Supreme Prosecutors Office News Release

Released on: July 8, 2013
Released by: Special Investigation Division

On June 27, 2013 the Taiwan High Court issued its judgment in the "Red Fire Case" to prosecutors of the Taiwan High Prosecutors Office. Prosecutors of the Special Investigation Division ("SID") of the Supreme Prosecutors Office and the Taiwan High Prosecutors Office, after a careful study of the judgment, are of the view that **the part of the judgment finding "the defendant Gu Zhong-liang guilty of breach of fiduciary duties of a bank responsible person under the Banking Act, the pre-amended Financial Holding Company Act, as well as manipulation of share prices, matched orders affecting share prices, insider trading under the Securities and Exchange Act",and money laundering under the "Money Laundering Control Act" has been carefully considered and determined based on the evidence on file as described in the Reasons section. There is no substantive violation of the law by virtue of any violation of the objective reality and experience principles or principles of legal reasoning that would affect the results of the judgment; nor are there any other grounds for a second appeal pursuant to the various provisions under Articles 378 and 379 of the Code of Criminal Procedure. In addition, with regards to the part of the judgment that does not make a separate "not guilty" ruling on "the defendant Gu Zhong-liang's having committed the offense of non-arm's length transaction under the Securities and Exchange Act", the prosecutors have decided not to appeal against any part of the judgment, in light of the restriction on second appeals under the Criminal Speedy Trial Act ("Speedy Trial Act").** A summary of the study opinions is as set out below:

I. The defendant Gu Zhong-liang ("Gu") was indicted by the SID for breach of fiduciary duties of a bank responsible person under the Banking Act, the pre-amended Financial Holding Company Act as well as manipulation of share prices, non-arm's length transactions, matched orders affecting share prices, insider trading under the Securities and Exchange Act,and

money laundering under the Money Laundering Control Act, Gu was found guilty by the Courts in both the first instance and first appellate trials, and was sentenced to 9 years term imprisonment by the first instance court, and 9 years 8 months by the first appellate court, as well as a fine of NT$150 million. However, the courts have also determined that there was insufficient evidence of a part of the indictments, but will not issue a separate "not guilty" judgment.

II. **Findings of guilt:** breach of fiduciary duties of a bank responsible person under the Banking Act, and manipulation of share prices etc.

1. Breach of fiduciary duties of a bank responsible person under the Banking Act

The SID was of the view that the first instance sentence was overly light, without imposing a fine; it had therefore lodged an appeal by means of a written Brief of Reasons for Appeal to the Taipei District Prosecutors Office ("TDPO"). The offenses and criminal proceeds determined by the first appellate court were identical with those set out in the appeal grounds; furthermore, a heavier sentence of 9 years 8 months was imposed, together with a fine of $150 million, which was consistent with the appeal reasons submitted by the SID; the Court has also found that this part of the criminal acts also fell under Article 171, Paragraph 2, and Paragraph 1 Subparagraph 3 of the Securities and Exchange Act regarding breach of fiduciary duties by a director or supervisor, as well as satisfying the elements of the offense of breach of fiduciary duties under Article 342 of the Criminal Code. Given the principles governing competition of laws such that special laws shall prevail over general laws, and more severe laws shall prevail over lighter laws, the defendant shall be sentenced based on Article 125-2, Paragraph 2 and Paragraph 1 of the Banking Act for breach of fiduciary duties. Therefore, this part of the first appellate judgment, whether regarding the offenses found guilty by the first instance judgment or the offense not separately subject to a not guilty judgment, was consistent with the appeal submissions of the prosecution; accordingly, no further appeal will be made for this part.

2. Securities and Exchange Act: the offense of share price manipulation

The scope of the criminal indirect manipulation of share prices determined by the first appellate court was even broader than that determined by the first instance court or the facts of the indictment. Therefore, the prosecutors believe that the Court has been proper in its findings of fact and applications of law, and will not appeal against this part of the judgment.

III. **No separate issue of not-guilty judgment:** the pre-amended Financial Holding Company Act, and non-arm's length transactions, matched orders affecting share prices, insider trading and money laundering under the Securities and Exchange Act

1. The pre-amended Financial Holding Company Act, and matched orders affecting share prices and insider trading under and Securities and Exchange Act

No appeal was made against the first instance findings regarding "the pre-amended Financial Holding Company Act". With regards to "insider trading", both the first instance and first appellate courts held that the timings of buy and sell were before the earliest point in time for forming of the important news, which was inconsistent with the constitutive requirements for insider trading. With regards to "matched orders", both the first instance and first appellate courts held that there was no evidence to prove that the Defendant had conspired with the Barclays Bank or any person from said Bank; furthermore, the apparent matched orders were the result of the indirect share price manipulations carried out by Gu and others, so that the constitutive elements of matched orders were not satisfied. There was no error in this part of the courts' findings.

2. "Non-arm's length transaction" offense under Article 171, Paragraph 1, Subparagraph 2 of the Securities and Exchange Act

The first instance court held that ChinaTrust is not a public issuing

company, and therefore the provisions of the Securities and Exchange Act regarding “breach of fiduciary duties of director/supervisor” and “non-arm’s length transactions” cannot apply. The first appellate court, having considered the first instance court’s opinions, found that ChinaTrust is still a public issuing company and therefore the aforementioned provisions applied, but held that the criminal acts in the case at most amounted to “breach of fiduciary duties by a director/supervisor” under Article 171, Paragraph 1, Subparagraph 3 of the Securities and Exchange Act. The reasons of the Court were: “While the defendant and others had sold structured debts of ChinaTrust to Red Fire Developments Limited (“Red Fire”) without obtaining the resolved approval of its board of directors, which was a non-arm’s length transaction, nonetheless Red Fire had indeed repaid the purchase price, and ChinaTrust had recognized the gain on said sale in its financial statements. Therefore, the prosecution has proven that the Defendant and others had committed a breach of fiduciary duties, but did not produce evidence to explain that said structured debts had been cheaply sold to Red Fire. Furthermore, considering that the Defendant and others had had to sell the structured debts to facilitate their application for re-investment, one cannot say that it had been a transaction to the detriment of ChinaTrust”. The Court therefore had reason for considering that these circumstances did not satisfy the constitutive elements for the offense of “non-arm’s length transaction”

However, the Defendant and others had sold the structured debts to Red Fire without authorization, and Red Fire had subsequently redeemed them for a book profit exceeding US$30 million; if the Defendant and others had not carried out the unauthorized sale, the aforementioned profit would have belonged to ChinaTrust. This transaction should therefore be considered to the detriment of ChinaTrust, and given that the first appellate judgment had held that the aforementioned transaction manner was contrary to general business practice, it should have constituted the offense of “non-arm’s length transaction”. It was clearly contradictory to hold on the one hand that the Defendant had made a personal gain via Red Fire, so that he was guilty of breach of fiduciary duties, but on the other hand to hold that the said transaction was clearly not to the

detriment of ChinaTrust, so that it did not constitute the offense of "non-arm's length transaction". However, as the Supreme Court has not yet issued any precedents on the offense of "non-arm's length transaction", there is little room for an appeal on this part in light of the restrictions imposed by the Speedy Trial Act.

3. The offense of money laundering

The views of the first appellate court regarding the finding and indictment of the aforementioned fund flows are not inconsistent with those of the first instance court. However, it has held that the aforementioned fund transfer was made by Chen Jun-zhe, and Chen Jun-zhe was therefore the person who committed money laundering; since there was no evidence to prove that Gu had communicated the criminal intent or shared in the criminal acts in this regard, the Court has found that Gu was not guilty of money laundering. As the accomplice Chen Jun-zhe is still wanted by the police, and existing evidence does show that the aforementioned profit had been transferred by Chen Jun-zhe, one cannot find that the first appellate court had acted contrary to the Speedy Trial Act on this part.