

November 17, 2011

Pu Zhiqiang: Preliminary Observations on "Fake Tax Case"

Entrusted by Fake Design Culture Development Ltd. (hereinafter referred to as "Fake Company" or "Fake"), we provide legal services on tax-related matters for this Company (hereinafter referred to as the "Fake Tax Case" or "Tax Case"). After a preliminary understanding of the background and associated facts for the "Tax Case", and in accordance with the requirements of Fake Company, hereby we put forward the analysis observations as follows:

One: The police are suspected of "overstepping their authorities" and of handling a case illegally in the arrest of five persons including Ai Weiwei.

In the morning of April 3, 2011, Ai Weiwei, a renowned artist, was taken away by the police before departure at the Capital International Airport, and returned home on June 22 in the name of being "on bail pending trial". His family did not receive any official notification procedures, had no way to know of his alleged crime, what coercive measures were imposed upon him, and where he was detained.

At 12:00 on April 3, the Beijing Municipal Public Security Bureau searched the house of Ai Weiwei for nearly 12 hours, when they searched and seized 127 items including computers, portable hard drives, optical discs, books, etc., and the inscription of the list of seized items was signed as the Chaoyang Branch of Beijing Municipal Public Security Bureau, but they did not search Fake's Finance Office. The police took 10 staff members of the Ai Weiwei Studio to the Nangao Police Station and they were interrogated until late night.

At 14:00 on April 3, Wen Tao, assistant of Ai Weiwei, was forcibly pushed into a black Buick car and taken away by four men in plainclothes. He has lost contact afterwards, and his family rushed to Nangao Police Station, Nangao being where the incident happened, to report for kidnapping. Later in the evening of June 24, Wen Tao

was sent home by public security officers from Beijing. He was asked not to discuss his detainment publicly, nor to have any form of contact with Ai Weiwei. During Wen Tao's disappearance, his family did not receive any notification procedures. Even until this day, Wen Tao himself did not know why and for what crime he was secretly detained for up to 83 days.

At around 23:30 on April 6, the Beijing Local Taxation Bureau and the Municipal Public Security Bureau came to Beijing Huxin Financial Accounting Services Company Limited, which was entrusted with accounting responsibilities for the Fake Company, where they confiscated the original records, accounting records, tax-paying records, balance sheets, income statements and other accounting documentations from the year 2000 to February 2011 of Fake Company. An hour later at 00:47, Xinhua News Agency published an English report which states that: "Ai Weiwei is suspected of being involved in economic crimes, and is subjected to investigations in accordance with the law."

On April 7, when Hu Mingfen, the accountant of Fake Company, was visiting her relatives in Lanzhou, the Beijing Economic Investigation Team took her back to Beijing. Thereafter Hu lost contact with her family until June 13 when she was released "on bail pending trial". Her family did not receive any official notification procedures. Hu Mingfen was on bail under the conditions that she was to leave Beijing, not to contact anyone from the Fake Company and not to talk about the case.

On April 7, Hong Lei, spokesman of the Ministry of Foreign Affairs, stated at a press conference that, "Ai Weiwei is suspected of involving in economic crimes, and is subjected to investigations by the public security organs in accordance with the law."

At 15:00 on April 8, the Beijing Local Taxation Bureau and Beijing Municipal Public Security Department visited Fake Company's Finance Office, where they confiscated all the financial and accounting documentations from 2005 to 2010, as well as contracts and official seals, etc. They presented a "Tax Inspection Notice" and "Questioning Notice" to the Fake Company for the first time, and also required Lu Qing, legal representative of the Company, to visit the Beijing Local Taxation Bureau

on April 12 for questioning.

At 19:00 on April 9, Liu Zhenggang (male, 49 years old), shareholder and financial manager of Fake Company, was forcibly taken away by four men in plainclothes in his residing neighborhood in Haidian District and thereafter his whereabouts were unknown. His wife subsequently rushed to Dazhongshi Police Station in Haidian District to report the kidnapping. Afterwards his family did not know his whereabouts until June 11, when he was released "on bail pending trial", and they also did not encounter any official notification procedures. Liu Zhenggang was "bailed out" on the conditions that he was to leave Beijing, not to contact anyone from the Fake Company and not to talk about anything of relevance to the case.

At 1:00 on April 10, Zhang Jinsong (male, 43 years old), Ai Weiwei's driver, lost contact after separating with his friends. His family members rushed to the Nangao Police Station in Chaoyang District to report the kidnapping. His family did not know his whereabouts until June 23, when he was released "on bail pending trial". They also did not encounter any official notification procedures.

At 9:30 on April 12, after confiscating the Company multiple times and the successive "disappearance" of 4 personnel, the Second Investigation Branch of Beijing Local Taxation Bureau questioned Lu Qing, legal representative of Fake Company, for the first time.

On May 15, Lu Qing was taken to the Public Security Bureau of Chaoyang District to meet Ai Weiwei, who was brought in from a secret location for detainment. Ai Weiwei was asked not to reveal details about his detainment and the interrogation contents, while Lu Qing was only told that Ai Weiwei "was suspected of involving in economic crimes".

On the evening of June 22, Ai Weiwei was released "on bail pending trial". On that night Xinhuanet published a short message, stating that "The Beijing police department said Wednesday that Ai Weiwei has been released on bail because of his good attitude in confessing his crimes as well as a chronic disease he suffers from. The decision comes also in consideration of the fact that Ai has repeatedly said he is willing to pay the taxes he evaded, police said. The Beijing Fake Cultural Development Ltd., a company Ai controlled, was found to have evaded a huge amount of taxes and intentionally destroyed accounting documents, police said."

Ai Weiwei pointed out that the key investigation content during his secret detainment of 81 days was that "he is suspected of being involved in the crime of inciting subversion of state power". After his release "on bail", the police did not present any legal documents, and until now it is still unclear for Ai Weiwei about why and for what crime he is released "on bail pending trial".

On June 27, the Second Investigation Branch of Beijing Local Taxation Bureau stated in the "Tax Administrative Punishment Matters Notice" that the Fake Company had tax evasion behaviors and was expected to clear a tax penalty of 12,210,000 yuan. The Bureau also expressed clearly that: "The punishment is imposed on Fake Company, not Ai Weiwei."

According to the Company's business license and tax registration record, Fake Design Culture Development Ltd. was founded on November 29, 2000, the Company categorizes as limited liability, with a registered capital of 100,000 yuan, of which Lu Qing contributed 80,000 yuan and Liu Zhenggang contributed 20,000 yuan. The legal representative of the Company is Lu Qing, the person in charge of finance and tax matters is Liu Zhenggang, with 4 practitioners. Its business scope includes: organizing cultural and artistic exchange activities; exhibition organization; corporate image planning; graphic design and production; film and video production; photography services; arts and crafts design; home furnishing design; home decoration and design. Ever since 2000, Fake Company has entrusted Beijing Huxin Financial Accounting Services Company Limited with accounting and tax declaration responsibilities.

Ai Weiwei is only a designer of Fake Company, neither a manager, accountant or cashier who is responsible for finances, nor "the key management personnel and other direct obligation personnel" taking direct responsibility referred to in the "Criminal Law", and the concept of the so-called "actual controller" does not exist in the tax-related case. The "Tax Administration Law" does not investigate for the responsibility of any individuals beyond taxpayers (Fake Company in this case), so when the Ministry of Foreign Affairs and Xinhua News Agency announced that "Ai Weiwei is

suspected of being involved in economic crimes" and " The Beijing Fake Cultural Development Ltd., a company Ai controlled, was found to have evaded a huge amount of taxes" apparently do not have any factual or legal basis. The information was a joint effort among law-enforcement agencies, the Ministry of Foreign Affairs and the Xinhua Agency with the aim of framing the litigant.

The law regulates that public security organs do not have legal authority in handling tax administrative cases, and can register and investigate for criminal responsibility of relevant responsible people only when Fake refuses to implement the tax administrative punishment results and the tax authorities transfer the case to public security organs. Therefore, the public security organs have no legal basis, have overstepped their administrative boundaries, and was handling a case illegally when they secretly detained Ai Weiwei and four other people in the name of "tax evasion", searched the financial archives of Fake, and signed for "confiscation" on April 6 and 8 respectively before the tax authorities investigated and processed the "Fake Tax Case".

Two: The Beijing Municipal Tax Authorities had many procedural violations in handling the "Fake Tax Case" and left many facts unverified. The administrative behavior was short of legality and should be revoked according to the law.

On June 29, Fake Company submitted a written request to conduct a hearing. Fake has repeatedly reminded the tax authorities to "completely return" their financial records as soon as possible, to guarantee that Fake may fully exercise its rights to defense, but the tax authorities verbally responded that "all the accounting records are with the public security department". With respect to the fact that the hearing will "not be held in public", Fake has twice submitted written objections to the Local Tax Bureau. The Local Taxation Bureau verbally responded that: the hearing will not be held in public as it involves "trade secrets" of a third party.

On July 14, the Second Investigation Bureau held a secret "hearing" when no one else other than the legal representative and entrusted agent of Fake was allowed to sit in. During the hearing, the Bureau failed to present any third-party requests for

maintaining secrecy. This closed hearing was clearly illegal. In the hearing, the tax authorities did not present original copies of files as detained by the Public Security Department. As a result, Fake's representatives were unable to express any opinion regarding the authenticity and integrity of the copies.

Fake expressed that it would not accept the tax authorities' decisions made based on improper procedures and inconclusive evidences, and are unable to assume responsibilities for the possible loss and falsification of financial evidences during this period. On July 19, the tax authorities notified Fake to visit the Shibalidian Police Station in Chaoyang District to review the original account books. Since the public security organs are not legal "tax-handling" authorities and police stations are not appropriate places to store financial records, we recommended Fake Company to reject this "review" arrangement. At the same time, we once again required the tax authorities to completely return the account books and set a date for an open and legal hearing.

On November 1, the Second Investigation Bureau unexpectedly issued a "Tax Settlement Decision" and "Tax Administrative Penalty Decision", ordering Fake to pay taxes, overdue fines and penalties with a total amount of over 15,220,000 yuan within fifteen days, including 8,450,000 yuan of taxes and fines, and 6,770,000 yuan of penalties.

We think that the above "Settlement Decision" and "Penalty Decision" were made without verified facts, and have gravely violated legal procedures. It indicated that the authorities were redressing for the public security organs on the "Ai Weiwei Case". To safeguard the legitimate rights and interests of Fake Company, we recommend applying for administrative reconsideration in accordance with legal procedures, and then decide whether to file an administrative lawsuit after the conclusion of the administrative reconsideration.

Three: Legal approaches to safeguarding of rights and suggestions to Fake

According to the provisions of Article 88 in the "Tax Collection and Administration Law of the People's Republic of China", the premise for Fake to file an administrative reconsideration is to firstly pay about 8,450,000 yuan of overdue taxes and fines or to provide a guarantee accordingly. In view that Fake does not recognize the legality of the "Settlement Decision" and "Penalty Decision", we do not recommend Fake to "pay overdue taxes" but to employ the method of a tax payment guarantee, in order to comply with the requirements for reconsideration and lawsuit as well as to avoid outsiders' misunderstanding and misinterpretation.

In order to help Fake "pave the road" for the safeguarding of rights, Mrs Gao Ying and Ai Dan, respectively mother and brother of Ai Weiwei, decided to take the former residence of Ai Qing as collateral in exchange for the administrative reconsideration rights of Fake. From November 2, we set out to negotiate mortgage procedures with the tax authorities, but the Property Rights Transaction Centre notified us that the mortgagee could not be the tax authorities or any other administrative organs but could only be individuals or financial institutions. It indicated the omission in policy convergence among governmental departments and caused an operation failure for Fake Company in mortgaging the former residence of Ai Qing in order to accomplish the tax payment guarantee.

On November 9, the tax authorities delivered "Tax Matters Notice" (Er Ji Shui Tong [2011] No.7), requesting Fake to follow relevant provisions in the "Tax Payment Guarantee Trial Measures" released by the State General Taxation Administration to "select any one of the three ways: a guarantee, a mortgage or a pledge."

Help came from all sides of society to aid the tax case predicament of Ai Weiwei; within only 10 days from November 4 to 13, nearly 30,000 people remitted a loan of more than 8,690,000 yuan, which highlights the support from the public to Ai Weiwei and to his "guaranteeing" Fake Company's right-safeguarding by means of judicial

approaches, and thereafter Fake won the opportunity in defending for itself and in seeking fairness in problem-solving. Fake Company decided to choose the "deposit receipt" pledge as tax payment guarantee. Although the law stipulates clearly, yet the Local Taxation Bureau notified us that tax authorities as administrative organs could not be legal pledge obligees in accordance with relevant provisions of banks; therefore, the deposit receipt pledge guarantee also could not operate as an option.

As the deadline stipulated by the Tax Bureau approached, on November 16th, Fake Company was forced to agree on adopting the cash pledge practice, i.e. to transfer the tax overdue fine to the Tax Bureau and to open a tax keeping escrow in a bank, provided by the Local Tax Bureau for the tax payment guarantee, completed relevant procedures, and obtained the rights of filing an administrative reconsideration within the next sixty days according to laws.

Fake Company will set a date to file an administrative reconsideration. We will cherish this costly opportunity in defending our rights, try our utmost in the reconsideration and possible lawsuits, and make public the administrative reconsideration process in a detailed and timely fashion.

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November 17th , 2011