

Corporate Commercial Client Alert

Tax

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Stamp Duty Alert: District Court holds that Limited Liability Partnerships may be associated bodies corporate for s.45 intra-group relief

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John Wiley & Sons UK2 LLP & Anor v The Collector of Stamp Revenue [2022] HKDC 716

Limited liability partnerships (“LLPs”) and limited liability corporations (“LLCs”) are bodies corporate that have certain partnership-like characteristics. Whereas they have unlimited capacity and are legal persons separate from their members, unlike classic English or Hong Kong law partnerships, they do not have issued share capital, as such, but instead issue participation interests, which may variously be described as partnership capital or membership capital.

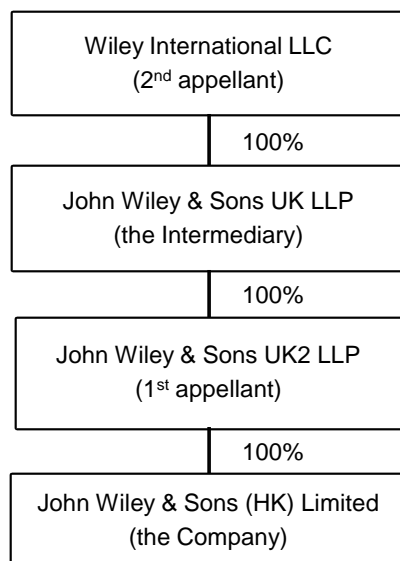
Section 45 of the Stamp Duty Ordinance (“SDO”) provides for relief from *ad valorem* stamp duty where the transferor and transferee of the property the transfer of which would otherwise be dutiable (such as Hong Kong immovable property or Hong Kong stock) are associated bodies corporate: that is, one beneficially owns, directly or indirectly, at least 90 per cent of the issued share capital of the other, or a third body corporate beneficially owns, directly or indirectly, at least 90 per cent of the issued share capital of each of the transferor and the transferee. The issue, therefore, is whether an LLP or an LLC can meet that association condition for s.45 relief to apply notwithstanding that those entities do not have issued share capital, as such.

Background

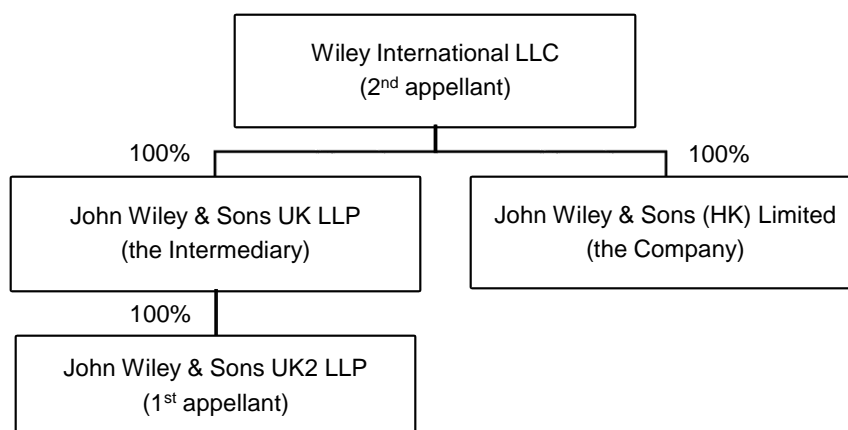
The duty payers were part of the Wiley group, a multinational undertaking for the publication of academic literature. The 1st appellant was an LLP incorporated in the United Kingdom and the 2nd appellant was an LLC incorporated in the State of Delaware of the United States of America.

As part of an arrangement for the internal restructuring of that corporate group, the 1st appellant transferred the entire issued share capital of a company incorporated in Hong Kong, John Wiley & Sons (HK) Limited (the “Company”), to the 2nd appellant. As shown in the diagram below, the end result of that transaction was that the Company ceased to be the 100 per cent subsidiary of the 1st appellant and became the 100 per cent subsidiary of the 2nd appellant. The 2nd appellant was the indirect 100 per cent parent of the 1st appellant through an intermediary LLP (the “Intermediary”).

Organisation chart before the transfer of the shares of the Company by the 1st appellant to the 2nd appellant



Organisation chart after the transfer of the shares of the Company by the 1st appellant to the 2nd appellant



But for s.45 relief, the transfer would have given rise to a charge to a substantial amount of stamp duty. The 1st appellant and the 2nd appellant therefore jointly applied for relief from stamp duty under s.45. The Collector of Stamp Revenue (the “**Collector**”) declined to grant relief. Whereas it was common ground that an LLP is a body corporate, the reason the Collector declined to grant relief was that neither the Intermediary nor the 1st appellant had issued share capital, so-called, and therefore in his view they could not be bodies corporate associated with the 2nd appellant within the meaning of s.45. The 1st and 2nd appellants appealed to the District Court (the “**Court**”).

Deacons acted for the appellant duty payers both as solicitors and as advocates before the Court.

The Court’s Decision

The Court allowed the appeal and a copy of its decision is available at [this link](#).

As a prior matter, the Court began by observing that it was well-established by case law at the House of Lords and Court of Final Appeal levels that the legislative purpose of s.45 relief was to exempt from stamp duty intra-group reconstructions where there was no change in the ultimate beneficial ownership of shares or immovable property, as the case may be, but merely a reconfiguration in the manner in which such property was held within the same group. Having ascertained the purpose at which s.45 relief was directed, the Court summarised the orthodox approach to the statutory interpretation: that is, the words of the statute must be interpreted in light of their object, purpose, and context; consequently, the Court

is not limited to a strictly literal interpretation of the same. In the opinion of the Court, the words “*issued share capital*” in the SDO were not a term of art: they did not refer in their narrow sense to the issued share capital of a company incorporated in Hong Kong. That interpretation would be too narrow, and would be inconsistent with the legislative history of s.45, from which it was apparent and, indeed, common ground with the Collector, that the Legislature had wished to expand the class of bodies corporate falling within the ambit of that section from companies with limited liability to, among others, bodies corporate incorporated in jurisdictions other than Hong Kong.

The Court reasoned that the natural corollary of that conclusion was that “*issued share capital*” was not used in a narrow, technical sense in s.45, but in reality designated a class of participation rights or interests in a body corporate that were materially analogous to issued share capital, as understood at Hong Kong law.

Both the 1st appellant and the Intermediary had partnership capital. Although this was not, strictly speaking, issued share capital, ownership of partnership capital entailed rights and obligations for the person to whom it was issued analogous to those of the holder of issued share capital, including a right to participate in the profits of the issuing entity in proportion with the capital contribution made. Further, partnership capital was an objective measure by which the Collector could ascertain whether the 1st appellant and the Intermediary had the requisite degree of association with the 2nd appellant (i.e., at least 90 per cent) for s.45 relief to apply. In the premises, the Court found that there was no principled reason to treat an LLP less favourably than another type of body corporate merely because it did not have issued share capital, so-called. To deny relief in the context of a corporate group structure comprising LLPs on that basis alone cured no mischief, and served no discernible policy purpose.

The impact of the Court’s decision is far-reaching, and it is as yet uncertain if the Collector will seek to appeal the decision to the Court of Appeal. The law as it currently stands is that LLPs and LLCs (and other bodies corporate issuing participation interests analogous to issued share capital, albeit not so designated) are bodies corporate capable in principle of being associated within the meaning of s.45 and their presence within a corporate group should not, itself, operate as a bar to relief. The impact of the decision of the Court may also be felt in other common law jurisdictions, such as the United Kingdom, where s.42 of the Finance Act 1930 (the provision on which s.45 of the SDO was based) remains in force, albeit its drafting has diverged somewhat from that in s.45.

How we can help

Planning and disputes involving stamp duty are fact-sensitive and may be highly complex. We have extensive experience advising clients in both non-contentious and contentious stamp duty matters, and representing them before the Court and the Court of Appeal in the event of a dispute.

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