

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO 23 OF 2023
(ON APPEAL FROM STAMP DUTY APPEAL NO 2 OF 2021)

In the matter of Section 14 of the
Stamp Duty Ordinance Cap 117

BETWEEN

JOHN WILEY & SONS UK2 LLP 1st Appellant
WILEY INTERNATIONAL LLC 2nd Appellant

and

THE COLLECTOR OF STAMP REVENUE Respondent

Before: Hon Kwan VP, Au and Chow JJA in Court
Date of Hearing: 26 April 2024
Date of Judgment: 5 July 2024

J U D G M E N T

Hon Chow JA (giving the Judgment of the Court):

INTRODUCTION

1. The issue which arises for determination in this appeal is whether Wiley International LLC (“**HoldCo**”), which holds, indirectly, the entire beneficial interest in John Wiley & Sons UK2 LLP (“**LLP 2**”), a limited liability partnership registered in the United Kingdom, should be regarded as the beneficial owner of not less than 90 per cent of the “issued share capital” of LLP 2 for the purpose of claiming stamp duty relief under Section 45(2) of the Stamp Duty Ordinance, Cap 117 (“**the Ordinance**”).

2. In what follows, unless the context indicates otherwise, references to “Section” shall be to the Ordinance.

RELEVANT STATUTORY PROVISIONS

3. To facilitate understanding of the issue in this case, we shall first set out the relevant provisions of the Ordinance.

4. Section 4(1) provides that, subject to the Ordinance, every instrument, wherever executed, specified in the First Schedule shall be chargeable with the stamp duty specified in respect thereof in that Schedule.

5. Head 2(1) in the First Schedule to the Ordinance relates to “CONTRACT NOTE for the sale or purchase of any Hong Kong stock ... on every note required to be made under section 19(1)”. The latter sub-section imposes an obligation on any person who effects any sale or purchase of Hong Kong stock as principal or agent to forthwith make and execute a contract note.

6. Section 45, so far as relevant, states as follows:

“Relief in case of conveyance from one associated body corporate to another

(1) Stamp duty under head ... 2(1) ... in the First Schedule shall not be chargeable on an instrument to which this section applies.

(2) Subject to subsections ... (6), this section applies to any instrument as respects which it is shown to the satisfaction of the Collector that the effect thereof is to convey a beneficial interest in immovable property, or to transfer a beneficial interest in Hong Kong stock, from one associated body corporate to another, and also applies to any instrument that is a contract note in respect of a sale or purchase of Hong Kong stock made between one associated body corporate and another, where in each case the bodies are associated, that is to say, one is beneficial owner of not less than 90 per cent of the issued share capital of the other, or a third such body is beneficial owner of not less than 90 per cent of the issued share capital of each.

...

(6) The ownership referred to in subsections (2) and (4) is ownership either directly or through another body corporate or other bodies corporate, or partly directly and partly through another body corporate or other bodies corporate, and the Third Schedule shall apply accordingly for the purposes of this section.”

7. §1 of the Third Schedule to the Ordinance provides as follows:

“Where, in the case of a number of bodies corporate, the first directly owns share capital of the second and the second directly owns share capital of the third, then, for the purposes of this Schedule, the first shall be deemed to own share capital of the third through the second, and, if the third directly owns share capital of a fourth, the first shall be deemed to own share capital of the fourth through the second and third, and the second shall be deemed to own share capital of the fourth through the third, and so on.”

BASIC FACTS

8. The background facts of this case are fully set out in the Collector of Stamp Revenue (“**the Collector**”)’s Case Stated dated 17 December 2021, and the written judgment of His Honour Judge KC Chan dated 15 July 2022 (“**the Judgment**”), and will not be repeated here. For the purpose of disposing of the present appeal, the following brief summary should suffice.

9. John Wiley & Sons (HK) Limited (“**HKCo**”) is a limited company incorporated in Hong Kong on 22 April 1977 under the former Companies Ordinance, Cap 32 (“**the Former CO**”).

10. LLP 2 and John Wiley & Sons UK LLP (“**LLP 1**”) are each a limited liability partnership registered in the UK under the Limited Liability Partnerships Act 2000 (“**the LLP Act**”). The basis on which LLP 2 and LLP 1 were organised, and the rights and obligations of their members (including capital contribution, division or sharing of profits and losses, admission and withdrawal of membership, members’ duties and restrictions, entitlements and obligations of outgoing members, and liquidation) were governed by their respective limited liability partnership agreements dated 10 January 2012 and 8 April 2011 (“**LLP 2 Agreement**” and “**LLP 1 Agreement**” respectively).

11. The contribution of capital and acquisition of a “share” in LLP 2 by a member is governed by Clause 9 of the LLP 2 Agreement, which states, so far as relevant, as follows:

“9. Capital

A			A
B	9.1	The Initial Members shall contribute the capital specified in Schedule 2 within 30 days of incorporation of the LLP2.	B
C	9.2	At incorporation of the LLP2, each of the Initial Members acquires a share in the LLP2 in accordance with the amount of value of his contribution to the LLP2 on incorporation.	C
D			D
E	...		E
F	9.4	Where, in accordance with instructions from the Designated Members, a Member contributes capital to the LLP2 at any time after incorporation of the LLP2, that Member acquires a share in the LLP2 in accordance with the amount or value of that contribution.	F
G			G
H	9.5	The Members shall share any profits (including any interest on capital contribution) or losses of a capital nature, as certified by the Auditors, in the same proportions in which they have contributed capital to the LLP2.”	H
I			I
J			J
K	Similar provisions concerning the contribution of capital and acquisition of a “share” in LLP 1 by a member appear in Clause 9 of the LLP 1 Agreement.		K
L			L
M	12.	HoldCo is a limited liability company formed under the Limited Liability Company Act of the State of Delaware of the United States of America.	M
N			N
O			O
P	13.	As at 30 April 2019, immediately prior to the share transfer described at §14 below:	P
Q			Q
R	(1)	The issued share capital of HKCo consisted of (i) 100 ordinary shares with a total paid up amount of HK\$500, and (ii) 6,480 ordinary shares with a total paid up amount of GBP 86,707,820.	R
S			S
T			T
U			U
V			V

(2) The entire issued share capital (6,580 ordinary shares) of HKCo was owned by LLP 2.

(3) LLP 2 was 100% beneficially owned by its only member, namely, LLP 1.

(4) LLP 1 was 100% beneficially owned by its only member, namely, HoldCo.

14. On 30 April 2019, LLP 2 (as transferor) transferred the entire issued share capital (6,580 ordinary shares) of HKCo to HoldCo (as transferee) for the consideration of GBP 313,240,835.09 (“**the Share Transfer**”) pursuant to (i) a “Bought Note” and a “Sold Note”, and (ii) an “Instrument of Transfer”, of the same date. Payment of the purchase price was effected by a Loan Note Instrument dated 30 April 2019 for the amount of GBP 313,240,835.09 issued by HoldCo in favour of LLP 2.

15. The Share Transfer was apparently made as part of an internal group restructuring of the global John Wiley & Sons group of companies/entities.

16. On 29 May 2019, LLP 2 and HoldCo (collectively, the “**the Duty-Payers**”) applied to the Collector for stamp duty relief in respect of the Share Transfer on the ground that it constituted an intra-group transfer of shares under Section 45.

17. Correspondences ensued between the parties on whether relief should be granted, the details of which it is not necessary to set out in this judgment. Eventually, on 9 December 2020, the Collector rejected the Duty-Payers’ application for stamp duty relief, and assessed the stamp duty chargeable on the Bought and Sold Notes each in the sum

of HK\$3,180,602. In a letter dated 9 December 2020 from the Collector to the Duty-Payers' former solicitors (Deacons), the Collector gave the following reasons for coming to the view that stamp duty relief should not be given for the Share Transfer:

"You considered that an interest in an LLP is *analogous* to share capital, and the *purposive* intent of section 45 of the SDO is to exempt from *ad valorem* stamp duty transfers between associated bodies corporate.

As explained in my letter dated 16 July 2020, the Stamp Office takes the same view with HMRC to accept a LLP incorporated under the Limited Liability Partnership[s] Act 2000 is a body corporate for the purposes of section 45 of the SDO. However, in the absence of share capital, a LLP could not satisfy the 'issued share capital' requirements under section 45(2) of the SDO.

While using the modern purposive approach to interpret a [statute], the Collector of Stamp Revenue must read the SDO adhering to its textual meaning. Section 45(2) imposes a hurdle of 90% test on 'issued share capital', we consider there is no ambiguity on this provision. The legislation has chosen a particular word 'share capital' instead of the general word 'ownership interest', we cannot interpret 'share capital' and 'membership interest' are construed as being part of the family or genus to which they are of same kind or nature. It is a plain and clear provision which invites no room for alternative interpretation.

Therefore, we maintain the view that the present transfer cannot be exempted from stamp duty by virtue of section 45 of the SDO."

18. Dissatisfied with the Collector's assessment, the Duty-Payers lodged an appeal to the District Court on 7 January 2021 pursuant to Section 14.

THE JUDGMENT

19. The Duty-Payers' appeal was heard by the Judge on 7 July 2022. At the hearing:

(1) The Duty-Payers argued that the Share Transfer was a genuine transfer between them which (together with LLP 1) were genuine associated bodies whose degree of closeness was more than what was required and the transaction was clearly one that was contemplated by Section 45.

(2) On the other hand, the Collector argued that the test of association required to be satisfied for obtaining relief under Section 45 was beneficial ownership of “not less than 90% of the issued share capital of the other”, and contended that the term “issued share capital” had the same meaning as used in the company law context, carrying with it and forming an integral part of its meaning the same attributes and requirements (as to allotment, registration, reporting and so on) as provided by various provisions of the Companies Ordinance. Hence, the ambit of Section 45 was restricted to those groups all of whose relevant members had to be incorporated with “the entire process whereby unissued shares were applied for, allotted and finally registered” (“**the Entire Process**”), the same as required by and known under the Hong Kong Companies Ordinance and common law in respect of a company limited by shares. Since LLP 2 and LLP 1 did not have “issued share capital”, they could not be owned, or owning the other, as to 90% of “issued share capital”, and therefore did not form part of a series of “associated bodies corporate” for the purpose of entitlement to relief under Section 45.

20. On 15 July 2022, the Judge handed down the Judgment allowing the Duty-Payers’ appeal. The essential reasoning of the Judge

for his decision that relief under Section 45 should be given in respect of the Share Transfer is as follows:

(1) The legislative purpose of Section 45 is “*to give relief from stamp duty on an instrument by which one company transfers property to its associated company: provided that the association is so close that the transfer is little more than a change in the nominal ownership, with the underlying control remaining the same: and a 90 per cent shareholding is made the test of closeness*” (quoting the judgment of Lord Denning in *Escoigne Properties Ltd v. IRC* [1958] AC 549, at 567). The reason for exemption is that “*when the whole transaction is between closely associated companies, what is in effect an exchange between them of property for shares or money is more a matter of internal administration than a sale in the ordinary sense*” (quoting the judgment of Lord Reid in *Shop and Store Developments Ltd v IRC* [1967] 1 AC 472, at 498G).

(2) The Judge noted that Section 45 was originally s 5A of the old Stamp Ordinance (“**Old Section 5A**”), which was introduced by s 3 of the Stamp (Amendment) Ordinance 1968. Under Old Section 5A, relief was given where the effect of the instrument was to “convey or transfer a beneficial interest in property from one associated company to another such company”, and the test of association required for granting relief was that both were “companies with limited liability and either one of them is the beneficial owner of not less than ninety per cent of the issued share capital of the other; or not less than ninety per cent of the issued share capital of each of them is in the beneficial ownership of a third company with limited liability”.

- (3) Thus, the term “issued share capital” in Old Section 5A would have to be construed in the context of a “company with limited liability”, and therefore in the company law context.
- (4) However, that context was removed in 1981 when the old Stamp Ordinance was consolidated and amended by the Ordinance in which Old Section 5A was completely rewritten into the current Section 45, which introduced the concept of “bodies corporate” to replace “companies with limited liabilities” while “issued share capital” remained the definition of association.
- (5) The term “body corporate” is a broader term than “company”.
- (6) In enacting Section 45, the legislature clearly intended to open up the ambit of the relief “(a) to encompass not only associated groups whose relevant members were incorporated ... as ‘companies with limited liability’ but to encompass all associated groups regardless of whether their relevant members were incorporated as companies with limited liability or incorporated in other forms of bodies corporate, (b) to encompass all bodies corporate regardless of whether they were limited liability entities or unlimited ones, and (c) by so doing, removing the doubt that entities incorporated overseas which might not be called or qualified as ‘companies with limited liability’ might also be entitled to relief.”
- (7) With the removal of the prerequisite of “companies with limited liability”, there is no language within Section 45 itself or other context that points to the Collector’s interpretation and displaces the starting point of construing

the term “issued share capital” according to its natural and ordinary meaning.

(8) An important context for the true construction of the term “issued share capital” in Section 45 is that nowadays, it is commonplace that a group of associated bodies corporate would consist of members that are bodies corporate incorporated overseas under foreign laws. The Collector accepts that Section 45 is intended to afford relief to transactions involving overseas bodies corporate if the requirements therein are met. Therefore, if the term “issued share capital” is construed according to the Collector’s interpretation, the entitlement of those overseas bodies corporate to the relief would, despite having met the required closeness of association, also depend on whether in their jurisdiction of incorporation there is the “Entire Process” for the particular form of body corporate. Much uncertainty and difficulty could result if the Collector’s interpretation is adopted.

(9) Bearing in mind the aforesaid general purpose of Section 45, there is no principled, commercial, policy, or even discernible, reason or purpose why the legislature would intend to selectively give relief only to those closely associated groups of bodies corporate the “share capital” of their relevant members having been “issued” with the Entire Process, and not to others, even though the closeness of association is shown.

(10) As for the natural and ordinary meaning of the words “issued share capital” –

(a) The word “issue”, by reference to the Shorter Oxford English Dictionary, means “having been legally given

to (those entitled to the share capital) in a legally completed transaction”.

(b) The term “share capital” means simply what Megarry J (as he then was) explained it in *Canada Safeway Ltd v Inland Revenue Commissioners* [1973] 1 Ch 374, at 380D: “a share capital is one that is divided into shares of a fixed amount”.

(11) Hence, to fulfil the purpose of Section 45 such that the degree of closeness of the association can be tested out by reference to a beneficial ownership of 90% of the issued share capital of the other –

“... the division must be one legally recognized according to the laws of the jurisdiction in which the body corporate was incorporated... it would amount to ‘share capital’ so long as the capital of that body corporate is divided into quantifiable portions (or shares in the ordinary use of that word, such as 1/3 share and 1/2 share or a percentage share), whether expressed in terms of monetary value or in term of proportions, and all such shares together make up 100% of the total value of the capital; and as said, such organization of its capital is legally recognized.”

(12) Adopting the above interpretation of the term “issued share capital” –

“it is evident that [LLP 2 and LLP 1] have issued share capital within the meaning of section 45, each in the nominal value of GBP 100, and they have been divided into 2 portions or shares – GBP 1 and GBP 99, which had been taken up and paid for by, therefore issued to within the meaning of section 45, the initial members. As said, those shares in the capital had changed hands in the meantime resulting in the ownership positions mentioned above at the time of the Share Transfer. It is also amply evident that [LLP 2 and LLP 1] together with [HoldCo] met the test of closeness in their association in that [LLP 2] was ultimately wholly owned by [HoldCo].”

- (13) Accordingly, the Duty Payers are “associated bodies corporate” within the meaning of Section 45, and the Collector was not correct in rejecting the Duty-Payers’ claim for relief under that section.

THE APPEAL

21. Dissatisfied with the Judgment, the Collector, with leave granted by Poon CJHC and Barma JA on 20 January 2023, lodged the present appeal on 1 February 2023. In the Notice of Appeal, the Collector raises the following four grounds of appeal:

- (1) When interpreting the phrase “issued share capital”, the Judge placed excessive emphasis on the ordinary and natural meaning of the words which he expressly said was “the starting point for statutory interpretation”. This is at variance with the modern approach to statutory interpretation.
- (2) In the interpretation exercise, the Judge did not consider and apply the correct context in which “issued share capital” appeared.
- (3) While the Judge purportedly set out the legislative purpose of the provision at §30 of the Judgment, he failed to bring the purpose back to the correct context upon which the legislature chose to use the words “issued share capital”. Consequently, the Judge wrongly accepted the Duty-Payers’ approach which focused exclusively on the supposed purpose, but which completely ignored and failed to give effect to the words used in their context.
- (4) In finding that there was nothing in the LLP Act or its subsidiary enactment regulating the capital or even share

capital of a limited liability partnership, including class, allotment, issuance and registration of shares, the Judge ought to have found that the partnership interest in a limited liability partnership, apparently being a loosely controlled and non-transparent (non-registrable) beneficial interest, was not commensurate with the qualities found in “issued share capital” as required in the context and purpose of Section 45.¹

THE PARTIES’ SUBMISSIONS

22. On behalf of the Collector, Mr Eugene Fung, SC (together with him, Ms Elizabeth Cheung) argues that:

(1) The legislative history shows that Section 45 has always been intended to provide exemption from duty on the transfer of certain assets between associated companies. That was the position under Old Section 5A, which provided relief from the payment of stamp duty on the transfer of property other than shares or marketable securities between associated companies. Although Section 45, which replaced Old Section 5A in 1981, changed “company with limited liability” to “body corporate”, it retained “issued share capital” as the test for association, and it remained the legislative intention for the exemption to be applied only to associated companies which satisfied the association requirements, but not to other kinds of corporate entity.

(2) In support of this contention, Mr Fung refers to and relies on

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¹ At §4.2 of the Notice of Appeal, the Collector also complains that the Judge was wrong to have taken into account the opinion evidence of Georgie Blyth. This complaint is no longer relied upon by the Collector in the present appeal.

- (a) The Explanatory Memorandum to the Stamp Duty Bill 1981 (§8), which referred to the new Section 45 as providing “relief in the case of conveyances or immovable property as between associated companies” and making “new provision in respect of companies which are indirectly connected”.
- (b) When moving the second reading of the Stamp Duty Bill 1981, the Financial Secretary said that “Clause 45(6) widens the scope of the relief afforded to transactions in immovable property between associated companies, to include transactions involving subsidiaries; that is to say, the relief will now extend to cases where the 90% test applied to one company’s beneficial ownership of the share capital of another, can be satisfied indirectly by tracing that ownership through other companies in accordance with the scheme which is set out in the Third Schedule”.
- (c) In 1991, when Section 45 was further amended to extend relief to transfers of shares between associated companies and introduce an anti-avoidance provision to provide for the consequences of the cessation of association within 2 years of the execution of the relevant instrument, the Financial Secretary, at the Second Reading of the Stamp Duty (Amendment) Bill 1991, said that to “guard against abuse of relief afforded to the corporate groups, companies must remain associated for two years after the date of the transfer of the property or shares.”

(3) The phrase “share capital” is not a term of art. According to the Oxford English Dictionary, it means “[t]hat part of the capital of a company received from its owners in return for shares; the authorized or nominal value of a company’s shares”. This ordinary meaning of “share capital” is identical to how the term has been used and understood in the companies legislation in Hong Kong.

(4) For the purpose of Section 45, the phrase “issued share capital” should be construed to mean “*the total of the authorized or nominal value of the shares that have been issued to the company’s shareholders*”, a meaning which has been consistently adopted by the courts in a tax context.

(5) There is no dispute that a limited liability partnership registered under the LLP Act does not have “share capital” or “issued share capital”. Further, the nature of a member’s share or interest in a limited liability partnership is fundamentally different to that of a share in a company with a share capital. In particular –

(a) There is no statutory definition of a member’s share or interest in a limited liability partnership.

(b) In the case of LLP 2, there is no requirement in the LLP 2 Agreement to determine the total number of “share(s)” upon incorporation, and there is no fixed or maximum number of “share(s)” that may be issued to its member(s). Different limited liability partnership agreements may have different terms governing members’ “share(s)” and their capital contribution.

(c) On the other hand, s 68(2) of, and s 8 of Schedule 2 to, the Companies Ordinance, Cap 622 (“**the New CO**”)

require the total number of shares to be issued on the formation of a company to be identified. This feature enables the percentage of ownership of issued share capital in a company to be ascertained with certainty at any one time.

(d) It follows that the number or value of the “share(s)” which a member holds in LLP 2 does not afford a ready measure of the extent of ownership of LLP 2 in the way that a percentage of the issued share capital in a company with a share capital does.

(e) A member’s share in a limited liability partnership ultimately depends more on what is agreed amongst the members in its governing limited liability partnership agreement.

(6) Given that LLP 2 does not have any issued share capital, HoldCo cannot be said to be a “beneficial owner of not less than 90 per cent of the issued share capital” of LLP 2 immediately before the transfer.

23. On the other hand, Mr Stefano Mariani (for the Duty-Payers) argues that:

(1) Section 45 is intended to relieve transfers within the same corporate group. Such transfers, being occasioned by or a function of corporate reconstruction, are internal to that group and do not involve a change in the ultimate beneficial ownership of the property forming the subject-matter of the disposition, and are not, in substance, true transfers on a sale and purchase or otherwise on which *ad valorem* stamp duty

should be charged, but mere reconfigurations in the manner in which an asset is held.

(2) The words “share capital” must be construed in the context and purpose and intent of Section 45: that is, to relieve intra-group transfers from *ad valorem* stamp duty. The criterion that the legislature selected to ascertain whether a transfer took place within the same group was the degree of association between the transferor and transferee.

(3) The notion of a “body corporate” is wider than that of “a company with limited liability”: every company is a body corporate, but not every body corporate is a company. There is a presumption of statutory construction against redundancy. It must therefore be assumed that the enlargement of the scope of Section 45 relief was intentional and met an identifiable policy purpose. The reason why the draftsman opted for the broader term “body corporate” was, one may infer, to enable relief to apply in cases where the transferor or transferee were incorporated abroad or were otherwise divergent from the parochial notion of a “company with limited liability” under Hong Kong law.

(4) As the association condition is applicable to corporations incorporated overseas, Section 45 must be construed as reflecting that legislative intent. A strictly parochial reading of the corporate terminology in which the association condition is framed should be rejected.

(5) For the purpose of Section 45, “share capital” signifies “a class of participation interest in the corpus and income of the corporation issuing it that is economically and juristically analogous to share capital at Hong Kong law, albeit not necessarily identical to it. It should in principle

be sufficient for the purposes of showing the closeness of association required by [Section 45 for claiming relief] for a corporation to have an aggregate ‘capital’ divisible into individual ‘shares’ (that is, units, howsoever called), each denoting an identifiable and proportional interest in the corpus of the issuing corporation”.

(6) The Judge rightly held that a membership interest in a limited liability partnership (such as HoldCo’s indirect interest in LLP 2) falls within the class of participation interests denoted by the words “share capital” in Section 45, construed purposively.

(7) The Collector has failed to provide any detailed or principled explanation of why the 1981 amendment of the Ordinance rewrote Old Section 5A to omit “companies with limited liability” from the association requirement and replaced it with “body corporate” (or if developments in the UK legislation were followed, why Parliament chose to enact that substitution in the Finance Act 1967).

(8) The Collector’s argument that a body corporate must have share capital, so-called, to qualify for the association requirement for relief must be rejected, as it would exclude companies in jurisdictions where English or Chinese are not official languages, as in such cases a participation interest in the foreign corporation could be called something else (eg *action* in French or *Geschäftsanteil* in German). If, however, the Collector accepts that “share capital” imports a class of participation interest, which whilst not necessarily bearing that name are, in substance rather in form, analogous to “share capital” under Hong Kong corporate law, he must accept that if a participation interest in a limited liability

partnership presents such comparable features, his appeal ought to be dismissed.

DISCUSSION

24. The outcome of the present appeal depends on the true construction of Section 45, in particular whether HoldCo's 100% indirect beneficial interest in LLP 2 should be regarded as beneficial ownership of not less than 90 per cent of the latter's "issued share capital" within the meaning of that section.

25. Before we consider the issue of the true construction of Section 45, it may be noted that if the association requirement of "issued share capital" is satisfied in the present case, it is not in dispute that, by virtue of Section 45(6) of, and §1 of the Third Schedule to, the Ordinance, HoldCo should be deemed to be the beneficial owner of not less than 90% of the issued share capital of LLP 2 for the purpose of Section 45(2) even though HoldCo's interest in LLP 2 is held *indirectly* through LLP 1.

(i) Principles for construction of tax statutes

26. The general principles for statutory interpretation are well-established, and have been stated at §§27 and 28 of the Judgment (by reference to the judgments of Li CJ in *HKSAR v Cheung Kwun Yin* (2009) 12 HKCFAR 568 and of Fok PJ in *T v Commissioner of Police* (2014) 17 HKCFAR 593). It is not necessary to set them out again here.

27. Mr Fung and Mr Mariani have referred the Court to two other principles relating to the interpretation of tax statutes:

(1) Mr Fung submits that there is no equity about a tax - what is or is not fair regarding tax is exclusively a matter for the legislature. This principle is well established. In *Feng Hongyan v Collector of Stamp Revenue* [2018] 2 HKLRD 1471, the following was stated by Anthony Chan J -

“[34] Mr Chang had also referred the court to *Cape Brandy Syndicate v IRC* [1921] 1 KB 64 at 71 where it was held that: ‘... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.’

[35] With respect, I agree that there is no room for the court to look behind the clear words of a statute and try to construe them in such a way to achieve what it perceives to be a fair or fairer result. That is a matter within the exclusive province of the legislature.”

(2) On the other hand, Mr Mariani submits that an exempting provision should be construed *generously* in a manner consistent with its true intent, meaning and spirit, citing in support the following statement of Lord Ellenborough CJ in *Warrington v Furbor* (1807) 8 East 242, at 245: “... *where the subject is to be charged with a duty, the cases in which it is to attach ought to be fairly marked out; and we should give a liberal construction to words of exception, confining the operation of the duty.*”

These two principles may have greater or lesser significance depending on the facts and circumstances of any given case. We do not, however, consider either to be decisive in the present case.

28. Mr Mariani also refers the Court to what has been called the *Ramsay* principle in support of the proposition that the construction of “clear words” in a taxing statute does not confine the courts to a literal interpretation, and regard should be had to the context, scheme and purpose of the relevant legislation as a whole. This proposition is not controversial, and does not require any resort to the *Ramsay* principle for its support. Mr Mariani further submits that the *Ramsay* principle is not limited to tax avoidance schemes and is equally applicable in ascertaining whether a transaction or arrangement is exempt from tax, citing *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2022] AC 690 (§§14 and 15) in support. It is important to note, however, that the *Ramsay* principle is not a substantive rule of law, or an over-arching principle of statutory construction, applicable specially to the interpretation of tax statutes; it merely requires the need to apply *orthodox* methods of purposive interpretation to the facts viewed realistically (*Collector of Stamp Revenue v Arrowtown Assets Ltd* [2004] 1 HKLRD 77, at §§28-29, 31, 25, 40, 105, 130-132). Thus understood, there can be no quarrel that the *Ramsay* principle is not limited in its application to tax avoidance schemes. This having been said, the question in the present case remains how the expression “issued share capital” in Section 45 ought properly to be construed. This question we now turn to.

(ii) Construction of Section 45

29. In order to arrive at the true construction of Section 45, it is necessary to have regard to, *inter alia*, the object/purpose and context of Section 45, as well as the language used by the legislature.

30. Object or purpose: There is no dispute about the statutory object or purpose of Section 45 or its predecessor (ie Old Section 5A).

31. In Clause 3 of the “Objects and Reasons” of the Stamp (Amendment) Bill 1968, which first introduced relief from stamp duty for intra-group transfer of immovable property in Hong Kong, it was stated that: “[t]he object of the proposed new section 5A is to make provision for the granting of relief from the payment of stamp duty on the transfer of property, other than shares or marketable securities, between associated companies which satisfy the requirements set out in subsection (4) of section 5A”.

32. In *Arrowtown* (§154), Lord Millett NPJ adopted Lord Denning’s exposition of the purpose of the corresponding UK provision (ie s 42 of the Finance Act 1930) in *Escoigne* quoted at §20(1) above, adding the following (at §155) –

“It is not its purpose to grant relief in respect of a transfer to a company which is 90% controlled by the transferor. Its purpose is more general: to grant relief to transfers between associated bodies. 90% is merely the test of association. If the test is not satisfied, there can be no relief. But it does not follow that, if the test is satisfied, there must be relief. That depends on whether the test is satisfied in circumstances contemplated by the section, that is to say where it can be said that the bodies are genuinely associated so that the transfer does not involve a significant change of ownership.”

33. Historical context: The historical context of Section 45, which has been much emphasised by counsel in the present case, requires some careful consideration.

34. Old Section 5A was derived from s 42 of the Finance Act 1930 (“**the 1930 Act**”) and s 50 of the Finance Act 1938 (“**the 1938 Act**”). It was added to the former Stamp Ordinance in 1968 by s 3 of the Stamp (Amendment) Ordinance 1968 (No 30 of 1968).

35. So far as relevant, Old Section 5A states as follows:

“(2) This section applies to any instrument as respects which it is shown to the satisfaction of the Collector that –

(a) the effect of the instrument is to convey or transfer a beneficial interest in property from one associated company to another such company ...

(4) For the purposes of this section a company shall be deemed to be associated with another company if, but not unless, both are companies with limited liability and either -

(a) one of them is the beneficial owner of not less than ninety per cent of the issued share capital of the other; or

(b) not less than ninety per cent of the issued share capital of each of them is in the beneficial ownership of a third company with limited liability.”

36. It can be seen immediately that under Old Section 5A, relief from stamp duty was available only to associated “companies with limited liability”, and the degree of association required for obtaining relief was that (a) one of them was the beneficial owner of not less than 90% of the issued shared capital of the other, or (b) not less than 90% of the issued share capital of each of them was in the beneficial ownership of a third “company with limited liability”.

37. Pausing here, it may be noted that in the 1938 Act, there was in existence a Fourth Schedule (“**Schedule 4**”) which contained “Provisions relating to subsidiary companies for the purpose of national defence contribution”. §1 of Part I (“**Part I**”) of Schedule 4, titled “Provisions for determining amount of capital held through other bodies corporate”, provided as follows –

“Where, in the case of a number of bodies corporate, the first directly owns ordinary share capital of the second and the second directly owns ordinary share capital of the third, then, for the purposes of this Schedule, the first shall be deemed to own ordinary share capital of the third through the second, and, if the third directly owns ordinary share capital of a fourth, the first shall be deemed to own ordinary share capital of the fourth through the second and third, and the second shall be deemed to own ordinary share capital of the fourth through the third, and so on.”

38. In s 42(3) of the 1938 Act, it was further provided that:

“In this section and Part I of the said Schedule references to ownership shall be construed as references to beneficial ownership, and the expression ‘ordinary share capital’, in relation to a body corporate, means all the issued share capital (by whatever name called) of the body corporate, other than capital the holders whereof have a right to dividend at a fixed rate or a rate fluctuating in accordance with the standard rate of income tax, but have no other right to share in the profits of the body corporate.” [emphasis added]

39. Two observations may be made at this juncture. First, the provisions of Schedule 4 were originally enacted for purposes connected with “national defence contribution” only, and had nothing to do with stamp duty relief. Second, the expressions “bodies corporate” and “ordinary share capital”/“issued share capital” already appeared in s 42 of the 1938 Act and Part I of Schedule 4 thereto. We shall return to the relevance of these matters later in this judgment.

40. In 1967, the provisions of Part I of Schedule 4 found its way into the stamp duty relief provisions through the Finance Act 1967 (“**the 1967 Act**”). By s 27(2) of the 1967 Act, s 42(2) of the 1930 Act (“**the Original Section 42**”) was replaced by the following (“**the Amended Section 42**”) –

“(2) This section applies to any instrument as respects which it is shown to the satisfaction of the Commissioners that the effect thereof is to convey or transfer a beneficial interest in property from one body corporate to another, and that the bodies corporate in question are associated, that is to say, one is beneficial owner of not less than ninety per cent. of the issued share capital of the other, or a third such body is beneficial owner of not less than ninety per cent. of the issued share capital of each.

(3) The ownership referred to in subsection (2) above is ownership either directly or through another body corporate or other bodies corporate, or partly directly and partly through another body corporate or other bodies corporate, and Part 1 of Schedule 4 to the Finance Act 1938 (determination of amount of capital held through other bodies corporate) shall apply for the purposes of this section with the substitution of references to issued share capital for references to ordinary share capital.”

41. Two points arising out of the 1967 amendments are of note. First, the 1967 amendments replaced the term “company with limited liability” in the Original Section 42 by the term “body corporate” in the Amended Section 42. Second, Part I of Schedule 4 was adopted for determining the amount of capital held through other bodies corporate for the purposes of the Amended Section 42 with the substitution of references to “issued share capital” for references to “ordinary share capital”.

42. The 1967 amendments in the UK were adopted in Hong Kong through the Stamp Duty Bill 1981, which consolidated and amended the old Stamp Ordinance and the (now repealed) Stamp Duties Management Ordinance (Cap 121). Section 45 was included within Part V of the 1981 Bill which, as stated at §8 of its Explanatory Memorandum, *“deals with exemption and relief and reproduces, with modifications, the existing law ... Clause 45 provides for relief in the case of conveyances of immovable property as between associated companies and makes new provision in respect of companies which are indirectly connected. (See also the Third Schedule)”*.

43. At §11 of the Explanatory Memorandum, it was further stated that *“[t]he Third Schedule (which applies in relation to the relief granted by clause 45 in respect of conveyances as between associated companies) is in line with the existing United Kingdom legislation”*. The Third Schedule to the Ordinance is materially the same as Part I of Schedule 4 to the 1938 Act.

44. As a result of the enactment of Section 45 in 1981, relief from stamp duty becomes available in Hong Kong for conveyances of immovable property between associated “bodies corporate”, and the degree of association required for obtaining relief is that one is beneficial owner of not less than 90% of the issued share capital of the other, or a third such body is beneficial owner of not less than 90% of the issued share capital of each (**“90% Issued Share Capital Association Requirement”**).

45. For the sake of completeness, we should mention that in 1991, Section 45 was further amended by the Stamp Duty (Amendment)

Ordinance 1991 to (i) extend relief to transfers of Hong Kong stock between associated bodies corporate, and (ii) introduce a new anti-avoidance provision to provide for the consequences of the cessation of association within 2 years of the execution of the relevant instrument.

46. The expressions “body corporate” and “issued share capital” in the Amended Section 42 were not specifically defined. Nevertheless, when Parliament decided to incorporate the provisions of Part I of Schedule 4 into the stamp duty relief provisions in the Amended Section 42, it may reasonably be thought that those expressions in the Amended Section 42 were intended to bear the same meanings as used in the 1938 Act.

47. In order to understand the meaning of the expressions “body corporate” and “issued share capital” as used in the 1938 Act, it is necessary to go further back to the Finance Act 1937 (“**the 1937 Act**”):

- (1) Part III of the 1937 Act provided for the levying of a tax called “national defence contribution”.
- (2) By s 19(1) and (2) of the 1937 Act, national defence contribution was charged on the profits from any trade or business carried on in the UK or carried on by persons ordinarily resident in the UK at specified rates, namely, 5% of the profits where the trade or business was carried on by a “body corporate”, and 4% of the profits in any other case.
- (3) Section 22 of the 1937 Act made provisions for the amalgamation of the profits or losses from the trade or business carried on by a subsidiary body corporate with the profits or losses from the trade or business carried on by the parent body corporate (referred to as “the principal

company”). Section 22(3) provided, *inter alia*, that for the purpose of that section –

“(a) a body corporate shall be deemed to be a subsidiary of another body corporate if and so long as not less than nine-tenths of its ordinary share capital is beneficially owned by that other body corporate;

(b) the expression ‘ordinary share capital’ had the same meaning as in the Fourth Schedule to the 1937 Act”.

(4) In the Fourth Schedule to the 1937 Act (not be to be confused with Schedule 4 to the 1938 Act), it was provided in Clause 13 thereof that –

(a) the expression “company” meant –

“a company within the meaning of the Companies Act 1929, or the Companies Act (Northern Ireland), 1932” (sub-paragraph (a));

(b) the expression “ordinary share capital” meant –

“all the issued share capital (by whatever name called) of the company, other than capital the holders whereof have a right to a dividend at a fixed rate or a rate fluctuating in accordance with the standard rate of income tax, but have no other right to share in the profits of the company” (sub-paragraph (d)). [emphasis added]

48. Reading the above provisions of the 1937 Act together, it would appear that the expression “body corporate” in the 1937 Act was intended to be a reference to “company” within the meaning of the Companies Act 1929, or the Companies Act (Northern Ireland) 1932.

49. However, the position was changed with the enactment of the 1938 Act. Section 42 of the 1938 Act, so far as relevant, stated as follows:

“(1) For the purposes of this section and section twenty-two of the Finance Act, 1937 (which provides for the amalgamation for the purposes of the national defence contribution of the profits or losses of bodies corporate with the profits or losses of their subsidiaries), a body corporate shall be deemed to be a subsidiary of another body corporate if and so long as not less than three quarters of its ordinary share capital is owned by that other body corporate, whether directly or through another body corporate or other bodies corporate, or partly directly and partly through another body corporate or other bodies corporate.

(2) The amount of ordinary share capital of one body corporate owned by a second body corporate through another body corporate or other bodies corporate, or partly directly and partly through another body corporate or other bodies corporate, shall be determined in accordance with the provisions of Part I of the Fourth Schedule to this Act.

(3) In this section and Part I of the said Schedule references to ownership shall be construed as references to beneficial ownership, and the expression ‘ordinary share capital’, in relation to a body corporate, means all the issued share capital (by whatever name called) of the body corporate, other than capital the holders whereof have a right to dividend at a fixed rate or a rate fluctuating in accordance with the standard rate of income tax, but have no other right to share in the profits of the body corporate.” [emphasis added]

Further, s 22(3)(a) and (b) of the 1937 Act was repealed by the 1938 Act (see s 55(7) of the 1938 Act and the Fifth Schedule thereto).

50. It can be seen that s 42 of the 1938 Act effected two major changes to the amalgamation provisions in s 22 of the 1937 Act. First, the ownership requirement for deeming a body corporate as a subsidiary

of another body corporate was lowered from nine-tenths to three quarters of the ordinary share capital of the subsidiary. Second, and more relevantly for the present purpose, the expression “ordinary share capital”, in relation to a body corporate, no longer meant “the issued share capital (by whatever name called) of the company other than [a specific type of share capital]”. Instead, it simply meant “all the issued share capital (by whatever name called) of the body corporate other than ...”. In other words, the concept of “body corporate” was no longer tied to “company” within the meaning of the Companies Act 1929, or the Companies Act (Northern Ireland) 1932.

51. As earlier noted, in 1967, Part I of Schedule 4 was incorporated into the stamp duty relief provisions in the Amended Section 42 with the substitution of references to “issued share capital” for references to “ordinary share capital”, and relief became available to associated “bodies corporate” instead of associated “companies with limited liability” provided that the stipulated association requirement was met.

52. It is clear from the above discussion of the historical context of the Amended Section 42/Section 45 that the expression “body corporate” in the Amended Section 42/Section 45 is wider than the concept of “company” incorporated under the relevant Companies Acts/Companies Ordinances in the UK/Hong Kong². Before the Judge, the Collector accepted that “body corporate” was a broader term than “company”, and was intended to afford relief to transactions involving

² As will be seen below, in *Canada Safeway* [1973] Ch 374, the relevant body corporate was a Canadian company.

overseas bodies corporate if the requirements in Section 45 were met³. In the present appeal, Mr Fung has also referred the Court to B Pinson QC, Revenue Law (7th Ed, 1973), p 599, where the learned author states that, for the purpose of stamp duty relief under the Amended Section 42, “it is apparently not necessary ... that the companies should be incorporated in England or Scotland”. In this regard, it may also be noted that the expression “body corporate” has consistently been defined in the UK Companies Acts and Hong Kong Companies Ordinances to include a foreign company.⁴

53. What is less clear, though, is whether, for the purpose of Section 45, “body corporate” can include other *types* of local or overseas body corporate (ie other than “companies”) such as an overseas limited liability partnership. The answer to that question depends on the meaning that should properly be given to the expression “issued share capital” in Section 45. This is because stamp duty relief is available to associated bodies corporates only if they can satisfy the 90% Issued Share Capital Association Requirement. In other words, the relevant body

³ See §§47 and 50 of the Judgment.

⁴ In s 455(3) of the Companies Act 1948, it is provided that “[r]eferences in this Act to a body corporate or to a corporation shall be construed as not including a corporation sole but as including a company incorporated outside Great Britain, and references therein to a body corporate shall be construed as not including a Scottish firm”. In s 2(3) of the former Companies Ordinance (Cap 32), it is similarly provided that “[r]eferences in this Ordinance to a body corporate or to a corporation shall be construed as not including a corporation sole but as including a company incorporated outside Hong Kong”. In s 2 of the new Companies Ordinance (Cap 622), the expression “body corporate” is defined to include a company [incorporated under the new or former Companies Ordinances] and a company incorporated outside Hong Kong, but excludes a corporate sole. In s 1173(1) of the Companies Act 2006, the expression “body corporate” is defined to include a body incorporated outside the United Kingdom, but does not include a corporation sole or a partnership that, whether or not a legal person, is not regarded as a body corporate under the law by which it is governed.

corporate must have “issued share capital” which could be owned. The expression “issued share capital” appear in various statutory provisions discussed above all concerning tax, without being given any special definition. As will be seen below, the expression “issued share capital” is a well understood concept under the companies legislation in the UK/Hong Kong and used frequently in tax statutes. Although the link between “body corporate” and “company” was removed by Section 42 of the 1938 Act, counsel’s research has not unearthed any relevant legislative materials which suggest that Parliament intended to use the expression “issued share capital” in any different sense when importing the provisions of Part I of Schedule 4 into the stamp duty relief provisions in the Amended Section 42 in 1967.

54. Statutory language: The Collector accepts that the expression “issued share capital” is not a term of art. He relies on the Oxford English Dictionary for the natural and ordinary meaning of the expression “share capital”, viz “[t]hat part of the capital of a company received from its owners in return for shares; the authorized or nominal value of a company’s shares”, and argues that, for the purpose of Section 45, “issued share capital” means the total of the authorised or nominal value of the shares that have been issued by the company to its shareholders.

55. In support of this argument, the Collector relies on the judgment of Megarry J (as he then was) in *Canada Safeway Ltd v IRC* [1973] Ch 374, at 380B-C, where it was held that “90 per cent. of the issued share capital” in the Amended Section 42 meant “90 per cent. of the nominal or face value of the issued share capital, rather than 90 per cent. of its market value”. In coming to that conclusion,

Megarry J drew attention to s 2(4) of the Companies Act 1948, which provided that -

“In the case of a company having a share capital – (a) the memorandum must also, unless the company is an unlimited company, state the amount of share capital with which the companies proposes to be registered and the division thereof into shares of a fixed amount ...”,

and said “*the concept is that of a ‘share capital’ which is ‘divided into shares of a fixed amount’*” (at 380C-D).

56. In that case, there was a transfer of some shares in an English company (Safeway Food Stores Ltd) by an American company (Safeway Stores Inc) to a Canadian company (Canada Safeway Ltd). The Canadian company had 2 classes of authorised share capital, namely, (i) 112,387 cumulative redeemable preference shares of CAD100 each, of which 62,387 had been issued, and (ii) 280,000 common shares of CAD 10 each, of which all had been issued. The American company owned the entirety of the 280,000 issued common shares of the Canadian company, but none of the issued preferred shares. On nominal values, the American company owned less than one-third of the issued share capital of the Canadian company, but the actual value of the shares owned by the American company was over CAD 195 million while the shares not owned by it were worth less than CAD 7 million. The Canadian company (taxpayer) argued that relief from stamp duty should be given in respect of the transfer of shares in the English company on the ground that the American company was the beneficial owner of not less than 90% of the issued share capital of the Canadian company for the purpose of the Amended Section 42. The claim for stamp duty relief was rejected by the Inland Revenue Commissioners.

57. In the ensuing appeal before Megarry J, it was common ground that “the whole question in dispute turns on whether the percentage to be taken is to be based on actual value or on nominal value: if the former, the exemption applies and the appeal succeeds; if the latter, the exemption does not apply and the appeal fails” (at 378E). Megarry J held that the latter provided the correct yardstick for determining whether the association requirement of beneficial ownership of not less than “90 per cent. of the issued share capital” for claiming stamp duty relief was met. His reasons for coming to this conclusion were as follows:

“... In the statutory phrase (which is identical in both the original and the revised versions of section 42 (2)) the percentage relates to the ‘issued share capital,’ and not the ‘issued shares.’

Now it seems to me that the *prima facie* meaning of the phrase ‘90 per cent, of the issued share capital’ is 90 per cent, of the nominal or face value of the issued share capital, rather than 90 per cent, of its market value. The Companies Act 1948, section 2 (4), provides that

‘In the case of a company having a share capital – (a) the memorandum must also, unless the company is an unlimited company, state the amount of share capital with which the companies proposes to be registered and the division thereof into shares of a fixed amount; ...’

The concept is that of a ‘share capital’ which is ‘divided into shares of a fixed amount.’... When the Finance Act 1930, section 42 (2), refers to ‘issued share capital,’ it uses language which, as might be expected, is entirely consonant with that of the Companies Act 1948. The 90 per cent, in section 42 (2) is a percentage of the ‘capital’ of the company, as qualified by the adjectival words ‘issued share.’ The word ‘capital’ seems to me to be a word which in this context is inept if it is intended to convey the idea of actual values.

...

In the present case, I can see no good reason for ousting die *prima facie* construction of the phrase in question, and good reason for adhering to it. The test of nominal value is simple,

workable and, above all, related to the words ‘share capital.’”
(at 380B-381C)

58. Mr Mariani submits the issue before Megarry J in *Canada Safeway* is different from that which requires determination in the present case. In that case, there was no dispute that the relevant body corporate (ie the Canadian company) was a company and had “share capital”/“issued share capital” in the sense as ordinarily understood under the companies legislation in the UK/Canada. Megarry J did not have to deal with the situation where the body corporate in question was not a “company” and had no “share capital”/“issued share capital” in the above sense. Therefore, says Mr Mariani, *Canada Safeway* is an authority only on an issue of *quantum* (ie the determination of the percentage of beneficial ownership held by one company in an associated company), and not of *substance* (ie the nature of the participation interest which may constitute “issued share capital”), for the purpose of the Amended Section 42.

59. We accept that *Canada Safeway* is not an authority which is directly on point for the purpose of the present appeal. Nevertheless, the significance of Megarry J’s judgment lies, in our view, not so much in the actual yardstick (namely, nominal or face value of the issued share capital) that was chosen for determining the percentage of ownership of the relevant body corporate for the purpose of meeting the association requirement in the Amended Section 42 (which would be dependent on the precise share capital regime established by the prevailing company legislation), but in the view taken that the expression “issued share capital”, although appearing in a legislation concerning stamp duty, ought to be understood by reference to its meaning under the Companies Act

1948 (even though the relevant body corporate in that case, ie, Canada Safeway Ltd, was a Canadian company and thus fell outside the definition of a “company”⁵, but within the definition of “body corporate”⁶, in the 1948 Act). In reaching his conclusion on the meaning of “issued share capital” in *Canada Safeway*, Megarry J drew attention to s 2(4) of the Companies Act 1948, and said that the concept was that of “share capital” which was “divided into shares of a fixed amount”. He also noted that when the Amended Section 42 referred to “issued share capital”, it used language which was entirely consonant with that of the Companies Act 1948.

60. Megarry J’s approach of applying the meaning of “issued share capital” under the prevailing companies legislation to interpret that expression as it appeared in a legislation concerning stamp duty has since been adopted in different tax contexts.

61. In *South Shore Mutual Insurance Co Ltd v Blair (Inspector of Taxes)* [1999] STC (SCD), the issue arose whether certain “founder members’ deposits” in the taxpayer (South Shore Mutual Insurance Co Ltd, a company limited by guarantee which did not have a share capital) held by the principal operating company (Pleasure Beach Ltd) of a group were “ordinary share capital” for the purpose of claiming group relief. Under Chapter IV (Group Relief) of Part X (Loss Relief and Group Relief)

⁵ In the Companies Act 1948, “company” is defined to mean “a company formed and registered under this Act or an existing company”, and “existing company” is defined to mean “a company formed and registered under the Joint Stock Companies Acts, the Companies Act, 1862, the Companies (Consolidation) Act, 1908, or the Companies Act, 1929, but does not include a company registered under the said Acts, the said Act of 1862 or the said Act of 1908 in Northern Ireland or Eire” (s 455(1)).

⁶ See footnote 4 above.

A of the Income and Corporation Taxes Act 1988 (“**the ICTA**”), relief for
B trading losses, and other amounts eligible for relief from corporation tax,
C may be surrendered by one company and claimed by another where the
D surrendering company and the claimant company are both members of
E the same group. By s 413(3)(a) of the ICTA, two companies shall be
F deemed to be members of a group of companies if one is the 75 per cent
G subsidiary of the other or both are 75 per cent subsidiaries of a third
H company, and s 838(1) provides that “*a body corporate shall be deemed
I to be ... a ‘75 per cent subsidiary’ of another body corporate if and so
J long as not less than 75% of its ordinary share capital is owned directly
K or indirectly by that other body corporate*”. Section 832(1) goes on to
L define (i) “ordinary share capital”, in relation to a “company”, to mean
M “*all the issued share capital (by whatever name called) of the company,
N other than ...*”, and (ii) “company” to mean “*any body corporate or
O unincorporated association but does not include a partnership, a local
P authority or a local authority association*”. Special Commissioner
Q Dr A N Brice considered *Canada Safeway* to be authority for the view
R that the phrase “issued share capital” should be construed by reference to
S its meaning in the Companies Acts (§51), and made the following
T pertinent observation at §56 of his judgment –
U
V

“... the phrase ‘issued share capital’, while perhaps not a term
of art in English law, does embody an idea which Parliament
has used in other statute law where the phrase is used to mean
that part of a company’s authorised share capital as has been
issued. Thus, following the principle in *R v Barnet London
BC, ex p Shah* [1983] 2 AC 309, that meaning should be
adopted unless it can be shown that the statutory framework, or
the legal context in which the words are used, require a
different meaning.”

62. The Special Commissioner went on to hold that the “founder members’ deposits” were not “issued share capital” of the taxpayer company within the meaning of s 832(1), for the following reasons:

“[59] ... The phrase [issued share capital] is open to two possible interpretations. The first, and narrower, interpretation is that the phrase means such authorised share capital of a company as has been issued, whether or not it is called ordinary share capital, so long as it gives a right to share in the profits. This interpretation flows from giving the ‘normal’ meaning to ‘issued share capital’ but ensuring that it is not limited to issued share capital with any particular name. So, for example, it could include issued preference share capital. The second, and wider, interpretation, is that ... the phrase includes anything that can be identified as being ‘issued’ and ‘share’ and ‘capital’. This interpretation follows from allowing the phrase ‘by whatever name called’ to govern the meaning of ‘issued share capital’.

[60] In light of the decisions in [*ex p Shah, Canada Safeway* ...], and in the light of the context of s 832(1) which provides interpretation for the whole of the Tax Acts, the conclusion is that the narrower interpretation is to be preferred; it does not lead to an unreasonable result and does not defeat the intention of Parliament.

...

[63] The answer to the first question raised by the arguments of the parties is that the principles of statutory construction lead to the conclusion that the phrase ‘issued share capital (by whatever name called)’ means such authorised share capital of a company as has been issued, whether or not it is called ordinary share capital. That means that as [the taxpayer company] does not have authorised share capital it does not have issued share capital and so does not have ‘issued share capital (by whatever name called)’.

63. *Taylor v Revenue and Customs Comrs* [2010] UKUT 417 (TCC) concerns income tax relief under the Enterprise Investment Scheme. In order to claim relief, an individual must not be “connected” with the company in which he makes the investment. Under

s 291B(1)(b) of the ICTA, an individual is considered to be connected with the issuing company if he directly or indirectly possesses or is entitled to acquire more than 30 per cent of “the loan capital and issued share capital of the company or any subsidiary”. One of the issues which arose for consideration in that case was the meaning that should be given to the expression “issued share capital” in that subsection. Roth J, sitting at the Upper Tribunal (Tax and Chancery Chamber), adopted the analysis of Megarry J in *Canada Safeway* in relation to the meaning of “issued share capital”, which he said was arrived at by Megarry J after a close attention to statutory language. He further expressed the view that the phrase “issued share capital”, which was used frequently in the ICTA, should receive the same interpretation throughout the ICTA, in the absence of some distinct or special definition for the purpose of any particular part of that Act. Roth J stated relevantly as follows:

[14] The meaning of ‘issued share capital’ received a clear and careful analysis by Megarry J in *Canada Safeway Ltd v IRC* [1973] 1 Ch 374 ...

[16] For the Respondents it was submitted that the *Canada Safeway* case was distinguishable since the alternative there considered was the market value, which was obviously prone to fluctuation, not the subscribed value that was fixed and readily ascertainable. That is so, but the reasoning of Megarry J was largely based on close attention to the statutory language. He recognised that there would be some marginal cases where this would produce a result that seemed at odds with the statutory purpose but on the whole the adoption of this meaning gave ‘substantial effect’ to the general purpose of the provision.

[17] Although the *Canada Safeway* case was therefore not addressing directly the issue of subscribed value, its reasoning appears to me to apply equally in the present case. Moreover, the expression ‘issued share capital’ is used frequently throughout the ICTA. As the Respondents were constrained to recognise, it would be a striking result if the same form of words were to

receive a very different interpretation within the same statute. In my judgment, if that result was intended, the draftsman would have made express provision for this by including a distinct definition of issued share capital specifically for the purpose of this part of the legislation in section 312. In the absence of such special definition, I consider that the phrase must receive the same meaning throughout the ICTA. That meaning has been well-established since the *Canada Safeway* judgment that has been applied for almost 40 years. Accordingly, I consider that it is clear that issued share capital in paragraph (b) refers to the nominal value of the shares. Once that is determined as the correct interpretation, the potential practical difficulty of aggregating the two elements in paragraph (b) falls away: the actual calculation is straightforward.”

64. In *Hunt v Revenue and Customs Commissioners* [2019] SFTD 784, the context was eligibility for Entrepreneur’s Relief from capital gains tax under the Taxation of Chargeable Gains Act 1992 (“**the TCGA**”), and the issue was whether the taxpayer held at least 5% of a company’s “ordinary share capital” within the meaning of s 169S(3)(a) of the TCGA. By s 169S(5) of the TCGA, read together with s 989 of the Income Tax Act 2007, “ordinary share capital”, in relation to a company, means “*all the company’s issued share capital (however described), other than ...*”, while s 288 of the TCGA defines “company” to include “*any body corporate or unincorporated association but does not include a partnership ...*”. Judge Redston, sitting at the First Tier Tribunal (Tax), adopted the analysis of Megarry J in *Canada Safeway*, and agreed with Roth J in *Taylor* that “*it would be startling if the term [issued share capital] had different meanings in different parts of the same Act. The meaning established by Megarry J in Canada Safeway is, as he said, ‘simple, workable and, above all, related to the words ‘share capital’, and so can easily be applied to the many other situations in which the term appears, unlike the multi-factorial alternative suggested by [the*

taxpayer's counsel]" (§42). Judge Redston added that the draftsman of the prescriptive Entrepreneur's Relief provisions "[could] reasonably be assumed to have used a term which he understood had a clear meaning" (§47).

65. Current context – the New CO: The adoption of Megarry J's approach to the interpretation of the expression "issued share capital" in Section 45 by reference to its meaning in the company law context does not mean that one must necessarily also adopt the yardstick actually chosen by the learned judge (namely, the nominal or face value of the issued share capital) to determine whether the 90% Issued Share Capital Association Requirement is met. Indeed, this exercise can no longer be done after the enactment of the new CO, because the concept of nominal (or par) value of shares in a company has been abolished in Hong Kong by s 135 of the New CO. This new regime of no-par for all companies applies to shares issued before the commencement date of that section⁷ as well as shares issued on or after that date. Further, under s 98(4) of the New CO, after the commencement date of Division 2 of that Ordinance⁸, any condition in an existing company's memorandum of association⁹ relating to (a) the amount of share capital with which the existing company proposes to be registered or is registered; or (b) the division of the share capital of the company into shares of a fixed amount, is to be regarded as deleted and not to be regarded as a provision of the company's articles. Thus, if the relevant body corporate is a company incorporated in Hong Kong, it is no longer possible to directly adopt the

⁷ Section 135 of Cap 622 came into force on 3 March 2014.

⁸ Division 2 of Cap 622 came into force on 3 March 2014.

⁹ As from the commencement date of Division 2 of Cap 622, a condition that was contained in the memorandum of association of an existing company and was in force is, for all purposes, to be regarded as a provision of the company's articles.

test proffered by Megarry J to determine whether the 90% Issued Share Capital Association Requirement is satisfied.

66. Nevertheless, under the New CO:

(1) For the purpose of incorporation of a new company, an incorporation form is required to be delivered to the Registrar stating, *inter alia*, (a) the total number of shares that the company proposes to issue on the company's formation; and (b) the amount to be paid up or to be regarded as paid up, and the amount to remain unpaid or to be regarded as remaining unpaid, on the total number of shares that the company proposes to issue on that formation.¹⁰

(2) Further, whenever there is a change to its capital, eg where there is an allotment of shares or an alteration of share capital, a company is required to deliver a statement of capital to the Registrar for registration stating (a) the total number of issued shares in the company; (b) the amount paid up or regarded as paid up and the amount (if any) remaining unpaid or regarded as remaining unpaid on the total number of issued shares in the company; and (c) the total amount of the company's issued share capital.¹¹

67. As pointed out by Mr Fung, the above information required to be disclosed publicly enables the percentage of ownership of issued

¹⁰ See s 68(2) of, and s 8 of Schedule 2 to, Cap 622. Where the share capital is to be divided into different classes of shares on formation, further specific information is required to be disclosed (see s 8(1)(d) and (2) of Schedule 2).

¹¹ See ss 142, 171 and 201 of Cap 622. Where the share capital is to be divided into different classes of shares, further specific information is required to be provided (see s 201(2A) and (3)).

share capital in a company to be ascertained with certainty at any particular time.

68. Conclusion on the true construction of Section 45: The expression “body corporate”, in the context of Section 45, is wider than “company” incorporated under the Former CO/New CO, and includes foreign companies. On the other hand, the expression “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 specific or different definition for that expression or any special context which suggests that a different meaning is intended. There is nothing in the context or language of Section 45 to indicate that the legislature intends to use the expression “issued share capital” in any different sense. Accordingly, we consider Mr Fung to be correct in his submission that, despite using the term “body corporate” in the 1981 amendment, it remained to be the legislative intention for Section 45 relief to be available only to associated companies which satisfy the 90% Issued Share Capital Association Requirement, but not to other kinds of corporate entity.

69. As for the meaning of the expression “issued share capital”, the dictionary meaning referred to at §54 above (ie “*that part of the capital of a company received from its owners in return for shares*”) is useful in elucidating the concept of “share capital”. In the company law context, “share capital” would also carry the idea of shares (in the nature of discrete or standard units) being allotted or issued to a person (shareholder) in return for money or other forms of consideration paid to

or received by the company as capital. Without in any way seeking to provide an exhaustive or all-embracing definition (which can only be done by the legislature), we venture to suggest that, as a starting point, the composite expression “issued share capital” in Section 45 may usefully be understood to mean 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 as have been issued.

70. In view of the new no-par regime for all companies incorporated in Hong Kong under the New CO, it seems clear that the test proffered by Megarry J in *Canada Safeway* for determining whether the association requirement in Section 45 is satisfied will have to be modified. Instead of using the nominal value of the share capital for determining whether the 90% Issued Share Capital Association Requirement is satisfied, reference will likely have to be made to the total consideration agreed for the issuance or allotment of shares as have been issued by the company. For the purpose of disposing of the present appeal, it is not necessary for us to determine definitively how the percentage of ownership of the issued share capital of a company should be calculated under the no-par regime in Hong Kong, or 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 under the Companies Act in the UK.

71. We do not accept Mr Mariani’s submission that, for the purpose of Section 45, “share capital” signifies, or refers to, “*a class of participation interest in the corpus and income of the corporation (or body corporate) issuing it that is economically and juristically analogous*

to share capital at Hong Kong law, albeit not necessarily identical to it”.

This definition of “share capital” is vague and uncertain, and can find no support from the historical context of, or language used in, Section 45, or any authority to which our attention has been drawn.

(iii) LLP 2 and HoldCo are not entitled to relief under Section 45

72. Although LLP 2 and LLP 1 are “bodies corporate” existing under the LLP Act¹², they are not “companies”. It follows that if, as we consider it to be the case, Section 45 affords stamp duty relief only to transfers of immovable property or Hong Kong stock between associated companies satisfying the association requirement under Section 45, HoldCo and LLP 2 cannot qualify as associated bodies corporate for the purpose of Section 45.

73. Further, it is not in dispute that LLP 2 and LLP 1 have no share capital. According to the legal opinion produced by the Duty-Payers, “[w]hilst unlike a body corporate within the meaning of the Companies Act 2006, an LLP does not, and cannot, issue and allot share capital”. It follows that HoldCo cannot be the beneficial owner of not less than 90% of the issued share capital of LLP 2 through LLP 1, and thus the association requirement under Section 45 is not satisfied.

74. Lastly, no shares (in the sense of discrete or standard units) in the capital of LLP 2/LLP 1 ever exist, and no such shares have ever been issued to their respective members. Hence, no capital paid by the members to LLP 2/LLP 1 could be regarded as the “issued share capital” of LLP 2/LLP 1 within the meaning of Section 45.

¹² See s 1(2) of the LLP Act.

75. In all, stamp duty relief under Section 45 is not available to the Bought and Sold Notes in respect of the Transfer of Shares, and the Collector was correct to reject the Duty-Payers' application for relief from stamp duty in the present case.

DISPOSITION

76. The Collector's appeal is allowed, and the Judge's order dated 15 July 2022 is set aside. We make an order in terms of §§1, 2 and 3 of the order sought by the Collector in the Notice of Appeal dated 1 February 2023. The Collector shall have the costs of the appeal and of the proceedings below, to be taxed if not agreed.

(Susan Kwan)
Vice President

(Thomas Au)
Justice of Appeal

(Anderson Chow)
Justice of Appeal

Mr Eugene Fung, SC and Ms Elizabeth Cheung, instructed by the Department of Justice, for the Appellant in the appeal

Mr Stefano Mariani, Solicitor Advocate of LCP, for the Respondents in the appeal