

Tax

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Hong Kong Tax Analysis

Court accepted limited liability partnership for intra-group stamp duty relief

In a recent Hong Kong District Court case, it was held that a limited liability partnership (LLP) in the United Kingdom (UK) and a limited liability corporate (LLC) in the United States of America (US) were entitled to stamp duty relief for an intra-group transfer of Hong Kong stock under Section 45 of the Stamp Duty Ordinance (SDO). The judgment of the case *John Wiley & Sons UK2 LLP and Wiley International LLC v. The Collector of Stamp Revenue [2022 HKDC 716]* was released on 15 July 2022.

Pursuant to Section 45 of the SDO, stamp duty relief is available for the transfer of Hong Kong stock or immovable property from one associated body corporate to another. To fulfil the relief condition, the test of "associated" being "beneficial owner of not less than 90% of the issued share capital of the other"¹ has to be satisfied.

LLP in UK has the key features of a body corporate as it has legal personality separate from that of its members and has unlimited capacity. The only point in dispute was whether LLP, being the transferor of this case, has "issued share capital" for the purpose of Section 45.

In this article, we summarize the facts of the case and highlight the Court's reasoning for accepting LLP for stamp duty relief.

Background

John Wiley & Sons UK2 LLP (UK LLP) was incorporated as an LLP in UK and owned the entire share capital of a company incorporated in Hong Kong (HK company). UK LLP was 100% owned by another LLP in UK (Intermediary UK LLP). In turn, Intermediary UK LLP was 100% owned by Wiley International LLC (US LLC), which was incorporated as an LLC in US.

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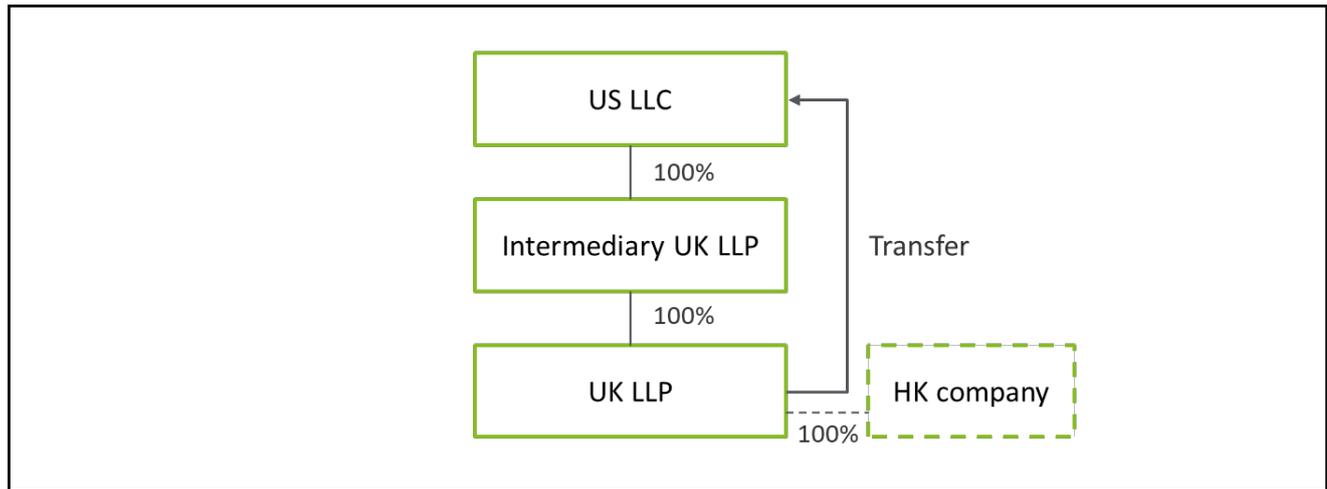
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¹ or a third body corporate is beneficial owner of not less than 90% of the issued share capital of each

As part of an internal group restructuring, the entire share capital of HK company were transferred by UK LLP to US LLC.



The dispute

UK LLP, the transferor, and US LLC, the transferee, applied for stamp duty relief in relation to the transfer of the shares in HK company. The Collector of Stamp Office rejected the application on the grounds that UK LLP and Intermediary UK LLP did not have "issued share capital" and therefore could not be "associated" bodies corporate for the purpose of Section 45(2) of the SDO. The duty payers then appealed to the Court.

Decision of the Court

The Court allowed the duty payers' appeal, concluding that LLP has "issued share capital" and hence the transferor and transferee are "associated bodies corporate" that are entitled to the stamp duty relief under Section 45 of the SDO. The Court's reasons for the judgment are as follows:

Legislative purpose of stamp duty intra-group relief

The term "issued share capital" is not defined in the SDO nor any precedent cases. Therefore, the judge took the purposive approach of statutory interpretation by considering the context and purpose of stamp duty relief under Section 45 of the SDO when interpreting the term "issued share capital". The judge found that the purpose of Section 45 is to grant relief to transfers between genuine associated bodies so that the transfer does not involve a significant change of ownership.

The judge also discussed the old and current legislation of the intra-group relief. The old provision was amended in 1981 and rewritten into the current provision to replace the concept of "companies with limited liability" with "bodies corporate". The judge considered that the term "body corporate" was a broader term and the intention of the amendment was to expand the scope of stamp duty relief to all associated groups, including entities incorporated overseas which might not be called or qualified as "companies with limited liability". It is therefore inconsistent to restrict the stamp duty relief to those groups with "issued share capital" which the Collector interpreted as having the same meaning in the Companies Ordinance.

Meaning of "issued share capital"

While the Collector adopted a literal interpretation of "issued share capital", the judge considered the natural and ordinary meaning of the term. The judge was of the view that a share capital means one that is divided into shares of a fixed amount. It would amount to "share capital" so long as the capital of a body corporate is divided into quantifiable portions.

In the present case, the partnership agreements of UK LLP and Intermediary UK LLP provided that members acquired a share in the LLP in accordance with the amount or value of his contribution to the LLP and would share

any profits or losses in the same proportions. Thus, the judge was of the view that UK LLP and Intermediary UK LLP have "issued share capital" within the meaning of Section 45 of the SDO.

Our observation

In the 2013 Annual Meeting between the Inland Revenue Department (IRD) and the HKICPA, the IRD expressed the view that an entity would generally be considered as a body corporate for the purposes of Section 45 of the SDO, if it had (1) perpetual succession (2) a legal personality distinct from that of its members; and (3) an issued share capital. If entities do not have issued share capital, they are unlikely to be associated for the purposes of Section 45 and the stamp duty relief would not be applicable.

The present case is the first case which ruled whether an LLP is a body corporate for the purpose of stamp duty intra-group relief under Section 45 of the SDO. We welcome the Court's decision which accepted LLPs as having "issued share capital" and hence being "associated" bodies corporate. This case also involves an LLC in the US, being the transferee, but it was neither in dispute nor discussed by the judge. Nevertheless, the conclusion drawn by the Court was that UK LLP and US LLC were associated bodies corporate for the purpose of stamp duty intra-group relief.

The impact of this case is far-reaching. It may have a significant impact to global restructuring projects involving Hong Kong companies, especially those with LLPs and LLCs as the transferors and/or intermediary holding entities, including a potential refund opportunity for group restructuring transactions involving LLPs and/or LLCs that were conducted in the last two years whereby Hong Kong stamp duty had been duly paid, if this case becomes final and conclusive.

As of the date of this publication, it is yet known if the Collector will appeal to a higher level of court. Professional advice should be obtained on whether stamp duty relief under Section 45 of the SDO can be supported by the decision drawn from this latest Court judgement.

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