

J. Y. Interpretation No.227 ( June 17, 1988 ) \*

**ISSUE:** Is the guarantor in a transaction punishable as the subject of the offence specified by Article 38 of the Act of Secured Transactions for Movable Property?

**RELEVANT LAWS:**

Articles 5, 16, 27, 33, 38, 39 and 40 of the Act of Secured Transactions ( 動產擔保交易法第五條、第十六條、第二十七條、第三十三條、第三十八條、第三十九條、第四十條 ) ; Article 31, Paragraph 1 of the Criminal Code ( 刑法第三十一條第一項 ) .

**KEYWORDS:**

subject of the offense ( 犯罪主體 ) , formal act ( 要式行為 ) , guaranty agreement ( 保證契約 ) , guarantor ( 保證人 ) , accessory contract ( 從契約 ) , guaranteed obligation ( 被保證債務 ) , chattel mortgage ( 動產抵押 ) , conditional sale ( 附條件買賣 ) , trust receipt ( 信託占有 ) .\*\*

**HOLDING:** The subject of the offense specified in Article 38 of the Act of Secured Transactions for Movable Property is the debtor in a Secured Transaction and does not include the guarantor

**解釋文：**動產擔保交易法第三十八條之罪，係以動產擔保交易之債務人為犯罪主體，並不包括其保證人在內。

---

\* Translated by Raymond T. Chu.

\*\* Contents within frame, not part of the original text, are added for reference purpose only.

in such a transaction.

**REASONING:** A transaction concluded under the Act of Secured Transactions for Movable Property is a formal act and must be put down in writing in the form of a contract, with such particulars as are required to be stated in an agreement of chattel mortgage, conditional sale, or trust receipt, as the case may be, by explicit provisions set forth in Article 5, 16 or 33 of said Act. The question about which party is the debtor in a particular transaction is determined by examining the details of the contract. A guaranty agreement, on the other hand, is an accessory contract between the creditor and a third party, and does not constitute a formal act. While the guarantor does have an obligation based on the guaranty, his obligation is secondary to the guaranteed obligation, and he has a legal status distinct from that of the debtor. Article 38 of the Act of Secured Transactions for Movable Property provides: "A debtor in a Secured Transaction for Movable Property who, in the attempt to gain illegal profits, moves away, sells, pledges, trans-

**解釋理由書：**依動產擔保交易法成立之交易，係屬要式行為，應以書面訂立契約，視其為動產抵押、附條件買賣或信託占有，分別載明其應記載之事項，此在該法第五條、第十六條、第十七條及第三十三條規定甚明。孰為交易之債務人，即依此等契約之記載。至於保證契約，則為第三人與債權人訂立之從契約，並非要式行為。保證人雖負有保證債務，究僅為從屬於被保證之債務，其地位與債務人並不相同。該法第三十八條規定：「動產擔保交易之債務人，意圖不法之利益，將標的物遷移、出賣、出質、移轉、抵押或為其他處分，致生損害於債權人者，處三年以下有期徒刑、拘役或科或併科六千元以下之罰金。」法律既明文限制以債務人為犯罪主體，而未如同法第三十九條或第四十條兼將第三人併列在內，顯係因特定之債務人關係而始成立之罪，保證人自不包括在內。除其有與債務人共同實施或教唆、幫助之情形，應依刑法第三十一條第一項規定以共犯論之外，不得單獨為該罪之犯罪主體。

fers, creates a mortgage on, or otherwise disposes of the subject matter of the transaction, thereby causing damage to the creditor, is punishable with imprisonment of not more than three years or detention or, in lieu thereof or in addition thereto, a fine of not more than 6,000 yin-yuan. “Inasmuch as the law specifically limits the subject of the offense to the debtor, rather than including third persons as the subjects of the offense under Articles 39 and 40 of the same Act, the offense specified in Article 38 is obviously one that may be established only if it is based upon the special relationship of the debtor, and the law is certainly not intended to include the guarantor, who, unless being found to have acted jointly with, incited, or assisted the debtor in committing such an offense and is for that reason punishable as a joint offender under Article 31, Paragraph 1, of the Criminal Code, may not, by himself alone, be the subject of such offense.