The Problems in Regulating the Transfer of Rights and Interests of Toll Highways in China and the Countermeasures for Them

Yan-xia LI
China Academy of Transportation Sciences, Beijing, China

Keywords: Government regulation, Toll highways, Transfer of rights and interests.

Abstract. At present, the laws, regulations and policies concerning the transfer of rights and interests of toll highways lag obviously behind the practice. It is urgent to enhance the government regulation of the transfer transactions. After the introduction of basic cases of the transfer of rights and interests of toll highways, the problems in the government regulation of such transfer are discovered in three aspects, including market access and exit, transfer procedures and transfer prices. For them, the appropriate strategies and measures are put forward.

Introduction
In recent years, with the continuous development of China’s economy, the investment structure and operational mode of toll highways have become diversified, and the transfer transactions of rights and interests of toll highways have emerged one after another. Although the State has promulgated many policies and regulations for such activities, the laws, regulations and policies lag obviously behind the current practice. At the local level, many problems in relation to such transfer have occurred and the transfer of rights and interests of toll highways is in disorder now. Therefore, it is urgent to conduct an in-depth studies on how to improve the regulations on the transfer of rights and interests of toll highways.

Current Situation of Regulating the Transfer of Rights and Interests of Toll Highways

Basic Cases of the Transfer of Rights and Interests of Toll Highways
According to the State’s current provisions and practices in relation to the transfer of toll highways, the transfer of rights and interests of toll highways are classified into three cases, in terms of the nature of transfer subjects and the transfer ratio. The first case is the transfer of rights and interests of toll highways for which tolls are collected for paying back loans borrowed by governments. It is the most frequent in China. In this case, there are only two bodies, that is, government department in charge of transportation and social investors and the transfer object is the rights and interests of a toll highway.

The second case is the transfer of for-profit highways. It is different from the first case. The transfer subject involves two different investors, one of which may be a State-owned enterprise or social investor, or both of which may be SOEs or social investors. The third case is the transfer of parts of rights and interests in toll highways, is a common mode for both first-time and second-time transfer of rights and interests of toll highways, characterized in that there are more than two transfer subjects - one or more transferors, or one or more transferees. By transfer, the rights and interests in toll highways can be either converged to one enterprise, or scattered from one enterprise to many. The object of transfer is the rights and interests of toll highway, represented by the partial equity of such toll highway.

Basic Content of Government Regulation on the Transfer of Rights and Interests of Toll Highways
After the years’ development, construction investment structure and operation mode of China’s highway present a diversified trend. Under a high degree of market orientation, it is an inevitable
trend for investors to conduct a capital operation by tapping the remnant assets. The transfer of rights and interests of toll highways in various manners occurs repeatedly, where the transferor transfers to the transferee for compensation, such rights and interests it has obtained legally, including the rights of collecting tolls, advertisement management and operation of service facilities. Based on the theory of government control and a current analysis over the transfer of rights and interests of toll highways, the government regulates the transfer of rights and interests of toll highways, mainly by market access control, market structure control, transfer price control and others.

Market access control can be divided into the following two aspects. The first is the access control of the transferor. The government must, through policies and laws, strictly define the scope of transferable rights and interests in toll highways, and the asset quality and corresponding debtor-creditor relationship of specific toll highway and only allow the transfer of those highway assets meeting the requirements. The second is the access control of the transferee. Highway construction involves a very high cost, and belongs to a capital-intensive, and poor management can easily lead to the loss of state-owned assets. Therefore, the government should, through policy and legal means, make provisions on the transferees in respect of financial strength, assets scale, business performance and social responsibility, so that only those investors meeting the minimum requirements have the right to enter the toll highway industry. At the same time, the government should allow investors to participate in the transfer of rights and enter the toll highway industry, through the bidding and other means.

Market structure control refers to the government’s adjustment of the structure of toll highway industry, by encouraging or restricting the behavior of the participating bodies in transfer market of rights and interests in toll highways, through policies, laws and regulations. The adjustment mainly cover limiting the horizontal mergers affecting the market structure, requiring segment operation for one highway, and posing a moderate control on highway enterprises having a too large market share. An oversized enterprise tends to form a strong market monopoly, and finally this may damage the interests of consumers.

According to the current provisions, the right of collecting tolls in the transfer of rights and benefits of toll highways should be valued in present earning value method. The application of present earning value method is actually a process of discounting the prospective earning of the highway assets being assessed. The present earning value method, when used for assessing highway assets, has the three indicators of earning period, earning amount of highway assets, and applicable discount rate. According to the current provisions, the period of transfer of rights and interests of toll highways shall be agreed upon by the transferor and the asset assessment agency within the approved charging period. The earnings of highway assets mainly include the income of vehicle road tolls and bridge toll, and other incomes provided in transfer contract, such as advertising revenue. The sum of these incomes constitutes the total income of highway assets. At the same time, the normal operation of highway assets requires corresponding costs, such as administrative cost and maintenance cost. In addition, highway operation enterprises, during their operation of highway assets, should also pay certain taxes to the State, which are also included in the operating costs of highways.

In addition, the other controls mainly cover investment and financing of toll highways, use of fee income, service quality, and withdrawal of social funds.

Current Situation of Government Regulation on the Transfer of Rights and Interests of Toll Highways

After the years’ development, China’s highway construction investment structure and operation mode present a diversified trend. Under a high degree of market orientation, it is an inevitable trend for investors to conduct a capital operation by tapping the remnant assets. The transfer of rights and interests of toll highways in various manners occurs repeatedly, where the transferor transfers to the transferee for compensation, such rights and interests it has obtained legally, including the rights of collecting tolls, advertisement management and operation of service facilities. Based on the theory of government control and a current analysis over the transfer of rights and interests of toll highways, the
government regulates the transfer of rights and interests of toll highways, mainly by market access control, market structure control, transfer price control and others.

In order to regulate the transfer of rights and interests of toll highways, the State has promulgated a series of laws, regulations and policies. In 1994, the Ministry of Communications issued the Circular on Issues Relating to the Transfer of Highway Management Rights, formally recognizing the behavior of transfer of the right to operate toll highways. In order to regulate the transfer of the right of collecting tolls in relation to toll highways, the Management Rules on Toll Highways of 2004 (State Council Decree No. 417), based on the “Highway Law”, made further provisions on strengthening the management over toll highways, regulating the market behavior as to toll highways and safeguarding the legal rights and benefits of operators and users of toll highways, but it didn’t make any operable provisions on the transfer of rights and interests of toll highways. The Measures on Transfer of Rights and Interests of Toll Roads (Decree No. 11 of Ministry of Transport, National Development and Reform Commission and Ministry of Finance in 2008) promulgated in 2008 explicitly stipulates that the State allows the transfer of rights and interests in toll highways according to law and strictly manages such transfer. The regulation sets the conditions for such transfer, and regulates the behavior of transferor and transferee, the transfer procedure and the management over the income from such transfer. It also makes strict provisions on the assessment of right of charge, the transaction price for such transfer, and the qualification of transferee, and provides that the transferee must be selected by public bidding. In 2010, the Ministry of Transport issued the Circular on Issues Relating to Equity Transfer in Highway Operation Enterprises, regulating the equity transfer of toll-highway operation enterprises and further restricting the transfer of rights and interests in toll highways. In 2017, the State amended the Highway Law once again, changing the administrative examination and approval system for the transfer of right of charge in relation to the highways subject to government repayment of loans, to the filing system, and cancelling the examination and approval over charging period after the transfer of right of charge in relation to the highways subject to government repayment of loans. The period of collecting tolls shall be agreed upon by transferee and transferee, and shall not exceed the term prescribed by the State Council.

Regulating Market Access and Exit

Existing Problems

Firstly, the conditions for market access are only nominal. According to the current provisions, investors for construction projects of for-profit highways must be of sufficient financial strength, and meet the definite requirements for registered capital and net assets. However, the amount of assets of the investor has not been clearly provided for the transfer of rights and interests of toll highways. Consequently, some enterprises poor in financial strength and risk resistance and management have become the operating bodies of toll highways via the transfer of rights and interests of toll highways, rendering nominal the fund barriers to toll highways. At the same time, as for the projects of transfer of rights and interests of toll highways, there are no provisions on the access of investors, as a consortium, to the roll-highway industry, and this impliedly lowers the investment threshold for toll highways. Fund barriers to the transfer of rights and interests of toll highways became a decoration, exposing the operation of toll highways to hidden danger.

Secondly, the adjustment of market structure is inadequate. Many toll highways subject to transfer of rights and interests, as quality assets, have an obvious advantage in location and traffic. Many local governments transfer the highways subject to loan repayment by charging, just for the purpose of obtaining the funds as soon as possible, but ignore the responsibilities for controlling the market structure of toll highways. They concede to investors in respects of project selection, transfer period, and charging standard, fueling to some extent the regional monopoly of investors on toll highways.

Thirdly, the exit mechanism is not perfect. The current provisions have not established an exist mechanism of funds of toll highway investors. In particular, there are no corresponding regulations on
the mode and method in which private capital withdraws from toll highways; a necessary government supervision system lacks in key joints of transfer of rights and interests of highways; no mechanism of market withdrawal is available for the transfer of charging rights and interests. As a consequence, the government loses the ability of control when, after the transfer of rights and interests, the operating enterprises seek nothing but profit and harm the public and social benefits.

Countermeasures
Firstly, in respect of consummation of market access system, it is required to strictly provide for and examine the qualification of investment bodies, establish a qualification access system for various types of capital to enter the field of highway investment, refine the various indicators for capital access, prevent enterprises with poor investment ability from entering the field of toll highways, and prevent enterprises with poor financial strength from doing any unjust financing and speculative act by means of the transfer of toll highways, and thereby affecting the healthy development of the undertaking of toll highways.

Secondly, it is required to entrust the operational management of toll highways for the toll highway sections in a proper geographical area, so as to centralize the operational management within the area and to allocate the resources rationally.

Thirdly, post-supervision shall be enhanced. It is required to impose definite requirements for subsequent operation and management level of the enterprise as a transferee of rights and interests of toll highways, and to establish an adjustment mechanism for reasonable income level of the transferee. For those bodies failing to meet the requirements for operation and management level, severe punitive measures shall be made and a corresponding exit mechanism be set up, to ensure the standardization of operational management and the conformity of service level.

Regulating Transfer Procedures of Rights and Interests of Toll Highways
Existing Problems
Transfer subjects are random. In the transfer practice in relation to the rights and interests of toll highways, they include transportation departments at provincial and municipal levels, highway operating companies, and even the governments at district and county levels. There are unauthorized transfers. After being qualified for investment on rights and interests of toll highways, some investors transfer such rights and interests to third parties through a certain way without approval, and make profits therefrom. The transfer in sections exists. In some places, some projects are intentionally divided into several sections in order to circumvent the examination and approval.

Countermeasures
Current provisions pose strict restrictions only on the transfer mode of highways subject to the repayment of loans by the government, but aren’t related with the modes of the transfer of for-profit highways and the transfer of partial rights and interests of toll highways. Therefore, it is necessary to improve the legislation to protect the legitimate rights and interests of all investors and to ensure the preservation and appreciation of state-owned highway assets in value. First of all, the rights and interests of toll highways must be transferred in accordance with legal procedures. The transferor shall select a qualified agency for asset assessment, determine the transferee by means of public bidding, and conclude a contract for the transfer of rights and interests of the toll highways. Secondly, illegal transfer of rights and interests in toll highways should be punished severely. Those who bear criminal responsibilities shall be handed over to judicial organs for investigation so as to maintain the normal market order and safeguard the interests of the general public.
Regulating Transfer Price of Rights and Interests of Toll Highways

Existing Problems

Firstly, the assessment price is unreasonable. Current legislations provide for a base price for any transfer of rights and interests of toll highways involving public capital investment, and “the base price for bidding shall not be less than the assessment price for the value of right of charge, as approved or confirmed by related department”. Whether such provisions are reasonable is open to discussion. The transfer price of rights and interests of a toll highway is affected not only by the factors specific to the toll highway, such as traffic volume, charging standard, tax policy and charging period, but also by the mutual game relationship between the transferor and the transferee, that is, between the seller and the buyer.

Secondly, the assessment method is improper. The important parameters of present earning method include traffic flow, charging rate, transfer term, level of discount rate and operating cost. Among them, charging rate is relatively stable, and transfer term is agreed upon by both parties in advance. However, traffic flow, level of discount rate, and operating cost have to be predicted for a future period. Such predictions are uncertain to some extent, which makes it difficult to assess the accurate value of the right of collecting tolls in highways.

Thirdly, transfer periods aren’t uniform. The relevant laws and regulations of the State make different stipulations over the charging period of the highways subject to the Government’s repayment of loans and the charging period of for-profit highways, nor define which one of said two different methods shall be used to determine the transfer period. All this renders uncertainty to the practice of transfer. Some toll highways rely on “denaturation” to extend the period of collecting tolls. This prolongs the period of recovery of rights and interests of toll highways, and postpones the time of availability of highways for free use by general public, and as a result, increases the burden on highway users.

Countermeasures

Firstly, strict measures shall be adopted to regulate the agencies for assessing the transfer price of toll highways. The agencies with the qualification for assessment shall be those accepted by the State-owned asset administration at provincial or higher level, and shall be equipped with a specified number of staff with professional knowledge and experience, so as to ensure the accuracy of the assessment and valuation.

Secondly, benchmark floating ratio is introduced to determine the transfer price of rights and interests of toll highways. The advantage of such introduction is to enhance the accuracy of assessment and to ensure the transfer going that it can improve the accuracy of the assessment and ensure a smooth transfer. Meanwhile, the relevant departments of the government can restrain the behavior of both parties in the transfer by reference to the benchmark floating rate and by policies, legal and administrative measures so as to keep the transfer price of rights and interests of toll highways within a reasonable range, thereby guaranteeing the integrity of highway assets and realizing the social benefits of highways.

References


