

Hong Kong Tax Alert

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Limited liability partnerships, not having “issued share capital” like that of a company with limited liability, are nonetheless entitled to intra-group stamp duty relief

The District Court recently overturned a determination made by the Collector of Stamp Revenue (the Collector) who, while accepting that limited liability partnerships (LLPs) were bodies corporate, refused to grant intra-group stamp duty relief under section 45 of the Stamp Duty Ordinance (SDO) ¹.

The refusal was made on the grounds that the LLPs concerned, not having “issued share capital”, could not therefore be 90% associated with the transferee within the terms of section 45 of the SDO.

Adopting a purposive interpretation approach, the Court rejected the narrow interpretation adopted by the Collector and held that the term “issued share capital” should be accorded its ordinary and natural meaning.

The Court held that so long as (i) the participating or share capital of an LLP was “issued”, i.e., “having been legally given to (those entitled to the share capital) in a legally completed transaction”; and (ii) the share capital can be divided into quantifiable portions under the laws under which the LLP was incorporated, such capital qualified as “issued share capital” for the purposes of section 45 of the SDO.

This alert discusses the decision and its implications.

1. John Wiley & Sons UK2 LLP and Wiley International LLC v Collector of Stamp Revenue DCSA 2/2021. The decision can be downloaded from: https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=145761&currpage=T

Background and issue in dispute

Currently, stamp duty is imposed on certain types of instruments in respect of the transfer of beneficial interests in Hong Kong immovable property and stock.

In an internal group restructuring, stamp duty relief for the above dutiable documents would however be granted under section 45 of the SDO, if the transferor and the transferee are bodies corporate that are not less than 90% associated by reference to direct or indirect beneficial ownership as defined.

Such association can be satisfied by way of either (i) the transferor and the transferee are not less than 90% associated by reference to the beneficial ownership of their issued share capital; or (ii) a third body corporate is the beneficial owner of not less than 90% of the issued share capital of both the transferor and the transferee.

Before section 45 of the SDO in its current form was consolidated and amended in 1981, the previous corresponding version of the intra-group stamp duty relief was contained in section 5A of the old Stamp Ordinance (Old Section 5A).

The Old Section 5A referred the transferor and the transferee as being “companies with limited liability” associated by reference to their “issued share capital”.

While the current provision of section 45 of the SDO has replaced the term “companies with limited liability” under the Old Section 5A with the broader term “body corporate” that can cover an LLP, the reference to the association of the transferor and transferee by virtue of their “issued share capital” under the Old Section 5A survived and remained in the current provision of section 45 of the SDO.

In essence, the issue in dispute is whether given the above legislative background, the term “issued share capital” under section 45 of the SDO, when applied to a body corporate that is not a company with limited liability, would still need to be “similar” to that of the latter under the Companies Ordinance of Hong Kong (HKCO).

The facts

Prior to an internal group restructuring, the entire share capital of John Wiley & Sons (HK) Limited, a company incorporated in Hong Kong (the HK Co) was owned by John Wiley & Sons UK2 LLP (A1-LLP), and A1-LLP was in turn 100% beneficially owned by its only member John Wiley & Sons UK LLP (the Intermediary LLP), and the Intermediary LLP was 100% beneficially owned by its only member Wiley International LLC (A2).

The Intermediary LLP and A1-LLP were both incorporated as LLPs in the UK under the Limited Liability Partnerships Act 2000 (LLP Act 2000). An LLP incorporated under the LLP Act 2000 is a body corporate with legal personality separate from its members and has unlimited capacity.

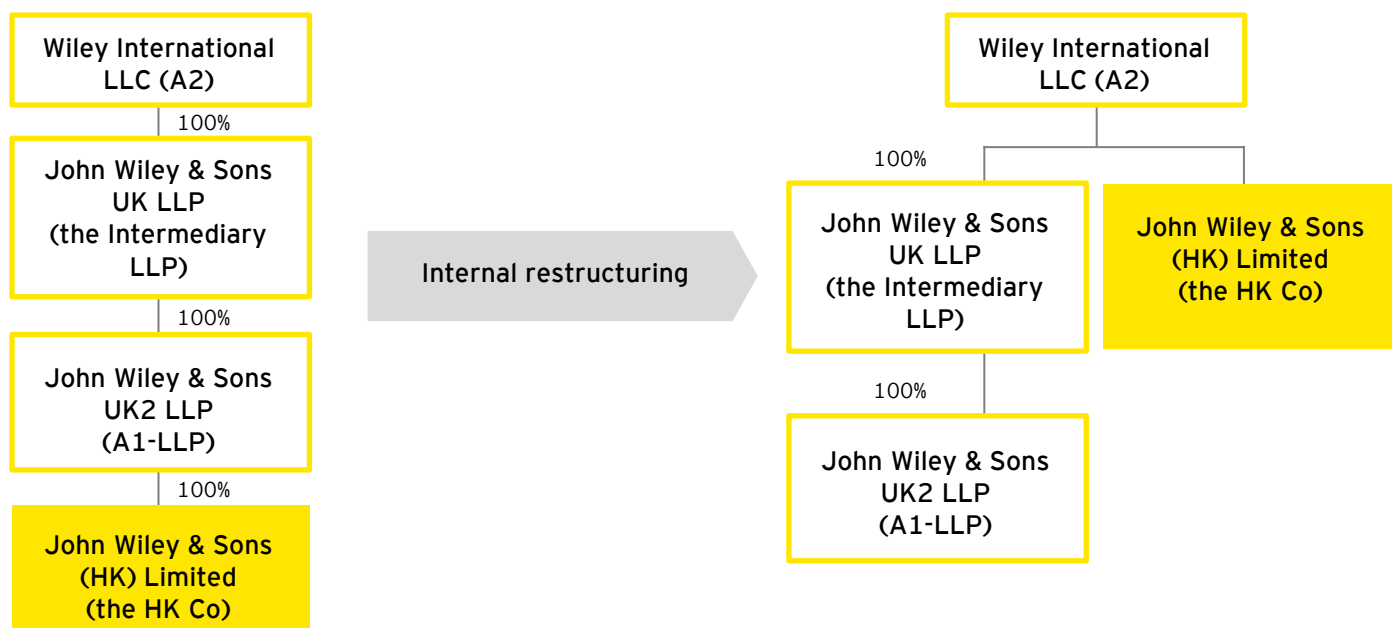
On 30 April 2019, contract notes and an instrument of transfer were executed to effect the transfer of the entire share capital of the HK Co from A1-LLP to A2 (the Share Transfer).

The structure of the group before and after the aforesaid internal group restructuring is illustrated in the following diagrams.

On 29 May 2019, the Appellants A1-LLP and A2 applied for stamp duty relief under section 45 of the SDO. The Appellants’ application for relief was however rejected on the ground that A1-LLP and the Intermediary LLP (collectively referred to as JWSLLPs) did not have “issued share capital”. Therefore, A2 and A1-LLP cannot be 90% associated by reference to the “issue shared capital” of the JWSLLPs under section 45 of the SDO.

Consequently, A2 and A1-LLP were each assessed an ad valorem stamp duty of HK\$3,180,602.

The Appellants then lodged an appeal against the assessment to the District Court.



Decision of the Court

The Collector accepted the facts that: (1) the JWSLLPs were at the material times bodies corporate within the meaning of section 45 of the SDO; and (2) at the time of the Share Transfer, (a) the Intermediary LLP beneficially owned 100% of the capital of A1-LLP, and (b) A2 beneficially owned 100% of the capital of the Intermediary LLP.

As such, the only point in dispute was whether the JWSLLPs have “issued share capital” for the purposes of section 45 of the SDO and hence, entitled to the intra-group stamp duty relief provided thereunder.

While it was common ground that the Court should construe section 45 of the SDO with the purposive approach of statutory interpretation, Counsel for the Collector argued that the Court cannot ignore the plain meaning of the term “issued share capital”, a term not defined in the SDO.

Counsel contended that where a transaction involved bodies corporate incorporated overseas, section 45 relief can only be granted if their “issued share capital” was issued with a “similar” set of mechanism and procedures that involved the entire process whereby unissued shares are applied for, allotted, and finally registered (the Entire Process) that is applicable to a company with limited liability under the HKCO.

Otherwise, Counsel contended that it would pose difficulties to the Collector, given that such capital is not registered, and it is not transparent to the public.

The judge outrightly dismissed such a contention, noting that in every case the duty payers have to prove their case to the Collector with factual evidence how they satisfy the conditions of section 45 of the SDO.

The judge then rejected Counsel’s Entire Process argument, noting that the purpose of section 45 of the SDO is to grant relief where the degree of the closeness of the association between the transferor and the transferee as stipulated in section 45 of the SDO is satisfied.

The judge took the view that the legislative amendment undertaken in 1981 clearly intended to extend the ambit of section 45 relief from associated companies with limited liability to other forms of bodies corporate including those incorporated overseas.

Such extension clearly militated against Counsel’s argument that the term “issued share capital” under section 45 of the SDO, when applied to a body corporate that is not a company with limited liability, would need to be subject to a “similar” set of mechanism and procedures akin to the Entire Process.

The judge further noted that there is not any principled, commercial, policy, or even discernable, reason or purpose why the Legislature would intend to selectively give relief only to those closely associated groups of bodies corporate the “share capital” of their relevant members have been “issued” with the Entire Process, and not to others, even though the closeness of association is shown.

Having regard to the legislative background and purpose, the judge considered that the term “issued share capital” in section 45 of the SDO should be construed according to its natural and ordinary meaning.

The judge then held that the word “issued” in the context of section 45 of the SDO as meaning “having been legally given to (those entitled to the share capital) in a legally completed transaction”.

As to the meaning of “share capital”, the judge held that it referred to the division of the shares of a fixed amount that is legally recognized according to the laws of the jurisdiction in which the body corporate was incorporated. As such, the “share capital” need not necessarily be required to be divided by way of a denomination into standard units called “shares” that are required to be registered or are evident by share certificates in the manner as contended for by Counsel.

It would amount to “share capital so long as the capital of that body corporate is divided into quantifiable portions... whether expressed in terms of monetary value or in term of proportions, and all such shares together make up 100% of the total value of the capital”.

Applying the said interpretation to the fact that the share capital of the JWSLLPs have evidently been issued under the LLP Act 2000 of the UK, the judge held that the JWSLLPs and A2 met the test of closeness in their association for the purposes of section 45 of the SDO and are therefore entitled to the intra-group stamp duty relief provided thereunder.

Commentary

This is the first time the Courts in Hong Kong have determined the issue of whether LLPs have “issued share capital” for the purposes of the stamp duty relief under section 45 of the SDO.

It is however not yet known whether the Collector would lodge an appeal against the decision to the Court of Appeal.

Clients who have LLPs or overseas LLCs in their holding structure that would need to rely on the stamp duty relief under section 45 of the SDO for their contemplated internal restructuring should watch this space and we will keep you updated.

Hong Kong office
Jasmine Lee
Managing Partner, Hong Kong & Macau
27/F One Taikoo Place, 979 King's Road, Quarry Bay, Hong Kong
Tel: +852 2846 9888 Fax: +852 2868 4432

Non-financial Services				Financial Services	
Wilson Cheng Tax Leader for Hong Kong and Macau +852 2846 9066 wilson.cheng@hk.ey.com				Paul Ho Tax Leader for Hong Kong +852 2849 9564 paul.ho@hk.ey.com	
Business Tax Services / Global Compliance and Reporting				Business Tax Services / Global Compliance and Reporting	
Hong Kong Tax Services				Hong Kong Tax Services	
Wilson Cheng +852 2846 9066 wilson.cheng@hk.ey.com		Tracy Ho +852 2846 9065 tracy.ho@hk.ey.com		Jennifer Kam +852 2846 9755 jennifer.kam@hk.ey.com	
May Leung +852 2629 3089 may.leung@hk.ey.com		Ada Ma +852 2849 9391 ada.ma@hk.ey.com		Ricky Tam +852 2629 3752 ricky.tam@hk.ey.com	
Grace Tang +852 2846 9889 grace.tang@hk.ey.com		Karina Wong +852 2849 9175 karina.wong@hk.ey.com		Leo Wong +852 2849 9165 leo.wong@hk.ey.com	
Joy Chen (Family Office) +852 2846 9688 joy.chen@hk.ey.com					
China Tax Services					
Ivan Chan +852 2629 3828 ivan.chan@hk.ey.com		Lorraine Cheung +852 2849 9356 lorraine.cheung@hk.ey.com		Sam Fan +852 2849 9278 sam.fan@hk.ey.com	
Becky Lai +852 2629 3188 becky.lai@hk.ey.com		Carol Liu +852 2629 3788 carol.liu@hk.ey.com			
Payroll Operate					
Vincent Hu +852 3752 4885 vincent-wh.hu@hk.ey.com					
International Tax and Transaction Services					
International Tax Services		Transfer Pricing Services			
Jo An Yee +852 2846 9710 jo-an.yee@hk.ey.com		Sangeeth Aiyappa +852 26293989 sangeeth.aiyappa@hk.ey.com		Martin Richter +852 2629 3938 martin.richter@hk.ey.com	
		Kenny Wei +852 2629 3941 kenny.wei@hk.ey.com			
Transaction Tax Services					
David Chan +852 2629 3228 david.chan@hk.ey.com		Jane Hui +852 2629 3836 jane.hui@hk.ey.com		Eric Lam +852 2846 9946 eric-yh.lam@hk.ey.com	
				Qiannan Lu +852 2675 2922 qiannan.lu@hk.ey.com	
People Advisory Services					
Robin Choi +852 2629 3813 robin.choi@hk.ey.com		Christina Li +852 2629 3664 christina.li@hk.ey.com		Jeff Tang +852 2515 4168 jeff.tk.tang@hk.ey.com	
				Winnie Walker +852 2629 3693 winnie.walker@hk.ey.com	
				Paul Wen +852 2629 3876 paul.wen@hk.ey.com	
Asia-Pacific Tax Centre					
Tax Technology and Transformation Services		International Tax and Transaction Services		Indirect tax	
Agnes Fok +852 2629 3709 agnes.fok@hk.ey.com		US Tax Desk		Shubhendu Misra +852 2232 6578 shubhendu.misra@hk.ey.com	
Robert Hardesty +852 2629 3291 robert.hardesty@hk.ey.com		Jeremy Litton +852 3471 2783 jeremy.litton@hk.ey.com		Peggy Lok +852 2629 3866 peggy.lok@hk.ey.com	
Albert Lee +852 2629 3318 albert.lee@hk.ey.com		Winona Zhao +852 2515 4148 winona.zhao1@hk.ey.com		Andy Winthrop +852 2629 3556 andy.p.winthrop@hk.ey.com	
		Operating Model Effectiveness		Tax and Finance Operate	
		Alice Chung +852 3758 5902 alice.chung@hk.ey.com		Edvard Rinck +852 2675 2834 edvard.rinck@hk.ey.com	
				Tracey Kuuskoski +852 2675 2842 tracey.kuuskoski@hk.ey.com	

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