
The Shanghai Second Intermediate People's Court

Judgment in writing

Public Prosecutorial Office: The Second Branch Court of People's Prosecutorial Office, Shanghai.

The Injured Party: Shanghai Engineering Machinery Corporation.

Registered Address: No.400, Wenshui Road, Shanghai.

Law agent: Zhu Miao Chun, Gu Hui Min, the lawyers of Tianhong Law Firm, Shanghai.

The Defendant Work Unit: Shanghai Hong Xu Engineering Machinery Equipment Corporation.

Registered Address: Fu Rong Economic Development Zone, Song Jiang District, Shanghai.

Operating place: Guo Zhong Hotel Apartment B #16A, No.1546, Dalian Road, Shanghai.

Counsel: Xu Zhi Hua, legal representative of Shanghai Hong Xu Engineering Machinery Equipment Corporation.

Defender: Wang Yu, the lawyer of Yi Ping Law Firm, Shanghai.

Defender: Chen Jia, an employee of Hong Xu Engineering Machinery Equipment Corporation.

Defendant: Lin Yi, male, was born in Shanghai on Dec.10, 1951, of the Han nationality. He graduated from junior high school. He was the general manager of Shanghai Hong Xu Engineering Machinery Equipment Corporation and Wu Xi Xin Ren Engineering Machinery Equipment Corporation. His registered permanent residence is No.113, Lao Xin Street; and his current residence is Suite #1404, Building #2, Guang Hui Garden , No.271 Dong An Road, Shanghai. He was taken into custody on Feb.3, 2004 for being a suspect of infringing business secret, and arrested on Mar.11, 2004. Now he is in Shanghai No. 2 Detention Place.

Counsel: Wang Jun Min, the lawyer of Zhong Xin Zheng Yi Law Firm, Shanghai.

Defendant: Dong Wei De, male, was born in Shanghai on Feb.24, 1951, of the Han nationality. He graduated from university. He was an engineer of Shanghai Engineering Machinery Corporation. His registered permanent residence is Building #81, Suite #603, Si Tang Four Village, Bao Shan District, Shanghai; and his current residence is Suite 201, Building 28, Lane 903, Hu Tai Road, Shanghai. He was taken into custody on Feb.3th, 2004 for being a suspect for infringing business secret, and arrested on Mar.11, 2004. Now he is in Shanghai No. 2 Detention Place.

Counsel: Xu Yi Ren, the lawyer of Zhuo Jian Law Firm.

Defender: Wang Zhi Feng, the lawyer of Fazhan Law Firm.

The Shanghai Second Branch Court of People's Prosecutorial Office accused that Shanghai Hong Xu Engineering Machinery Equipment Corporation, accused Dong Wei De and Lin Yi of

infringing business secret. They were accused on Jun.14, 2004. Our court formed collegial bench according to the law. The injured party applied for a secret court trial to avoid to further release of the business secret. Our court assigned fact-finder Chen Wei Gang and representative fact-finder Liu Pei Lan to support our public prosecution. All the people including next friends, law agents, defenders, and defendants participated in our lawsuit. The court trial of this case was authorized to be delayed for one month by Shanghai High People's Court and the defenders of Lin Yi, Dong Wei De and the injured party all applied for postponement. Our court agreed with them. Now this trial has been finished.

At the beginning of year 2001, defendant Dong Wei De was employed in Shanghai Hong Xu Engineering Machinery Corporation as chief engineer, but he also was the engineer of Shanghai Engineering Machinery Corporation at the same time. During the period from March to May 2001, Dong took without authorization technical drawings for D62, D80 and D100 diesel hammers, which are the proprietary drawings of Shanghai Engineering Machinery Corporation, and handed them over to Hong Xu. Then, the general manager Lin Yi, who was accused in this case, instructed somebody to copy the above drawings and put on Hong Xu Corporation's signature. Defendant Lin Yi formed a joint-venture with others to set up a new firm named Wu Xi Xin Ren Engineering Machinery Corporation in October 2001. During the period from October 2001 to December 2003, under the management of Defendant Lin Yi, the defendant's work unit Hong Xu Corporation and Xin Ren Corporation produced three types of diesel hammers using the drawings obtained illegally by Defendant Dong Wei De, and sold them at lower prices to Shanghai Port Engineering Corporation and Shanghai San Hang Ben Teng Construction Engineering Corporation and so on, profited over 3,000,000 RMB illegally, and caused direct economic loss to Shanghai Engineering Corporation of about 5,910,000 RMB. In order to prove the above facts, Public Prosecutorial Office presented evidence from witness Shen Yao Chong, Cao Xi Yang, Mo Wen Yao, Xia Yu Fang and so on. Other evidences are as follows: <<Technical Appraisement Report>> and <<Supplementary Verification Report>> of the Ministry of Science and Technology Intellectual Property Rights Center, << Audit Report>> of Shanghai Fu Xing Ming Fang Accounting Firm, Secrecy Rules and Regulations, Special Technology Transfer Contract and Work Unit Certificate, business license and so on.

Public Prosecutorial Office considered that Hong Xu Corporation was fully aware or ought to know those business secrets they obtained were illegal, but they still used them, this act caused serious consequences to obligee, and also violated No.219 and No.220 articles of <<The people's Republic of China Criminal Law>>, constitute the crime of invading business secret; the accused Lin Yi, the General Manager of Hong Xu Corporation, should be prosecuted for criminal liability for helping the defendant work unit to commit criminal activity as the lead manager in direct charge; the accused Dong Wei De violated No.219 articles of <<The people's Republic of China Criminal Law>> for his criminal acts of revealing business secret, committed the crime of invading business secret and should be prosecuted for his criminal liability.

The law agents of Shanghai Engineering Machinery Corporation considered that the acts of Hong Xu Corporation, defendant Lin Yi and Dong Wei De had committed the crime of invading business secret and they should be prosecuted for their criminal liability.

The representative of Hong Xu Corporation considered that although she was the chairperson of the board, she was not in charged of the company operations and she did not know whether the three type products D62, D80 and D100 diesel hammers of her firm had invaded others' business secret and the amounts in the << Audit Report>> had some differences with real ones.

The defender of the defendant work unit considered that the technical information in the D62, D80 and D100 drawings had been public knowledge before 2001, the disputed object of this case was not business secret, and that the legal oblige did not exist, <<Technical Appraisal Report>> and << Audit Report>> could not be a basis for the verdict; although the defendant work unit used other company's D series drawings without authorization, it did not commit the crime of invading business secret.

The accused Lin Yi considered that the accusation of the indictment was truth, but the amounts of illegal earnings and the loss was not calculated correctly. His defender thought Shanghai Engineering Machinery Corporation was not the business secret obligee of this case, <<Technical Appraisal Report>> and << Audit Report>> could not be a basis for the verdict, the criminal indictment for accused Lin Yi was not clear, and its evidence was not adequate, so the prosecutor's case was not established.

The accused Dong Wei De considered that the accusation of the indictment was not true. His defender thought he did not carry out the action of revealing business secret objectively, and also did not invade business secret intentionally, so the prosecutor's case was not established.

Investigation:

The old name of Shanghai Engineering Machinery Corporation was Shanghai Engineering Machinery Works. The factory introduced nine types of technical drawing papers of diesel hammer from Germany including D62, D80 and D100 in 1985, and obtained the exclusive the production authorization in China. In 1995, the factory was merged with Shanghai Mineralize Machinery Factory to establish Shanghai Jin Tai Stock Corporation, which was renamed Shanghai Jin Tai Engineering Machinery Corporation through asset restructuring at the end of 2002. Its asset was restructured in May of 2003 and was separated from Shanghai Mineralize Machinery Factory to form the current Shanghai Engineering Machinery Corporation. The intellectual property rights of diesel hammer belong to it.

At the beginning of 2001, after the General Manager of Hong Xu Corporation Lin Yi met the accused Dong Wei De who was the engineer of Shanghai Jin Tai Stock Corporation thanked to other people's introduction; Dong was employed to take charge as the chief engineer of Hong Xu Corporation. During that time, the accused Lin Yi revealed his intention of producing diesel hammer, Dong expressed immediately that he could provide the technical drawings to Lin. Afterwards, during the period from March to May 2001, the accused Dong Wei De carried type D62, D80 and D100 diesel hammer technical drawings illegally from the reference library of

Shanghai Jin Tai Stock Corporation to Lin Yi, using his convenience to contact the technical drawing papers. Then the two accused instigated other people to conceal the words “Shanghai Engineering Machinery Corporation” and copied above papers in order to cover its true origin.

In October 2001, Hong Xu Corporation associated with Wu Xi Cun Tian Textile Machinery Co. Ltd to establish Xin Ren Corporation, the accused Lin Yi was the General Manager of the new company. During the period from October 2001 to December 2003, the accused Lin Yi used the illegal drawings to produce the same three type diesel hammers by imitation under Dong’s instructions. The total was to 14 units. They were sold them to Shanghai Port Engineering Corporation, Shanghai San Hang Benteng Construction engineering Corporation at low prices. According to the judicial audit, it had caused an economic loss of over 5,910,000 RMB to Shanghai Engineering Machinery Corporation, with Hong Xu Corporation making over 3,530,000RMB in profit.

The above facts are based on following evidence from Public Prosecutorial Office:

1. <<Regarding Approving the Recommendation of Introducing Technical Project of Diesel Hammer>> in May 1984 by Shanghai Planning and Economic Commission, <<Regarding the Recommendation of Technological Transfer of Diesel Hammer>> in August 1985 by Shanghai Foreign Economic Commission, << Technological Transfer of Diesel Hammer>> signed by Shanghai Engineering Machinery Works and DELMAG Company of Germany confirmed that the technology of D62, D80 and D100 diesel hammer was introduced from Germany and Shanghai Engineering Machinery Works was authorized to manufacture the contractual products exclusively in China.
2. The <<Declaration>> of Shanghai Engineering Corporation proves that its predecessor was Shanghai Engineering Machinery Works, and through three prior restructuring, whose name was changed to Shanghai Jin Tai Stock Company, Shanghai Jin Tai Engineering Machinery Co., Ltd and Shanghai Engineering Machinery Co., Ltd, and the intangible assets including diesel hammers and so on still belong to Shanghai Engineering Machinery Corporation.
3. The <<Special Technological Contract>> signed between Shanghai Engineering Machinery Works and DELMAG Company of Germany and its translated Chinese version proves that: Shanghai Engineering Machinery Factory introduced nine types of diesel hammers including D62, D80 and D100 from DELMAG Company of Germany, the introduced technology includes all kinds of technical documents, manufacturing and packing drawings, quality standard and so on. Shanghai Engineering Machinery Works was authorized to apply the introduced technology and manufacture products exclusively in China.
4. Scientific and Technological Achievements Certificates issued by the National Science and Technology Commission in 1994 proves that Shanghai Jin Tai Joint-stock Company obtained the Scientific and Technological Achievements Award for home-made casting technology for diesel hammer large section

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- ductile-iron upper piston as the primary obligee.
5. << Industry and Commerce Registry Information>> proves that Hong Xu Corporation and Xin Ren Corporation were established in January 1997 and October 2001, respectively. The scope of business of Hong Xu Corporation was mechanical and electrical devices, machine components, pile drivers and accessories and so on. The scope of business of Xin Ren Corporation was manufacturing and selling of barrel-type diesel hammers and accessories. The legal representatives of the above two corporations was Xu Zhi Hua, and the general manager was the accused Lin Yi. Lin operated those two corporations really. Xu is not responsible for operation matters.
 6. << Certificate Provided by a Unit>> proves that the accused Dong Wei De had been an engineer of technical department in charge of technical matters since he was employed by Shanghai Engineering Machinery Corporation in 1978. As an engineer, he had an easy access to convenience to technical drawings.
 7. The following technical appraisal conclusions presented by the Ministry of Science and Technology Intellectual Property Rights Center proves that:
 - (1) No.2 <<Technical Appraisal Report>> dated Jan.19, 2004:
 - I Non-standard dimensional tolerance of crucial parts such as upper cylinder, lower cylinder, fuel injectors of D62, D80 and D100 that Shanghai Engineering Machinery Corporation had produced were private technical information.
 - II The impact surfaces of upper piston and lower piston which forms the combustion chamber of diesel hammer were non-standard curved surfaces and their technical parameters were private technical information.
 - III The technical requirements of some crucial parts such as fuel pump assembly, fuel injector, check-non-return valve assembly, suction valve assembly, stop valve assembly, chain sheave, oil pump assembly, lower piston of D62, D80 and D100 that Shanghai Engineering Machinery Corporation had produced were private technical information.
 - (2) No.6 <<Technical appraisal report>> dated Mar.2, 2004:
 - I The D62, D80 and D100 diesel hammer production drawings of Wu Xi Xin Ren Engineering Machinery Corporation (with Shanghai Hong Xu Corporation's signature) offered by Shanghai Police Bureau were the same as those of Shanghai Engineering Machinery Corporation in terms of the shape of product, structure, technical parameters and technical essentials and etc.
 - II According to on-site measurement results of the products made by Wu Xi Xin Ren Engineering Machinery Corporation, the shape, structure and certain crucial parts of D62, D80 and D100 had the same technical parameters as those in the drawings of Shanghai Engineering Machinery Corporation and Shanghai Hong Xu Corporation.
 - (3) No.17 <<Additional Appraisal Report>> dated April 16, 2004:

According to the on-site measurement results of the D100 diesel hammer

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- made by Wu Xi Xin Ren Engineering Machinery Corporation, the shape, structure and certain crucial parts of the D100 had the same technical parameters as those of Shanghai engineering machinery Corporation and Shanghai Hong Xu Corporation.
- (4) <<Additional Appraisal Report>> dated October 13, 2004:
Appraising expert considered that it would not influence above appraisal conclusions that the defense disputed No.2 and No.6 <<Technical Appraisal Report>> and No.17 <<Additional Appraisal Report>>.
8. <<The Interim Provision of Keeping Nation's Secrets and Company's Internal Secret >>, <<Technical Management Regulation>>, <<The Management System Regarding Drawings, Process Used in Production>> that Shanghai Engineering Machinery Works had presented proves it set up the secret-preservation system, and took strict secret measures for related products, processes and tooling drawings.
9. The evidence presented by witnesses Shen Yao Chong, Qi Jian Ming, Cao Xi Yang, Cao Pei Qi all proved that Shanghai Engineering Machinery Corporation had promulgated << The Interim Provision of Keeping Nation's Secret and Company's Internal Secret >>, and organized all the employees to study it, and requested them to observe the sign-up procedure when they borrowed the drawings.
10. Witness Xia Yu Fang proved she had infringed the regulation of keeping and borrowing drawings by making a blueprint of master drawings and handing over to the accused Dong Wei De when he did not have requisition form filled.
11. Witness Hu Xiang Long proved that General Manager Lin Yi employed Dong Wei De who was an engineer of Shanghai Engineering Machinery Corporation at that time to be a technical consultant at the beginning of 2001. Dong brought the technical drawings of D62, D80 and D100 diesel hammers from Shanghai Engineering Machinery Corporation frequently and then handed them over to Hong Xu Corporation. The D62, D80 and D100 diesel hammers that Hong Xu Corporation had produced were manufactured according to the above drawings.
12. Witness Mo Wen Yao proved that on several occasions at Hong Xu Corporations in September 2001, Lin Yi had asked him to copy a set of drawing papers which bore the signature of "Shanghai Engineering Machinery Corporation". Lin asked him to scrape off the words "Shanghai Engineering machinery Corporation", put the stamp of "Hong Xu Corporation" and make them the drawings of Hong Xu Corporation.
13. Witness Liu Cai Xia proved Shanghai Engineering Machinery Corporation engineer Dong Wei De brought many drawings to Hong Xu Corporation frequently in September 2001, and handed them over to Lin Yi. She saw Hu Xiang Long limned the diesel hammer technical drawings of Shanghai Engineering Machinery Corporation in his office.
14. <<Search Record>> and<<Detained Article List>> from Shanghai Police Bureau proved that D62, D80 and D100 diesel hammer blueprint and master drawings totaling 47 items were uncovered from Hong Xu Corporation, and the accused

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- Lin Yi signed his name on above detained article list.
15. The accused Lin Yi proved that after being was hired to Hong Xu Corporation, Dong Wei De had found out that Hong Xu did not have the crucial technical drawings of D62, D80 and D100 diesel hammer production, and then suggested that he bring such drawings rom Shanghai Engineering Machinery Corporation to Hong Xu Corporation for producing the above hammers. Lin agreed to his idea. During the period from March to May 2001, Dong brought the technical drawings from Shanghai Engineering Machinery Corporation frequently, and handed them over to Lin Yi. In order to cover up their acts, Lin Yi asked his employees Mo Wen Yao and Hu Xiang Long to limn above papers and scrape off “Shanghai engineering machinery Corporation” words. During the period from September 2001 to Oct 2003, Hong Xu Corporation and Xin Ren Corporation sold 4 units of D62 diesel hammers, 7 units of D80 diesel hammers, 3 units of D100 diesel hammers to Shanghai Port Engineering Corporation, Shanghai San Hang BenTeng Construction Engineering Corporation and so on.
 16. The accused Dong Wei De proved that he had suggested to fetch out some crucial technical drawings of D62, D80 and D100 diesel hammers from Shanghai Engineering Machinery Corporation to Hong Xu Corporation for production purpose after noticing that Hong Xu did not have crucial drawings. Lin agreed to his idea, and Lin knew the origin of these drawings at the very start. In order to cover up their acts, Lin and he scraped off “Shanghai Engineering Machinery Corporation” words, and stamped them with “Hong Xu Corporation”. Lin asked Hu Xiang Long to limn the diesel hammer technical drawings of Shanghai Engineering Machinery Corporation and make them drawings of Hong Xu Corporation.
 17. Shanghai Fu Xing Ming Fang Accountant Firm presented <<Special Audit Report>> on April 19, 2004:
 - I Shanghai Hong Xu Engineering Machinery Equipment Corporation obtained a complete set of D62, D80 and D100 diesel hammer drawings illegally which belong to Shanghai Engineering Machinery Corporation and were certified to be a technical secret by The Ministry of Science & Technology IPR Center, but still produced the same products. From Oct 2001 to Dec 2003, Hong Xu’s sales revenue was 10,411,804.90 RMB (not including tax) with a profit of 3,046,133.61 RMB.
 - II “Hong Xu Corporation” and “Xin Ren Corporation” earned 10,411,804.90 RMB in revenue for producing the same products by imitation. As a result, Shanghai Engineering Machinery Corporation lost 5,917,028.72 RMB in profits according to the average marginal profit ratio of 56.83%.

Above evidences were found to be true according to the showing at the trial, identifying, and cross-examining.

During the proceedings, the prosecuting party and the defender put forward different opinions, we judged as follows according to the relevant evidences:

I Regarding whether D62, D80 and D100 diesel hammers that Shanghai Engineering Machinery Corporation produced were business secret.

According to the law, business secret means the technical and business information which is not known by the public, brings economic benefits, is operational and can be protected by obligee. “Not known by the public” and “Protective measures taken to keep secret” are crucial to determine whether the subject items belongs to the category of business secret.

Regarding the determination if certain information is of the nature “not known by the public”, it means such information cannot be obtained from public channels. Public channels include publications and the other ways, such as public selling, public use, reverse engineering and verbal leaks so on. However, except for publications, the other ways of public channels only have the possibility, not necessarily leading to the information be known by non-specific person, and such “Known” cannot be “known to some extent”. During the adjudicating procedure of this case, the prosecutorial office read out the conclusion of No. 2 and No. 6 <<Technical Appraisal Report>> and No 17 <<Additional Appraisal Report>> presented by the Ministry of Science And Technology IPR Center prove that the D62, D80 and D100 diesel hammers that Shanghai Engineering Machinery Corporation produced were business secret.

The defendant’s work unit and the defender of the two accused contended that the contents of above appraisal reports were not valid for lack of signature by expert. They contended that the appraisal reports had imperfect formality and untruthful contents. After presenting certain evidence, they contended that the technical drawings of D62, D80 and D100 diesel hammers were introduced from Germany, and had been known to the public before 2001. They contended that the construction and principle of D series products and the manufacturing technical requirements, material, heat treatment, machining technology, machining precision of crucial parts were public knowledge and not protected as business secrets. Our court had commissioned the Ministry of Science & Technology IPR Center to present No.53 <<Additional Appraisal Report>> to answer the questions raised by the defense. The reports concludes as follows: the defendants objections to No.2 and No.6 <<Technical Appraisal Report>> and No.17 <<Additional appraisal report>> would not influence the appraisal conclusion. Our court considered that whether the D series products Shanghai Engineering Machinery Corporation had produced belong to business secrets was the crucial thing of this case, it is related to professional knowledge of diesel hammer, and required expert witness. The Ministry of Science & Technology IPR Center was the authoritative organization appointed by Supreme Court, and the expert it appointed for this case has the proper credentials, so <<Technical appraisal report>> and <<Additional appraisal report>> are valid. Our court does not adopt the suggestions of defender for lack of legal basis.

Regarding “keeping secret”, The National Industrial & Commercial Administration explained the obligee’s act of taking protective measures as measures including signing confidential agreements on secret information, establishing keeping-secret system, and adopting other reasonable measures. The employees and associates of the obligee knows or ought to know that business secrets exist as long as the obligee has the requirement for keeping secret. Shanghai Engineering Machinery Corporation put out << The Interim Provision of Keeping Nation’s secret and Company’s Secret >>, <<Technical Management Regulation>>, <<The Management System for Drawings, Process Used in Production>> was proven to be true. Shanghai Engineering Machinery Corporation established keeping-secret system. This is consistent with the evidences provided by witnesses Shen Yao Chong, Qi Jian Ming, Cao Xi Yang. We therefore confirmed it. So our court refused the application of the accused Dong Wei De and his defender that Shanghai Engineering Machinery Corporation had not established the keeping-secret system.

For reasons given above, we confirmed D62, D80 and D100 diesel hammers that Shanghai Engineering Machinery Corporation produced were not known to the public, and could ender economic benefits to the obligee, and the obligee also adopted keeping-secret system at the same time, so it belongs to business secret.

II Regarding whether the defendant work unit and two accused infringed Shanghai Engineering Machinery Corporation’s business secret.

According to No.219 Clause of <<Criminal Law>>, the obligee of business secret is the owner of the business secret or the user authorized by the owner of the business secret. According to the existing evidence, Shanghai Engineering Machinery Corporation introduced the D62, D80 and D100 diesel hammers from Germany in 1985, and acquired the exclusive production rights in China. According to the item No. 8 of No.9 Clause of <<The People’s Republic of China Technology Introduction Contract Regulation >> the State Council had issued, the supplier of technology should not force receiving party to accept unreasonable restrictive measures, the contract should not contain clauses such as “Forbidding the receiving party to use the introduced technology after the contract expires”, unless authorized by relevant authorities. Although the contract expired, Shanghai Engineering Machinery Corporation is still the user of the business secret. Although Shanghai Engineering Machinery Works was renamed as Shanghai Engineering Machinery Corporation through many times of re-structuring, the intellectual property rights of D62, D80 and D100 diesel hammers still belong to this company. The evidence by witnesses Xia Yu Fang、Cao Pei Qi, Mo Wen Yao, Hu Xiang Long and the two accused, <<Searching Record>> and <<Detained Articles List>>, and so on proved that Dong Wei De infringed the keeping-secret system of Shanghai Engineering

Machinery Corporation to reveal crucial technical drawings of D62, D80 and D100 diesel hammers to others without authorization. Although Lin Yi, the general manager of the defendant work unit, knew those drawings that accused Dong Wei De supplied were business secret of Shanghai Engineering Machinery Corporation, still used them, those acts of the defendant work unit Hong Xu Corporation and the two accused all infringed business secret. So our court considered their explanations and submissions lacked factual basis, we refused their application.

III About the direct economic loss and the methodology.

Public Prosecutorial Office considered the defendant work unit Hong Xu Corporation and the two accused infringed Shanghai Engineering Machinery Corporation's business secret, caused direct economic loss up to 5,910,000 RMB, with Hong Xu Corporation making profits 3,530,000 RMB.

The defendant work unit and the two accused considered that the defendant work unit Hong Xu Corporation and Xin Ren Corporation were two different companies, but <<Audit Report>> audited those two companies all together. They considered the illegally obtained profits of Hong Xu Corporation and the direct economic loss suffered by Shanghai Engineering Machinery Corporation were wrongly calculated.

Our court considered that although the defendant work unit Hong Xu Corporation and Xin Ren Corporation were two independent legal entities, the existing evidence indicated that those two companies had a close relationship, (1) Assets relationship: Hong Xu Corporation was the controlling shareholder of Xin Ren Corporation (holding 60% stock rights), according to current accounting regulations, the two companies should be combined for accounting report forms. (2) Personnel relationship: the legal representatives of those two companies were the same person Xu Zhi Hua; and the general managers also were the same person Lin Yi, but Xu and Lin were wife and husband. (3) Managing condition: Hong Xu Corporation supplied components to Xin Ren Corporation. So the two associated companies had associated economic acts and financial data, <<Audit report>> was right to audit them together. In the <<Audit report>>, the sales revenue of 14 units of infringed diesel hammers $10,411,804.90 \text{ RMB} \times \text{average marginal profit ratio } 56.83\%$ of Shanghai Engineering Machinery Corporation during the period from Oct.2001 to December 2003 = 5,917,028.72 RMB, the illegally obtained profits by Hong Xu Corporation was calculated by deducting the portion of another shareholder Wu Xi Cun Tian Textile Machinery Corporation. According to the general auditing principle, its calculation was correct. So our court refused the application of the defendant work unit and the two accused regarding the illegal profit amount and direct economic loss were wrongly calculated.

IV Whether this case fits the category "of crimes causing especially serious

consequences”.

Public Prosecutorial Office considered the defendant work unit was fully aware or should know the accused Dong Wei De supplied illegally obtained business secret, but still used it, this act brought out direct economic loss in the amount of 5,910,000 RMB, so it belonged to the category of crime “causing especially serious consequences” to the obligee.

The defendant work unit and the defense of two accused considered the accusation was wrong; the real amount did not meet the starting point of 500,000 RMB to activate punishment, so it did not fit the category of crime “causing especially serious consequences” to the obligee.

According to No.219 Clause of <<Criminal Law>> and No.7 Clause of <<Regarding the Legal Explanation of Carrying Out Certain Infringing Intellectual Property Rights Cases >> that Supreme People's Court and Supreme People's Prosecutorial Office announced on Dec.22, 2004, it belonged to the category of “Causing Serious Consequences” to obligee if the loss was over 500,000 RMB, and the criminal should be sentenced to less than 3 years for infringing business secret and/or pay fines ; it belonged to the category of “causing especially serious consequences” to obligee if the loss was over 2,500,000 RMB, and the criminal should be sentenced to 3~7 years and/or pay fines. The No.15 Clause of this explanation regulated that when carrying out No.213 to No.219 Clauses of the Criminal Law, the work unit should be punished three times as much as the individual criminal. In this case, our court considered the defendant work unit Hong Xu Corporation used other's business secret causing a direct economic loss of 5,910,000 RMB, its act belonged to the category of “causing especially serious consequences” to the obligee, and the accused Dong Wei De revealed business secret causing a direct economic loss of 5,910,000 RMB, his act belonged to the category of “causing especially serious consequences” to the obligee. Therefore, we refused their submission.

For reasons given above, our court considered the defendant work unit was fully aware that accused Dong Wei De infringed the keeping-business secret regulation, supplied business secret illegally to Hong Xu Corporation, but they still used his illegal information, causing serious economic loss, this act had constituted infringing business secret crime; the accused Lin Yi as a general manager of Hong Xu Corporation carried out criminal activity directly, should be pursued for its criminal liability. The accused Dong Wei De revealed business secret, his act constituted infringing business secret crime. In view of the accused Lin Yi's better attitude of admitting his guilt, we will give him a lesser punishment. In order to defend the socialist market economic order, and protect the legal right of business secret obligee, according to No.219, No.220, No.25 and No.64 Clauses of <<The people's Republic of China Criminal Law>> and No.7, No.15 Clauses of <<Regarding the Legal Explanation of Carrying Out Certain Infringing Intellectual Property Rights Cases >> that Supreme People's Court and Supreme People's Prosecutorial Office proclaimed, **our verdict is as follows:**

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1. The defendant work unit Shanghai Hong Xu Engineering Machinery Equipment Corporation is found guilty of infringing business secret and is punished to pay 400,000 RMB in fines. (The fine should be handed in to our court in three months after the judge becomes effective).
 2. The accused Lin Yi is found guilty of infringing business secret and is condemned to set term of imprisonment for one year and six months, and is punished to 20,000 RMB in fines. (The term of imprisonment is carried out from Feb.3, 2004 to Oct.2, 2005. The fine should be handed in to our court in three months).
 3. The accused Dong Wei De is found guilty of infringing business secret, and is condemned to set term of imprisonment for three years, and is punished to pay 30,000 RMB in fines. (The term of imprisonment is carried out from Feb.3, 2004 to Feb.2, 2007. The fine should be handed in to our court in three months).
 4. Illegal gains should be seized and returned back to the injured party Shanghai Engineering Machinery Corporation.

If one refuses to obey this sentence, one can appeal through our court or appeal directly to Shanghai People's High Court. The written appeal should include the original petition and a copy.

Chief Justice: Xue Zheng
Judge: Wu Deng Lou
Alternate Judge: Yang Qin Tang

Dec.28, 2004

Engrossment clerk: Sheng Yan
Engrossment clerk: Xu Bao Ping

Enclosed are certain caluses and explanations of <<The people’s Republic of China Criminal Law>>:

No.219 If one of the following infringing business secret actions applies, causing serious loss to business secret obligee, the criminal would be sentenced to less than 3 years for a set term of imprisonment, and/or be punished to pay fines; In the case of causing especially serious loss to business secret obligee, the criminal would be sentenced to 3~7 years for a set term of imprisonment, and/or be punished to pay fine:

- (1) Using stealing, enticing, threatening and other illegal means to get obligee’s business secret;
- (2) Revealing, using or allowing others to apply obligee’s business secret with the way of item (1);
- (3) Infringing agreement or the requirement of obligee about keeping business secret, revealing, using or allowing others to apply obligee’s business secret;

One is fully aware or should know above actions, but getting, using or revealing others’s business secret, will be sentenced for infringing business secret.

By “business secret”, we mean information not known to the public, can render economic profits to obligee, the technical and working information that have practicability and oblige taking keeping-secret measures.

By “oblige”, we mean the owner and owner-authorized user of business secret.

No.220 Some units infringe the No.213 to No.219 Clauses of this section should be punished to pay fines, and the directly responsible executive should be punished.

No.25 Joint offense refers more than two people committing crime together.

No.64 All illegal earnings should be seized and returned to the injured party; prohibited articles and criminals’ own properties used for crimes should be confiscated. The confiscated properties and fines should be handed to exchequer. Nobody can handle with authorization.

Execution of Punishment:

No.7 Clause of <<Regarding the Legal Explanation of Carrying Out Some Infringing Intellectual Property Rights Cases >> that Supreme People’s Court and Supreme people’s Prosecutorial Office proclaimed on Dec.22, 2004 regulated that it belonged to “causing serious consequences” to obligee if the loss was over 500,000 RMB, the criminal should be sentenced to less 3 years for infringing business secret, and/or be punished to pay fines. It belonged to “causing especially serious consequences” to obligee if the loss was over 2,500,000 RMB, the criminal should be sentences to the 3~7 years, and/or be punished to pay fines. The No.15 clause of this explanation regulated that when carrying out No.213 to No.219 Clauses of Criminal Law, work unit should be punished three times as much as the individual.