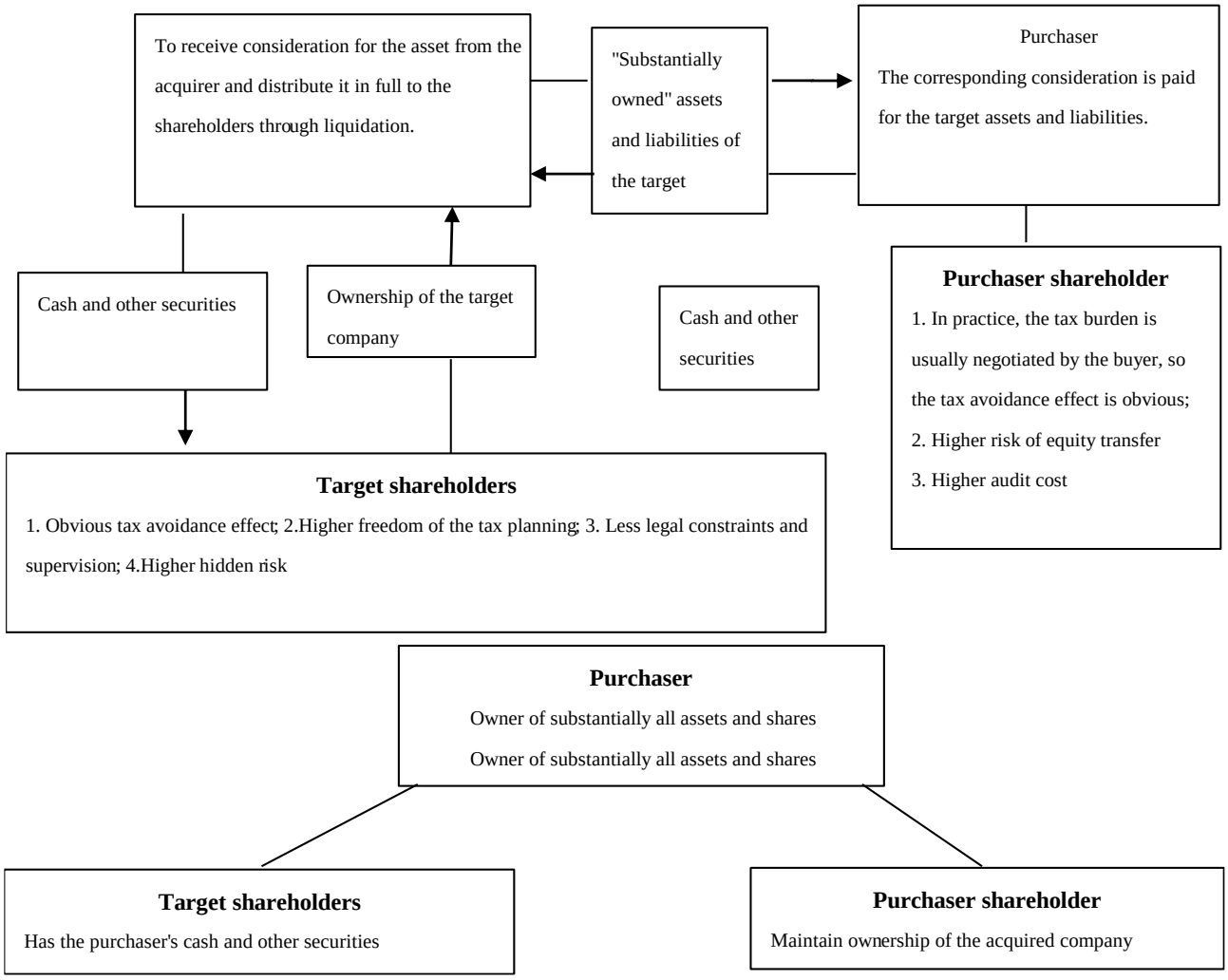

Figure 1. Schematic diagram of an equity transfer tax shelter

There has a big difference between equity transfer and assets transfer in tax treatment. In the process of transferring assets, the transferor shall pay the corresponding enterprise income tax (or individual income tax), value-added tax and additional, value-added tax and stamp tax; the Transferee shall pay stamp tax and deed tax. While in the transfer process, no value-added tax and additional, value-added tax and deed tax. Suppose the resolution of the shareholders transfers the shares. Only the TRANSFEROR has to pay enterprise income tax (or individual income tax), if signed the assignment contract, only increased the stamp tax. Therefore, following the above equity transfer and asset transfer provisions, the tax evasion effect will be pronounced. In the process of transfer of shares, no stamp duty is payable if a shareholder's resolution is adopted to transfer the shares.

2. EVALUATION OF EQUITY ASSETS TRANSFER FROM THE PERSPECTIVE OF TAX LAW

First, it violates the principle of taxation according to capacity.

The principle of energy taxation is the basic principle of tax law, where the core is according to distribute the corresponding tax burden according to the taxpayer's ability to afford. The principle of energy taxation becomes the guiding principle of tax legislation and the criterion of tax law interpretation and explains the supplementary tax law's loopholes. In the act of equity transfer of the real estate, the transaction subject evades the tax by packaging the real estate

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right of Land tenure as equity, which results in the same substantial behavior with a tremendous difference in tax payment, which shows fairness, violation of the principle of energy taxation.

Second, it leads to the failure of essential tax functions.

Tax is an essential means for the state financial organs to maintain the administrative operation, Macroeconomic regulation and control and social resources to be reallocated, while equity asset transfer makes use of loopholes in the current tax policy, through the abnormal tax avoidance processing has caused our country tax revenue serious drain, the financial function invalidation, which has destroyed our country tax revenue system normal stable movement [4]. In the process of land and real estate circulation, the purpose of levying value-added tax is to regulate the value-added income and regulate the order of the land and real estate transaction market, while equity Asset transfers frustrate the state's goal of regulating the real estate market through tax levers and Macroeconomic regulation and control the planning of urban construction.

Third, the abuse of tax legalism.

The nature of equity asset transfers is still controversial in tax practice, although it is argued that equity asset transfers are not expressly prohibited by law. However, the application of tax legalism must be connected with substantive taxation, and the tax adjustment of equity asset transfer is beyond the scope of tax law. In practice, the transfer of equity assets causes the severe loss of national tax revenue and causes serious confusion of land management, which is not conducive to China's real estate industry's healthy and stable development. Therefore, the tax avoidance measures planned to evade land regulation should not be classified as legal categories. According to the principle of substantive taxation, when the form of taxation elements is not consistent with the essence, it can only be judged according to its essence.

3. EVALUATION OF EQUITY ASSETS TRANSFER FROM OTHER LEGAL PERSPECTIVES

From a criminal perspective, China's Criminal Law has special criminal provisions for the illegal transfer and reselling of Land tenure and a particular judicial interpretation. On the one hand, article 201 says that: Any taxpayer who fails to pay or underpays the amount of taxes payable by means of forging, altering, concealing or destroying without authorization account books or vouchers for the accounts, or overstating expenses or omitting or understating incomes in account books, or refusing to file his tax returns after the tax authorities have notified him to do so or filing false tax returns shall, if the amount of tax evaded accounts for over 10 percent but under 30 percent of the total of taxes payable and over 10,000 yuan but under 100,000 yuan, or if he commits tax evasion again after having been twice subjected to administrative sanctions by the tax authorities for tax evasion, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also be fined not less than one time but not more than five times the amount of tax evaded; if the amount of tax evaded accounts for over 30 percent of the total of taxes payable or is over 100,000 yuan, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined not less than one time but not more than five times the amount of tax evaded. On the other hand, the transfer of equity assets violates the "Land Management Law," and other laws and regulations on land management provisions should be punished. For example, the Liaocheng Intermediate People's Court of Shandong Province (2017) Lu 15 Sentence No. 156 had entered a guilty verdict for Dawn Materials Enterprise in Liaocheng selling land through equity transfer of profits. In this case, the defendant used the form of "transfer of shares" to sign the "yin-yang contract," ostensibly to change the enterprise's legal person. It aims to resell Land tenure and real estate to avoid tax. Moreover, the amount of tax evaded is enormous and accounts for more than 10% of the tax payable to meet the Criminal

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Law requirements of tax evasion. Therefore, it is possible to pursue criminal responsibility for land tenure transfer's illegal act in judicial practice.

From the perspective of civil and commercial law, the transfer of equity assets belongs to the void contract situation stipulated in Article fifty-two of the contract law [5]. Transfer of equity assets transfer of assets to achieve the transfer of assets, surface law provisions, but its land and real estate transfer process is not in line with China's mandatory provisions, which is a legal form to cover up the illegal purpose [6].

The transfer of equity assets meets the requirements of invalidity of the contract: first, the illegal transfer of land during the transfer of equity assets is prohibited by law or administrative regulations; second, both sides intend the use of equity to carry out the actual transfer of assets; third, both sides of equity transfer of assets are in order to circumvent the laws and regulations for the mandatory provisions of the land transfer by way of equity transfer; fourth, the illegal transfer of Land tenure, malicious tax avoidance, destroyed the country for the land and real estate market Macroeconomic regulation and control, causing severe tax losses. Therefore, to circumvent the land law's mandatory provisions, equity transfer contracts that evade taxation are invalid contracts.

From the perspective of Administrative Law, to strengthen land and other real estate management, China has issued a series of laws and regulations to control the transfer of land use management and real estate transactions. As far as the transfer of Land tenure is concerned, according to the Provisional Regulations on the transfer and transfer of state-owned land, only the following three conditions can be met: (1) all land transfer fees have been paid; (2) Land Tenure has been obtained; (3) more than 25% of the development workload has been completed. From and after the relevant Land Planning Department to implement the audit. However, the law's restrictions on Land tenure transfers can be circumvented through equity transfers. The transferee only needs to sign the transfer agreement and register the transfer according to the regulations to control the Land tenure, avoid the relevant government organs' supervision, and overshadow the mandatory provisions of laws regulations.

We analyze the difference between equity transfer and asset transfer based on multi-level and multi-vision. Through the in-depth analysis of typical equity asset transfer cases, it is found that the transfer of assets employing equity transfer will not have other economic benefits, and the transfer of assets utilizing equity transfer is against the objectives and purposes of China's tax law. Criminal Law, civil and commercial law, administrative law, and other legal vision fields confirm that equity asset transfer has the essence of illegal attributes.

4. ON THE LEGISLATION OF ANTI-TAX AVOIDANCE TO REGULATE THE TRANSFER OF EQUITY ASSETS

4.1. The Introduction of Disregard of Corporate Personality in Tax Law

The system of disregard of corporate personality, also known as lifting the corporate veil, was first applied to the 1905 case of "United States V. Milwaukee Refrigerated Transport Company," followed by various countries' courts. It is mainly used to prevent shareholders from abusing the company to commit illegal and criminal acts. Later, it developed into the system of disregard of corporate personality in the modern sense, and its emphasis turned to the adjustment of the legal relationship between enterprise groups, and its scope of application was extended to the fields of tax law and bankruptcy law [7].

China's laws have some reference to the system of denial of corporate personality, but only in the Civil Code made a simple principle provisions: "the contributor of a for-profit corporation shall not abuse the independent status of the corporation and the contributor's limited liability to the detriment of the interests of the creditors of the legal person; if the abuse of the

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independent status of the corporation and the contributor's limited liability to evade debts and seriously harm the interests of the creditors of the corporation, the contributor shall be jointly and severally liable for the debts of the legal person." Although articles 10 and 11 of the Nine People's Summary respectively identify five specific situations of "personality confusion" and four specific situations of "excessive domination and control" respectively, the list of cases is limited and does not include the field of tax law, so the deterrent effect on the abuse of the company's independent business corporation status in practice to commit illegal and criminal acts is still limited. The transfer of assets in the form of shares discussed in this paper is precisely the abuse of its independent personality.

The law endows the company with an independent personality. It enables it to play its independent and effective role in society [8]. However, when the company does not have a substantial legal person element, but mechanically determines that its personality and responsibility are independent, it will produce a disadvantageous influence. It makes the legal person system lose its original meaning. In real life, there are many situations in which the form of equity is used to transfer a large amount of land to avoid tax, because the profit space of land transfer is huge, and the development of land has a long cycle, high risk and low profit, so many companies use equity to transfer Land tenure, to achieve the purpose of real estate speculation. Illegal land transfer prolongs the development cycle of land and is not conducive to the optimal allocation of land and indirectly increases housing prices. Furthermore, because of the complexity and high risk in the process of equity transfer, many real estate disputes, disturbed the order of China's real estate market, not conducive to land to escape the supervision of China's relevant land management measures. This is an abuse of the corporate personality system, which has brought serious tax losses to the country and many other problems such as legal and regulatory gaps in the relevant land management measures, which is not conducive to China's healthy and orderly development's real estate industry.

Therefore, in the case that the shareholders and the company cannot be separated from each other, through the specific legal relationship, the company's legal personality is individually and relatively denied in order to adjust the company's personality, the balance of interests and the balance of the company's legal person system, in order to achieve the goal of legal justice and judicial justice. We may consider introducing the system of disregard of corporate personality into the tax law as a principle of the tax law, and in the Ministry of Finance and the tax bureau of the departmental rules for the transfer of equity-based assets applicable to the company's legal personality system of denial of special legal provisions.

4.2. Clear the Definition of Equity Assets Transfer from the Legislative Level

For the definition of equity assets transfer, the Chinese government should make a comprehensive and normative review of the administrative organ's reply to the case, define the equity asset transfer, and learn from foreign regulatory norms on equity and asset transactions. For example, according to the United States' internal revenue code, if the equity transferee will liquidate the target enterprise's assets soon after it obtains the target enterprise, the equity transfer should be identified as the asset transfer according to the essence [9].

Based on the analysis of a large number of related collection and management cases, this paper finds that tax evasion and tax avoidance mainly occur in real estate and land, and the transaction behavior of tax avoidance has the following obvious characteristics [10].

First, the target company has a single asset structure. The structure of the assets owned by the enterprises that transfer the equity is relatively simple. The shares of real estate and land account for the vast majority of the assets, even if there are liabilities and have nothing to do with the assets transferred.

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Second, the business of the target company is simple. Enterprises have fewer employees, the burden of staff placement is lighter, and enterprises' operation is basically at a standstill.

Third, companies are valued at about asset prices. In the process of equity asset transfer, the company's transfer is usually called the Shell Company. The composition of the company's assets and business are straightforward. Therefore, enterprises' comprehensive quality such as profitability, asset structure, and development prospects is less considered in evaluating enterprise value.

Fourth, transfer all the shares in the company. The use of equity transfer of assets is usually to obtain 100% control of an asset in the enterprise, but not for strategic needs to obtain its strategic decision-making power and actual operating rights, so the usual equity asset transfer is the transfer of 100% of the equity.

Fifth, the company immediately after the acquisition of the liquidation of the corresponding assets. Suppose the transferee enterprise liquidates its assets shortly after acquiring the target enterprise's equity to directly acquire its target assets. In that case, it may be determined that the company's acquisition is not for normal operations but to acquire its corresponding assets. The transfer of its shares should be recognized as the transfer of assets.

To sum up, when judging whether equity transfer is equity asset transfer, we can take "whether equity transfer simply makes asset beneficiary transfer" as the recognition principle. Considering and judging from the composition of the assets, the valuation plan, the Operating Status of the target company, the transfer cycle, the subsequent treatment, etc. , and will define the standard as the Ministry of Finance, the General Administration of Taxation in the form of departmental regulations to be determined.

4.3. Establishing the Linkage Mechanism of Anti-Tax Avoidance Between Tax Revenue and Relevant Departments

In a sense, tax law is a legal field closely related to other departmental laws and synthesizes many departmental laws. Tax activities involve all aspects of social and economic life, so the relationship between Tax Law and relevant department law should be based not only on the concept and principle of borrowing but also on establishing the coordination and link mechanism between tax law and other laws. At the same time, we should establish the anti-tax-avoidance linkage mechanism between the various departments to bring forth new ideas, expand ideas, and form a sound land development real estate construction monitoring system. First, given the real estate development project progress, it establishes the Real Estate Development Project process file and closely monitors the project development and the construction. Second, the establishment of illegal real estate companies file mechanism. A real estate company with a severe record of violation of the law May cancels its qualification for participating in land transfer and competitive bidding activities within a certain period. The most important of these is establishing an integrated law enforcement linkage platform consisting of the tax bureau, the National Development and Reform Commission, the Housing Authority, the Natural Resources Bureau and the market supervision and administration bureau [11]. It can save the cost of development and maintenance and improve the efficiency of information communication and lay a good foundation for improving law enforcement administration efficiency.

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