Court held UK LLP has issued share capital for the purpose of intragroup stamp duty relief

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In brief

The District Court (DC) handed down its judgment on *John Wiley & Sons UK2 LLP and another v. The Collector of Stamp Revenue*[1] on 15 July 2022. The case concerns whether the appellants (being the transferor and transferee) were entitled to stamp duty relief under section 45 of the Stamp Duty Ordinance (SDO) in respect of an intragroup transfer of shares in a Hong Kong company. The only point in dispute is whether the membership interest in a UK limited liability partnership (LLP) is 'issued share capital' for the purpose of section 45 of the SDO.

The DC allowed the appellant's appeal and held that the membership interest in a UK LLP is 'issued share capital' within the meaning of section 45 of the SDO, and the appellants were therefore 'associated bodies corporate' within the meaning thereof and entitled to the stamp duty relief. It remains to be seen whether the Collector of Stamp Revenue (the Collector) will appeal to the Court of Appeal.

In detail

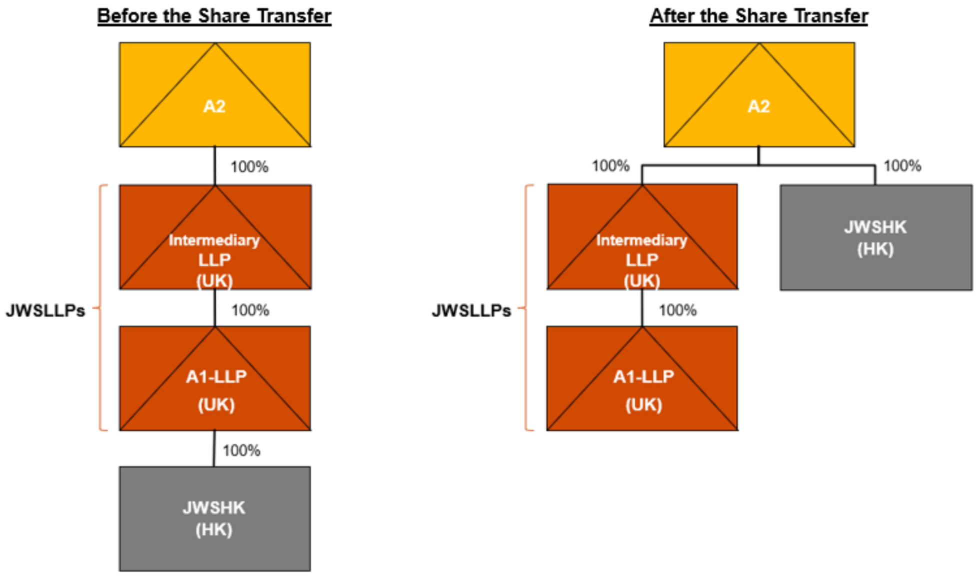
Background of the case

This is the joint appeal of John Wiley & Sons UK2 LLP (A1-LLP) and Wiley International LLC (A2) (collectively 'the Appellants') against their stamp duty assessments in respect of an intragroup transfer of shares in John Wiley & Sons (HK) Limited (JWSHK), a Hong Kong company. The background of the case is summarised below.

- The Appellants, JWSHK and John Wiley & Sons UK LLP (Intermediary LLP) are members of the John Wiley & Sons group.

- A1-LLP and Intermediary LLP (collectively 'the JWSLLPs') were incorporated as LLPs in the UK under the Limited Liability Partnerships Act 2000 (LLP Act).

- As part of an internal group restructuring, the entire share capital of JWSHK was transferred from A1-LLP to A2 (the Share Transfer). The organisation chart of the relevant entities before and after the Share Transfer are set out below.



- The Appellants applied for stamp duty relief under section 45 of the SDO[2] (s.45 relief) in respect of the Share Transfer. While the Collector accepted that the Appellants were bodies corporate, he rejected the Appellants' application on the grounds that the JSWLLPs did not have issued share capital, and therefore the Appellants (being the transferor and transferee) could not be associated for the purpose of s.45 relief. The Appellants appealed to the DC.

Key characteristics of the JWSLLPs

- A UK LLP is a body corporate with legal personality separate from that of its members and has unlimited capacity. The capital of an LLP is not required to be divided into a certain number of shares with certain nominal value. There is also no provision in the LLP Act regulating the class, allotment, issuance and registration of shares, the reporting of the increase in issued share capital as a result of allotment, and the issuance of share certificates.

- The basis on which the JWSLLPs were organised and the rights and obligations of their members were set out in their respective Limited Liability Partnership Agreements (LLPAs). In particular:

  (1) The initial members shall contribute the capital specified in the LLPAs, i.e. GBP100 for each of the JWSLLPs.

  (2) Where a member contributes capital to the LLP, that member acquires a share in the LLP in accordance with the value of that contribution.

  (3) The members shall share any profits or losses of a capital nature in the same proportions as their capital contribution to the LLP.

Judgment of the DC

Following the purposive approach of statutory interpretation[3] of the meaning of 'issued' and 'share capital' in this case, the DC allowed the Appellant's appeal and held that the JWSLLPs had issued share capital within the meaning of section 45 of the SDO, and hence the Appellants were 'associated bodies corporate' within the meaning thereof and entitled to s.45 relief. The key points of the DC's judgment are set out below.

- The term 'issued share capital' is not defined in the SDO. No previous Hong Kong or UK cases have discussed the point in issue.

- The court should construe section 45 of the SDO with the purposive approach of statutory interpretation.

- The legislative purpose of section 45 of the SDO is to grant stamp duty relief to intragroup transfers of Hong Kong shares or immovable properties where there is no significant change in the ultimate beneficial ownership.

- The amendment to the stamp duty legislation in 1981[4], by which the term 'body corporate' was adopted to replace 'company with limited liability', is intended to simplify the criterion for entitlement to s.45 relief and to encompass all associated bodies corporate, regardless of their forms and including those incorporated under foreign laws (which may not qualify as 'companies with limited liability' as adopted in the old legislation).

- The Collector argued that (1) the term 'issued share capital' under section 45 of the SDO has the same meaning as that in company law context, and (2) the issue of share capital encompasses the entire process whereby unissued shares are applied for, allotted and finally registered (the Entire Process). However, the DC was far from persuaded that the Collector's interpretation is the true and proper construction of the term. Instead, the DC accepted the argument of the Counsel for the Appellants that there was no discernible reason or purpose why the legislature would intend to selectively grant relief only to those associated bodies corporate of which the 'share capital' has been 'issued' with the Entire Process, and not to others even if they can demonstrate the required degree of association.

- Having regard to the context and purpose of section 45, the term 'issued share capital' should be interpreted as follows:

  (1) The word 'issued' should be interpreted as 'having been legally given to (those entitled to the share capital) in a legally completed transaction'.

  (2) It would amount to 'share capital' so long as:

    (a) the capital of that body corporate is divided into quantifiable portions (such as 1/3 share or a percentage share), whether expressed in terms of monetary value or proportions, and all such shares together make up 100% of the total value of the capital; and

    (b) such division of capital is legally recognised according to the laws of the jurisdiction in which the body corporate was incorporated.

- Based on the above, it is evident that the JWSLLPs have issued share capital within the meaning of section 45 of the SDO, and the Appellants were 'associated bodies corporate' whereby A1-LLP was ultimately wholly owned by A2. The Appellants were therefore entitled to s.45 relief.

The takeaway

This case has set a legal precedent in Hong Kong on the interpretation of 'issued share capital' in determining the association between two bodies corporate for claiming s.45 relief. Based on the DC's judgment, LLPs (or other forms of foreign bodies corporate) that do not have 'issued share capital' in the strictest sense may still be entitled to s.45 relief if their membership or member interest has similar features as 'issued share capital', subject to other conditions. This should provide some level of certainty on the stamp duty implications for groups that are contemplating an intragroup transfer of Hong Kong shares or immovable property involving LLPs or other forms of bodies corporate. However, it remains to be seen whether the Collector will appeal to the Court of Appeal.

Endnotes

1. The DC's judgment can be accessed via this link: https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=145761&currpage=T

2. Section 45 of the SDO provides that, among other things, any instrument effecting a transfer of Hong Kong stock between associated bodies corporate is not chargeable to stamp duty, subject to conditions. Two bodies corporate are 'associated' when one is the beneficial

owner of at least 90% of the issued share capital of the other, or when a third body corporate is the beneficial owner of at least 90% of the issued share capital of each.

3. Under the purposive approach of statutory interpretation, one should consider the context and purpose of the legislation. Words are interpreted based on their natural and ordinary meaning unless the context or purpose points to a different meaning.

4. Section 45 of the SDO was originally section 5A of the old Stamp Ordinance (Old Section 5A). In 1981, the old Stamp Ordinance was consolidated and amended by the SDO in which Old Section 5A was completely rewritten into the current section 45 of the SDO. In particular, the prerequisite that the relevant entities must be 'companies with limited liability' under Old Section 5A has been removed, and the term 'company with limited liability' has been replaced by 'body corporate'.

Let's talk

For a deeper discussion of how this impacts your business, please contact:

PwC's Corporate Tax Leaders based in Hong Kong

Charles Lee
+852 2289 8899
charles.lee@cn.pwc.com

Jeremy Ngai
+852 2289 5616
jeremy.cm.ngai@hk.pwc.com

Jeremy Choi
+852 2289 3608
jeremy.choi@hk.pwc.com

Rex Ho
+852 2289 3026
rex.ho@hk.pwc.com

Cecilia Lee
+852 2289 5690
cecilia.sk.lee@hk.pwc.com

Jenny Tsao
+852 2289 3617
jenny.np.tsao@hk.pwc.com

Kenneth Wong
+852 2289 3822
kenneth.wong@hk.pwc.com

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For more information, please contact:

Long Ma
+86 (10) 6533 3103
long.ma@cn.pwc.com

Gwenda Ho
+852 2289 3857
gwenda.kw.ho@hk.pwc.com

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