

# Hong Kong (SAR) Tax Alert

July 2024 | Issue 9



## The Court of Appeal holds that stamp duty group relief only applies to associated companies with issued share capital

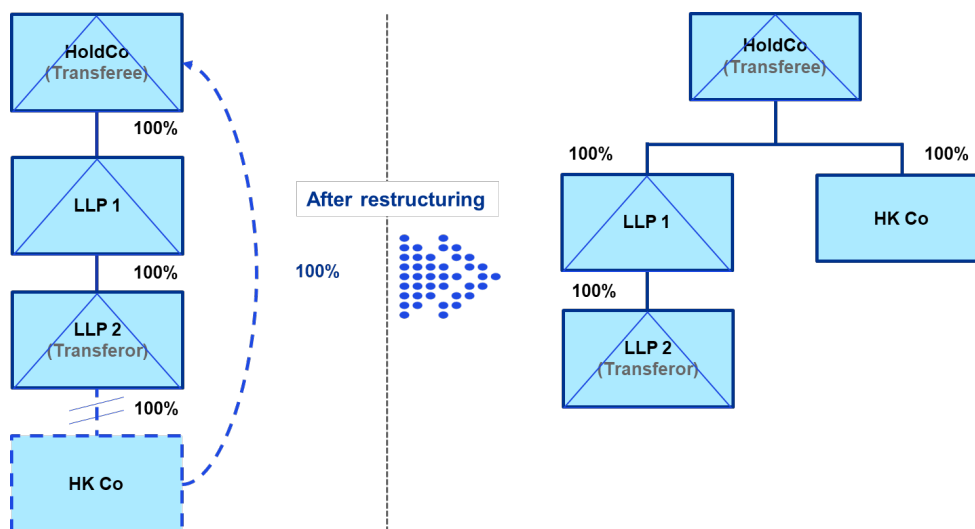
### Summary



The Court of Appeal (COA) recently overturned the lower court's judgment in the *John Wiley* case. The COA held that the stamp duty relief for intra-group transfer under section 45 of the Stamp Duty Ordinance (SDO) (s.45 relief) is only available to **associated companies** which satisfy the 90% association requirement via **issued share capital**. Given that the transferor (which is a UK limited liability partnership) involved in the intra-group share transfer in this case is not a company and does not have share capital, s.45 relief is not available to the transfer.

In this news alert, we summarise the COA's analysis and share our observations from the case.

The COA handed down its judgment in *John Wiley & Sons UK2 LLP and Another v The Collector of Stamp Revenue*<sup>1</sup> on 5 July 2024. The case concerned whether s.45 relief<sup>2</sup> is applicable to an intra-group transfer of a Hong Kong SAR (Hong Kong) company (HK Co) from a UK limited liability partnership (LLP 2 or Transferor) to a foreign limited liability company (HoldCo or Transferee) (see the diagram below).



<sup>1</sup> The COA judgment can be accessed via this link to the Judiciary website: [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=161104&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=161104&currpage=T)

<sup>2</sup> Section 45 of the SDO provides a stamp duty relief for transfer of Hong Kong stock or immovable property between **associated bodies corporate** if certain conditions are met. Under section 45, two bodies corporate are "associated" if one is the beneficial owner of at least 90% of the **issued share capital** of the other, or if a third party body corporate is the beneficial owner of at least 90% of the **issued share capital** of each of the two bodies corporate.

The duty payer won in its appeal to the District Court<sup>3</sup>. The Collector then lodged a further appeal to the COA. **The COA overturned the District Court's judgment** and held that **s.45 relief is not available** in the present case.

### The issue in dispute

The key question in this case is whether HoldCo's 100% indirect beneficial interest in LLP 2 can be regarded as beneficial ownership of at least 90% of LLP 2's "issued share capital" within the meaning of section 45 of the SDO. The key issue in dispute is how the term "issued share capital" should be interpreted.

In answering this question, the COA analysed the true construction of section 45 of the SDO from the following three perspectives:

1. The object or purpose of section 45;
2. The historical context of section 45; and
3. The language used by the legislature in section 45.

### The COA's judgment and analysis

Below is a summary of the COA's analysis and comments:

- There is no dispute about the object or purpose of section 45 or its predecessor, section 5A of the old Stamp Ordinance (Old Section 5A) – i.e. to grant a stamp duty relief for transfer of property between associated companies (per Old Section 5A) or associated bodies corporate (per section 45) which satisfy the 90% association requirement as set out in the section.
- In respect of the historical context of section 45, the COA found that:
  - Under Old Section 5A (which was derived from a piece of UK legislation), it is clear that stamp duty relief was available only to associated "companies with limited liability" and the degree of association was determined by "issued share capital" (i.e. the **90% Issued Share Capital Association Requirement**).
  - When section 45 of the SDO was enacted in 1981 to replace Old Section 5A, the term "company with limited liability" was replaced by the term "body corporate" (this change mirrored the amendment made to the referenced UK legislation). However, the 90% Issued Share Capital Association Requirement remains unchanged. Also, there were not any legislative materials suggesting that the term "issued share capital" should be interpreted differently under section 45.
  - It is clear from the above legislative history that the term "**body corporate**" in section 45 is **wider than the concept of "company" incorporated under the Companies Ordinance in Hong Kong**. The Collector also accepted that s.45 relief can be available to overseas bodies corporate, including foreign companies so far as the 90% Issued Share Capital Association Requirement is met.
  - To satisfy the 90% Issued Share Capital Association Requirement, the relevant body corporate **must have "issued share capital"** which could be owned.
- In respect of the language used by the legislature:
  - The term "issued share capital" is a well understood concept under company law. When used in a tax statute, it should, *prima facie*, be interpreted to bear the same meaning as it is employed in the company law context in the absence of any (i) specific or different definition for the term or (ii) suggestion that a different meaning is intended in the context and language of section 45<sup>4</sup>.
  - Accordingly, despite using the term "body corporate", it remains to be the legislative intention for s.45 relief to be available only to **associated companies** (and not other kinds of corporate entity) which satisfy the 90% association requirement **via issued share capital**.
  - The argument of the duty payer's counsel that for the purpose of section 45, "share capital" signifies a class of participation interest in a body corporate that is economically and juristically analogous (and not necessarily identical) to share capital in Hong Kong law, was rejected by the COA on the basis that it is not supported by the historical context and language used in section 45, or other legal authority available.
  - Based on the ordinary meaning of the term "share capital" and the current context of company law in Hong Kong (i.e. a no-par regime where the concept of nominal value of share capital has been abolished), the COA suggested that, as a starting point, the term "issued share capital" in section 45 may mean the total monetary value of the consideration paid / agreed to be paid by the shareholders in return for shares of a company as have been issued.

<sup>3</sup> For previous coverage of the case and the District Court judgment, please refer to our [Hong Kong Tax Alert - Issue 11, August 2022](#).

<sup>4</sup> The COA quoted case law established by various overseas tax cases that dealt with the meaning of "issued share capital" to support this finding.

Based on the above and as LLP 1 and LLP 2 are not “companies” and do not have share capital, it follows that HoldCo cannot be the beneficial owner of at least 90% of the issued share capital of LLP 2 through LLP 1. The COA therefore held that the 90% Issued Share Capital Association Requirement is not met within the meaning of section 45 and s.45 relief is not available to the intra-group share transfer.

### KPMG Observations

It remains to be seen whether the duty payer in this case will lodge a further appeal against the COA judgment. If there is no further appeal and the COA judgment becomes final, the application of s.45 relief in Hong Kong would be limited to **associated companies** with **issued share capital**.

As highlighted in our previous coverage of this case<sup>3</sup>, given the diversified forms of legal entities employed by business groups nowadays and that some of them do not have share capital, it would be more sensible from a policy perspective to amend section 45 of the SDO to (1) grant stamp duty relief to associated legal entities in any forms (and not just limited to bodies corporate, or companies as in the view of the COA) and (2) allow the 90% association relationship be established by other means (e.g. ownership interests other than shareholding) rather than just through issued share capital.

In the meantime, business groups contemplating an intra-group transfer of a Hong Kong company or immovable property between legal entities other than in the form of a company or legal entities without issued share capital (e.g. an LLP, LLC, or other forms of body corporate) should closely monitor the development of this case and consider what other options are available.

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