

## Tax

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# Hong Kong Tax Analysis

## Court of Appeal denied intra-group stamp duty relief for limited liability partnerships

Hong Kong's Court of Appeal (CA) released its decision on *John Wiley & Sons UK2 LLP and Wiley International LLC v. The Collector of Stamp Revenue [2024 HKCA 578]* on 5 July 2024. The CA overturned the District Court's (DC) decision and denied the intra-group stamp duty relief under Section 45 of the Stamp Duty Ordinance (SDO) for the transfer of Hong Kong stock between a limited liability partnership (LLP) in the United Kingdom (UK) and a limited liability corporate (LLC) in the United States of America (US).

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"<sup>1</sup> (Association Requirement) 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. However, it does not issue and allot share capital. The CA ruled that the true construction of "issued share capital" in Section 45 bears the same meaning under the company law context. Given that UK LLP, the transferor, does not have issued share capital, US LLC, the transferee, cannot be a "beneficial owner of not less than 90% of the issued share capital" of UK LLP. Hence, the stamp duty relief under Section 45 is denied.

In this article, we analyze the different approaches adopted by the CA and DC in reaching their decisions and highlight the implications of those decisions.

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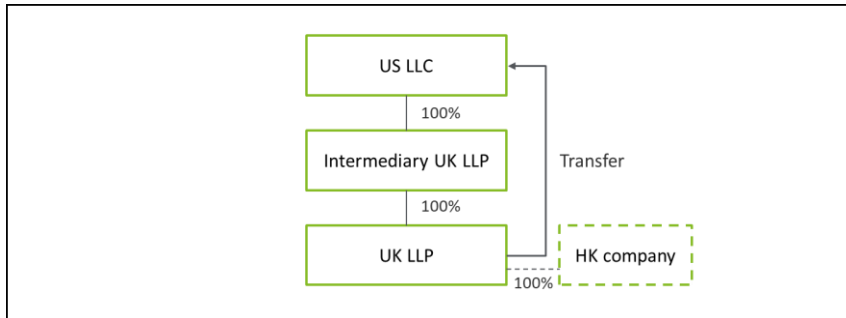
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<sup>1</sup> or a third body corporate is beneficial owner of not less than 90% of the issued share capital of each

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



## The dispute

The main dispute centres on the interpretation of the term “issued share capital” within the context of Section 45 of the SDO and hence whether the Association Requirement can be fulfilled.

## Decision of the DC<sup>2</sup>

The DC adopted a purposive approach in interpreting the term “issued share capital” within the context of Section 45 of the SDO. The DC considered that the purpose of Section 45 is to grant relief for transfers between genuine associated bodies so that the transfers do not involve a significant change of ownership. Based on this interpretation, the DC allowed the duty payers' appeal, concluding that LLPs have "issued share capital" within the meaning of Section 45 and hence the transferor and transferee were "associated bodies corporate" that were entitled to stamp duty relief. The Collector of Stamp Office appealed the decision to the CA.

## Decision of the CA

The CA overturned the DC's decision and ruled in favour of the Collector of Stamp Office, concluding that UK LLP does not have issued share capital and hence cannot fulfil the Association Requirement for stamp duty relief under Section 45 of the SDO.

In interpreting the term “issued share capital” within the context of Section 45 of the SDO, the CA examined the historical context and evolution of Section 45, as well as the judicial interpretations of “issued share capital” in various tax and company legislations, referencing significant tax cases. The CA considered that, in the absence of a distinct definition within the tax statute, the term “issued share capital” should bear the same meaning as in company law, i.e. the total monetary value of the consideration paid (or given) or agreed to be paid (or given) by the shareholders in return for shares of a company that have been issued. In this context, the CA considered that the legislative intention was to make stamp duty relief under Section 45 of the SDO available only to associated companies which satisfy the 90% issued share capital association requirement, but not to other kinds of corporate entity.

Consequently, the CA ruled that UK LLP and US LLC were not entitled to stamp duty relief under Section 45 of the SDO on the grounds that UK LLP has no share capital that has ever been issued to its members, and therefore, US LLC cannot be the beneficial owner of at least 90% of the issued share capital of UK LLP and the Association Requirement under Section 45 of the SDO is not satisfied.

<sup>2</sup> For a detailed discussion of the DC's judgment, please refer to our previous [Hong Kong Tax Analysis Issue H108/2022](#) published in 5 August 2022.

## Our observation

This case involves a dispute over the applicability of stamp duty relief, which is available on the transfer of Hong Kong stock or immovable property between associated bodies corporate. The DC and CA adopted different approaches in interpreting the term “issued share capital” for the Association Requirement within the context of Section 45 of the SDO. The DC adopted a purposive approach to statutory interpretation and allowed the stamp duty relief. In contrast, the CA interpreted “issued share capital” based on the company law context and denied the stamp duty relief. The impact of the decision is far-reaching. It may affect group restructuring exercises, especially those involving LLPs.

Despite the approach undertaken by the CA, the judge admitted that the following issues may need to be considered under circumstances where the share capital regime is different from the traditional company law model (e.g. the new no-par regime under the current Companies Ordinance in Hong Kong, other foreign share capital regime, etc.):

- how the percentage of ownership of the issued share capital of a company should be calculated under the no-par regime in Hong Kong;
- how the test of association should be applied to a foreign company which may have a share capital regime quite different from the traditional model.

However, the judge considered that these issues are not necessary to be determined by the court in this appeal.

Another observation is that the status of US LLC and UK LLP as bodies corporate was not contested in this appeal. The CA agreed that the expression of "body corporate", in the context of Section 45, is wider than "company" incorporated under the Companies Ordinance. The CA also acknowledged that LLP is a “body corporate” under the LLP Act in the UK. On the other hand, in the DC judgement, it was mentioned that the Stamp Office agreed LLP can be a parent of a group but cannot be a subsidiary of another body corporate as it does not have issued share capital. This may imply that there is no dispute that LLP is regarded as a body corporate in the context of Section 45.

As of the date of this publication, it is not yet known whether the duty payers will appeal to the Court of Final Appeal. Businesses planning for restructuring, especially those involving LLPs and LLCs, should monitor the development and seek professional advice in assessing whether the stamp duty relief is applicable in their cases.

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