



## CHINA LEGAL BRIEFING 100

W E N G E R & V I E L I B E I J I N G O F F I C E

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### 1. National

#### Provisions of Supreme People's Court on Certain Issues Regarding Adjudication of Cases Involving Loans Secured by Pledge over Depositary Accounts for Refunded Export Tax

最高人民法院关于审理出口退税托管账户质押贷款案件有关问题的规定

【Issued By】 Supreme People's Court

【Subject】 Debt and Credit

【Promulgated on】 November 22<sup>nd</sup> 2004

【Effective From】 December 7<sup>th</sup> 2004

【Source】 [www.court.gov.cn](http://www.court.gov.cn)

This judicial interpretation is formulated on the basis of General Principles of Civil Law, Contract Law and Guarantee Law with a view to protecting the legitimate interests of the parties as to disputes over Lending Secured by Pledge Created over Accounts Exclusively for Refunded Export Tax ("Secured Lending").

The Secured Lending for the purpose of this Provisions refer to an lending arrangement whereby the borrower places the Account Exclusively for Refunded Export Tax ("Account") under the control of the lending bank and undertakes that the funds in the Account are to be used to secure the repayment for such lending.

The Secured Lending shall be conducted in writing and become effective as of the date on which the lending bank starts to exercise actual control over the Account of the borrower. The lending bank holding such security interest shall have priority in obtaining the refunded tax in the Account over which pledge has been created. In insolvency proceedings, to the extent of the unpaid lending, the lending banking holding such security interest shall have priority in obtaining the refunded tax in such Account.

The courts shall not impose restrictive or enforcement measures over the refunded tax in the Account over which pledge has been created, except that:

- the borrower places funds other than the refunded tax in the Account;
- the lending bank has enforced the payment due by the borrower in the Account under the other Lending Agreement, and the amount of such enforcement overcomes the amount of the Security Lending; and
- the lending bank agrees to the transfer of the Account by the tax authorities; and
- the lending bank impairs the rights of other creditors by abusing the exclusive nature of the Account.

**Response of the Supreme People's Court to the Question of How to React to the Circumstance in Which the Documentation Is Not Able to Be Served at the Address of the Defendant Provided by the Plaintiff in the Complaint**

最高人民法院关于依据原告起诉时提供的被告住址无法送达应如何处理问题的批复

**【Issued By】** Supreme People's Court

**【Subject】** Civil Procedure

**【Promulgated on】** November 25<sup>th</sup> 2004

**【Effective From】** December 2<sup>nd</sup> 2004

**【Source】** [www.court.gov.cn](http://www.court.gov.cn)

In response to the questions raised by several High Courts as to how to react to the circumstance in which the documentation is not able to be served at the address of the defendant provided by the plaintiff in the complaint, the Supreme People's Court made in accordance with the Law of PRC on Civil Litigation the following statements:

The court shall request additional information from the plaintiff if the documentation is not able to be served to the defendant directly or to the address of the defendant provided by the plaintiff when the complaint was filed. If, however, the plaintiff is not able to provide additional information in connection therewith due to objective reasons, or the address of the defendant is not able to be determined based on such additional information provided by the plaintiff, the court shall serve the documentation to the defendant by means of public announcement in accordance with the law. In no case shall the court dismiss the case or terminate the proceedings on the ground that the plaintiff failed to provide true and accurate address of the defendant.

In the event the relevant authorities prevent one party from investigating the address of the other parties and the plaintiff applies the court to provide assistance in this regard, the courts shall make such investigation upon the application of the plaintiff.

### **Provisions on Sale and Auction of Properties in Civil Enforcement Proceedings by People's Courts**

关于人民法院民事执行中拍卖、变卖财产的规定

**【 Issued By 】** Supreme People's Court

**【 Subject 】** Civil Procedure

**【 Promulgated on 】** November 25<sup>th</sup> 2004

**【 Effective From 】** January 1<sup>st</sup> 2005

**【 Source 】** [www.court.gov.cn](http://www.court.gov.cn)

The objective of this judicial interpretation is to remove the uncertainty in the auction and sale of properties in connection with judicial enforcement proceedings. Under the Law on Civil Litigation currently in force, the provisions governing sale and auction are too general. Although the Law on Auction has been in operation for years, it mainly applies to voluntary auction instead of the auction related to judicial enforcement proceedings. The rules concerning auction and sale in this regard continue to be general and vague, even if the Rules on Certain Issues Regarding Enforcement by People's Courts (Provisional) ("关于人民法院执行工作若干问题的规定（试行）") devoted certain provisions thereto. The key points of this judicial interpretation are summarized as follows:

- When the court cash in the properties upon which restrictive measures such as seizure and freezing have been imposed, the auction shall be its first choice unless otherwise provided for by laws and regulations. The court may sell such properties for cash if the parties to the proceedings and other persons holding rights and interests against and in such properties agree to the sale, or the objects seized are gold or silver or products thereof, or public trading prices for the seized movables are available, or the seized movables are seasonal or easy to decompose, or the maintenance of the seized objects are extremely difficult or the costs thereof are extremely high.
- The court shall appoint an appraiser to evaluate the properties to be auctioned provided however that appraisal may not be conducted where the value of the properties is low or the prices for such properties are easy to determine. The parties may object to the appraisal results. Nevertheless, the right to reopen the appraisal by the parties and other interested parties are restricted to a few circumstances.
- There shall be a reserved price for each item under auction. Such price shall be determined by the court organizing the auction by making reference to the appraisal result. If no appraisal has been conducted, such price shall be determined by making reference to available market price after consulting with the parties to the proceedings.
- The appraiser and the auctioneer shall be selected: (1) from candidates unanimously agreed upon by parties and confirmed by the court; (2) by drawing lot before the parties; or (3) by public bidding upon the request of the parties.
- The person other than the applicant to bid at the auction shall submit a deposit to the court in the amount of 5% of the market or evaluated price for the real estate, other propitiatory rights and movables with high value.
- The properties under auction may be accepted by the applicant or other creditors to set off and satisfy their debts if no one bids at the auction or the highest price from the bidders is lower than the reserved price.

The transfer of ownership of and the other titles to the properties under auction shall be deemed as being completed at the time the deal is reached at the auction or the judicial order approving the set-off is served.

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