

# Hong Kong Tax Controversy Insight

**Distribution of property under an estate in excess of the beneficiaries' entitlements does not necessarily attract stamp duty**

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*In a recent Court of Appeal ("the CoA") decision<sup>1</sup>, the deceased person died intestate leaving behind five surviving children who were entitled to the deceased's property including an immovable property, in equal shares under the law of intestacy. The five surviving children entered into a deed of family arrangement under which three of them agreed to renounce their rights and interests in the immovable property to the remaining two beneficiaries. The CoA held that the deed of assent effecting the aforesaid agreement is not chargeable with stamp duty.*

*The CoA decision represents a significant departure of the Stamp Office's long-established practice that deems an assent to be a conveyance operating as a voluntary disposition inter vivos if it has the effect of conferring on a beneficiary more than the beneficiary's entitlement under a will or the law of intestacy, and assesses stamp duty on the excess entitlement.*

*While the CoA decision was not further appealed, whether the distribution of property from the deceased's estate by way of an assent to the beneficiaries would attract stamp duty can be a complicated issue under certain circumstances. Clients who would like to understand the implications of the CoA decision or explore whether they could apply for a refund of stamp duty paid in prior years should seek professional tax advice where necessary.*

1. Wong Suet Shirly v Collector of Stamp Revenue CACV 66/2020

## Background facts

Madam Ming Sum Yee ("the Deceased") died intestate on 20 February 2012. The only persons entitled to the Deceased's estate are her five surviving children, including the Appellant.

The Deceased was the registered owner of a public housing unit acquired under the Tenants Purchase Scheme of the Hong Kong Housing Authority ("the Property"), which restricts, *inter alia*, alienation.

Relying on the advice given by a staff of the Housing Authority that only two children could become the succeeding owners of the Property (which subsequently turned out to be incorrect), the five surviving children entered into a Deed of Family Arrangement ("the DFA") under which it was agreed that the three surviving siblings ("the 3 Siblings") would renounce their rights and interests in the Property, leaving the Property to the appellant and another surviving sibling, Ms. Wong Suet Mui Alice ("Alice").

The Appellant, as the administratrix of the Deceased, executed a Deed of Assent ("Assent") in accordance with the DFA for the purpose of vesting and assigning the Property unto Alice and herself.

The DFA and the Assent were presented for adjudication to the Collector of the Stamp Revenue ("the Collector"). The Collector took the view that the DFA and the Assent operated as a voluntary disposition *inter vivos* within the meaning of section 27 of the Stamp Duty Ordinance ("the SDO") and were chargeable with stamp duty of HK\$16,650.

The Collector further determined that the higher Scale 1 ad valorem stamp duty rates was applicable as the Appellant was acting in her capacity as administratrix, as opposed to her personal capacity, in executing the Assent. The lower Scale 2 ad valorem rates chargeable on a conveyance of residential property between close relatives were not applicable.

The Appellant appealed against the notice of stamp duty assessment in respect of the DFA and the Assent to the District Court.

## Issues in dispute

The Collector subsequently revised his position and no longer contended that the DFA is chargeable with stamp duty. His view was that the DFA operated as a disclaimer by the 3 Siblings of their expectant interest in the Property, and not as a conveyance or transfer of an immovable property.

The issues in dispute was therefore:

- I. whether the Assent amounts to a conveyance of immovable property operating as a voluntary disposition *inter vivo* chargeable with stamp duty under section 27 of the SDO; and
- II. if so, whether the lower Scale 2 rates should apply.

## Relevant stamp duty provisions governing *inter vivo* transactions and prevailing Stamp Office practice

- Section 27(1) states that stamp duty is payable on any conveyance of immovable property operating as a voluntary disposition *inter vivos*;
- Section 27(4) provides that if the Collector is of the opinion that the consideration stated in a conveyance of property or a transfer of Hong Kong stock is inadequate, the conveyance or transfer shall be deemed to be a conveyance or transfer operating as a voluntary disposition *inter vivos*.

In general, a distribution of immovable property under an estate in accordance with that provided under a will or the law of intestacy (e.g., the Intestates' Estate Ordinance of Hong Kong) is a testamentary disposition not chargeable with stamp duty.

However, it has been the long-established practice of the Stamp Office to charge stamp duty on the relevant instrument that effects a distribution of the beneficiaries' interests in excess of their entitlements under the intestacy provisions on the basis that the instrument operated as a voluntary disposition *inter vivos* under the SDO.

## Decision of the District Court

The District Court ruled the above two issues in the Collector's favor.

First, the District Court was of the view that the Assent operated to convey the extra 60% interest in the Property (disclaimed by the 3 Siblings) to the Appellant and Alice in excess of their original entitlement of 40% in aggregate to which they were entitled under the intestacy provisions.

Second, the lower Scale 2 rates were not applicable as the Appellant executed the Assent in her capacity as the administratrix. The Appellant could not rely on her close relationship with the Deceased in her personal capacity and her close relationship with the 3 Siblings as they never had any beneficial interest in the Property.

Not satisfied with the District Court decision, the Appellant lodged an appeal to the CoA.

## Decision of the Court of Appeal

The CoA overturned the decision of the District Court and ruled in favor of the Appellant.

On the first issue, Counsel for the Collector argued that the Assent consisted of two dispositions: (i) a transfer from the administratrix to all the 5 surviving children in equal shares; and (ii) a transfer of the 60% interest of the Property from the 3 Siblings to the Appellant and Alice. As the second disposition deviates from the law of intestacy, it should be regarded as a disposition *inter vivos* and chargeable with stamp duty.

The CoA rejected the above arguments and held that it is well established law that beneficiaries of an estate had no beneficial interests in any asset of the estate until the execution of an assent by the executor or administrator. As such, there was nothing which the five surviving children could convey or transfer by way of the DFA.

Furthermore, the CoA considered that the Counsel's argument is incompatible with the general law as regards the effect of a disclaimer. As a matter of law, a beneficiary is free to refuse or renounce the gift to him, for the law cannot force a man to take an estate against his will. If an expectant beneficiary disclaims his interest, the administrator should simply leave him out of the consideration in the administration of the estate as if the person was non-existent or had never been named as a beneficiary. The administrator should then distribute the estate to the remaining beneficiaries in accordance with the relevant law on intestacy.

On these principles, the DFA, operating as a disclaimer, was to divest the 3 Siblings of their right to call upon the administratrix to distribute the Property in their favor. The whole interests in the Property had remained with the Deceased's estate throughout. When the Appellant acted as the administratrix to distribute the Property in accordance with the law of intestacy, she was acting in line with the above principles in leaving the 3 Siblings out of consideration, and correctly distributed the Property between herself and Alice as the only remaining beneficiaries under the intestacy provisions.



The CoA indicated that the present case was no different from where an expectant beneficiary has died before the estate is administered and distribution could be made to him. The administrator would simply leave him out of consideration and distribute the estate to the remaining beneficiaries.

For the above reasons, the CoA held that the Assent did not amount to a conveyance of immovable property operating as a voluntary disposition inter vivos chargeable with stamp duty.

Having decided the first issue in favor of the Appellant, the CoA would have no need to decide the second issue. Nonetheless, the CoA indicated that when a personal representative made a conveyance or transfer, it was the deceased, whom the personal representative represented, should be regarded as the transferor. It follows that if the Assent is chargeable with stamp duty, the lower Scale 2 stamp duty rates should apply as the Deceased and the transferees, as well as the transferees among themselves (being daughters of the Deceased and are sisters themselves), are closely related persons.

## Comments

The CoA decision represents a significant departure of the Stamp Office's long-established practice that deems the instrument(s) effecting a distribution of the beneficiaries' interests in excess of their entitlements under intestacy as a conveyance operated as a voluntary disposition inter vivos and chargeable with stamp duty.

While the CoA decision is not further appealed, whether the distribution of property from the deceased's estate by way of an assent to the beneficiaries would attract stamp duty can be a complicated issue under certain circumstances. Clients who would like to understand the implications of the CoA decision or explore whether they could apply for a refund of stamp duty paid in prior years should seek professional tax advice where necessary.



**Hong Kong office**

Agnes Chan, Managing Partner, Hong Kong &amp; Macau

27/F One Taikoo Place, 970 King's Road, Quarry Bay, Hong Kong

Tel: +852 2846 9888 / Fax: +852 2868 4432

Non-financial Services				Financial Services			
<b>Ernst &amp; Young Tax Services Limited</b> <b>David Chan</b> Tax Leader for Hong Kong and Macau +852 2629 3228 david.chan@hk.ey.com				<b>Ernst &amp; Young Tax Services Limited</b> <b>Paul Ho</b> Tax Leader for Hong Kong +852 2849 9564 paul.ho@hk.ey.com			
<b>Greater China Tax Controversy</b> <b>Co-Leader</b> <b>Hong Kong Tax Controversy Leader</b>				<b>Greater China Tax Controversy</b> <b>Co-Leader</b> <b>China Tax Controversy Leader</b>			
<b>Ernst &amp; Young Tax Services Limited</b> <b>Wilson Cheng</b> +852 2846 9066 wilson.cheng@hk.ey.com				<b>Ernst &amp; Young (China) Advisory Limited</b> <b>Carrie Tang</b> +86 21 2228 2116 carrie.tang@cn.ey.com			
<b>Business Tax Services / Global Compliance and Reporting</b>				<b>Business Tax Services / Global Compliance and Reporting</b>			
<b>Hong Kong Tax Services</b>							
<b>Wilson Cheng</b> +852 2846 9066 wilson.cheng@hk.ey.com		<b>Tracy Ho</b> +852 2846 9065 tracy.ho@hk.ey.com		<b>May Leung</b> +852 2629 3089 may.leung@hk.ey.com			
<b>Ada Ma</b> +852 2849 9391 ada.ma@hk.ey.com		<b>Grace Tang</b> +852 2846 9889 grace.tang@hk.ey.com		<b>Karina Wong</b> +852 2849 9175 karina.wong@hk.ey.com			
<b>China Tax Services</b>							
<b>Ivan Chan</b> +852 2629 3828 ivan.chan@hk.ey.com		<b>Lorraine Cheung</b> +852 2849 9356 lorraine.cheung@hk.ey.com		<b>Sam Fan</b> +852 2849 9278 sam.fan@hk.ey.com			
<b>Becky Lai</b> +852 2629 3188 becky.lai@hk.ey.com		<b>Carol Liu</b> +852 2629 3788 carol.liu@hk.ey.com					
<b>International Tax and Transaction Services</b>							
<b>International Tax Services</b>		<b>Transfer Pricing Services</b>					
<b>Jo An Yee</b> +852 2846 9710 jo-an.yee@hk.ey.com		<b>Sangeeth Aiyappa</b> +852 2629 3989 sangeeth.aiyappa@hk.ey.com		<b>Martin Richter</b> +852 2629 3938 martin.richter@hk.ey.com			
<b>Transaction Tax Services</b>		<b>Eric Lam</b> +852 2846 9946 eric-yh.lam@hk.ey.com		<b>Kenny Wei</b> +852 2629 3941 kenny.wei@hk.ey.com			
<b>People Advisory Services</b>							
<b>Ami Cheung</b> +852 2629 3286 ami-km.cheung@hk.ey.com		<b>Robin Choi</b> +852 2629 3813 robin.choi@hk.ey.com		<b>Jeff Tang</b> +852 2515 4168 jeff.tk.tang@hk.ey.com			
<b>Asia-Pacific Tax Centre</b>				<b>Paul Wen</b> +852 2629 3876 paul.wen@hk.ey.com			
<b>Tax Technology and Transformation Services</b>			<b>International Tax and Transaction Services</b>		<b>Indirect Tax</b>		
<b>Albert Lee</b> +852 2629 3318 albert.lee@hk.ey.com			<b>US Tax Desk</b>		<b>Tracey Kuuskoski</b> +852 2675 2842 tracey.kuuskoski@hk.ey.com		
<b>Robert Hardesty</b> +852 2629 3291 robert.hardesty@hk.ey.com			<b>Jeremy Litton</b> +852 3471 2783 jeremy.litton@hk.ey.com				
<b>Operating Model Effectiveness</b>			<b>Operating Model Effectiveness</b>				
<b>Edvard Rinck</b> +852 2675 2834 edvard.rinck@hk.ey.com							

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