

Court held transfer of Hong Kong stock upon an overseas merger not chargeable with stamp duty

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Issue 6

In brief

The Court of Appeal (COA) handed down its judgement on *Nomura Funds Ireland Plc v The Collector of Stamp Revenue* (the Collector) on January 14, 2021 and delivered its written judgement on July 21, 2021¹.

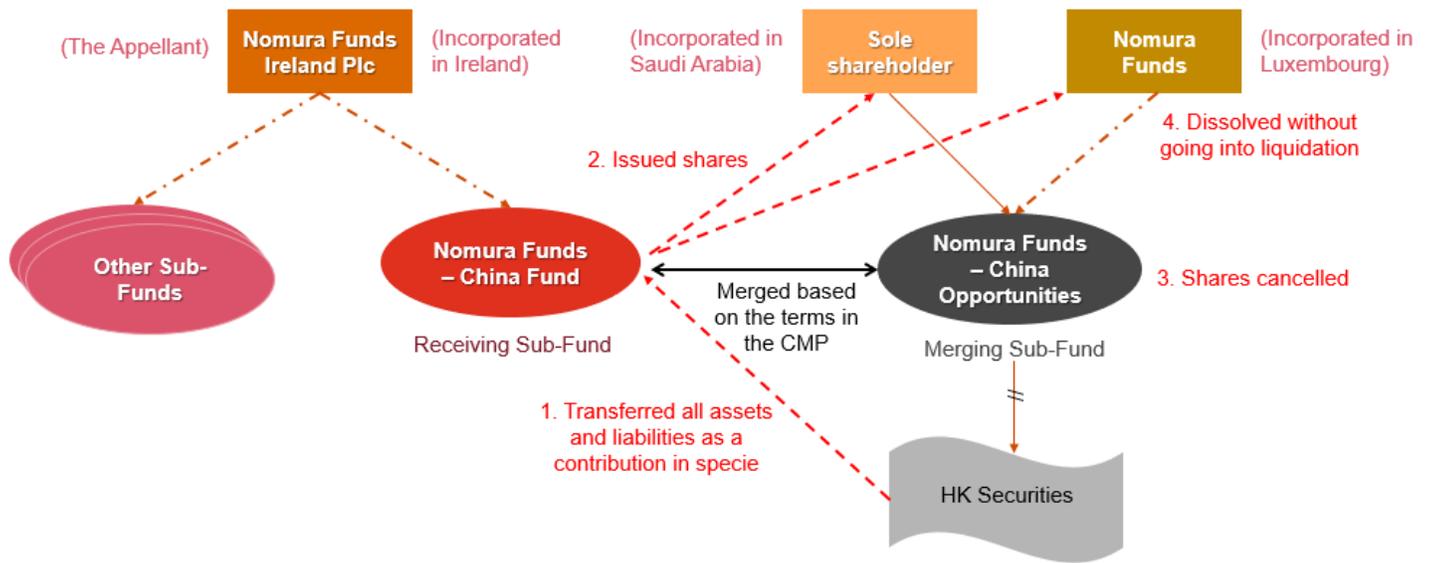
The COA held in this case that the transfer of Hong Kong stock upon a merger effected under the merger law of Luxembourg is not chargeable with Hong Kong stamp duty. However, the COA also held that the duty payer is not entitled to interest on the overpaid stamp duty refunded to it.

In detail

Background of the case

Below is a summary of the key facts of the case:

- Nomura Funds Ireland Plc (the appellant) is an investment company incorporated in Ireland. It is structured as an umbrella fund consisting of different sub-funds. One of its sub-funds is Nomura Funds – China Fund (Receiving Sub-Fund).
- Nomura Funds is another investment company incorporated in Luxembourg, with Nomura Funds – China Opportunities (Merging Sub-Fund) as its sole sub-fund.
- In 2015, the appellant and Nomura Funds agreed to merge Receiving Sub-Fund and Merging Sub-Fund based on the following key terms set out in a written instrument titled “Common Merger Proposal” (CMP) (see also the diagram below):
 1. the merger would be made in accordance with the relevant articles of the Luxembourg law on undertakings for collective investment (Luxembourg Law);
 2. the Merging Sub-Fund would transfer all assets and liabilities, including securities listed on the Hong Kong Stock Exchange (HK Securities), to the Receiving Sub-Fund as a contribution in specie;
 3. the Receiving Sub-Fund would issue shares to the sole shareholder of the Merging Sub-Fund;
 4. shares of the Merging Sub-Fund would be cancelled; and
 5. Nomura Funds would cease to exist (i.e. dissolved without going into liquidation).



- The appellant sought stamp duty relief on the transfer of HK Securities on the grounds that (1) there was no “transfer” but only “transmission” of HK Securities and that the transmission was effected by operation of the Luxembourg Law instead of the CMP; or (2) no beneficial interest in HK Securities passed under the CMP as the vesting of HK Securities amounted to a transmission or universal succession operated by the Luxembourg Law. The above arguments were supported by two Luxembourg legal opinions obtained by the appellant.
- The Collector disagreed with the appellant and considered that the CMP was the instrument that effected the transfer of the beneficial interest of HK Securities and therefore the CMP was chargeable with stamp duty.
- The appellant appealed against the stamp duty assessment firstly to the District Court (DC) and then to the COA upon the dismissal of its appeal by the DC.

The District Court’s judgement

The DC handed down its judgement on 22 March 2019² and dismissed the appellant’s appeal based on the following grounds:

- the two Luxembourg legal opinions were apparently inconsistent with each other and the second opinion lacked legal analysis and proper reasons;
- the transfer of HK Securities was not effected by operation of the Luxembourg Law but “in accordance with” that law;
- the Luxembourg Law only provides for the merger techniques and recognises the transfer of assets resulting from a merger but does not effect the transfer of the assets under the merger;
- the distinction between “transfer” and “transmission” adopted in other legal contexts was irrelevant to the present case and the word “transfer” for Hong Kong stamp duty purposes simply means “one parting with something to another”; and
- the CMP implemented the merger and in turn the transfer of the beneficial interest in HK Securities. As such, it was chargeable with stamp duty.

The COA's judgement

The COA overturned the DC's judgement and allowed the appellant's appeal. It held that the CMP is not a stampable instrument and there was no change in the beneficial ownership of HK Securities. Below is a summary of the COA's analyses in its judgement:

Issue 1 – Whether the two Luxembourg legal opinions should be accepted as evidence

The COA held that the DC judge was wrong in rejecting the Luxembourg legal opinions as they are clearly not inconsistent with each other and they provided clear and cogent reasons to support the conclusion that the vesting of HK Securities upon the merger was effected by operation of law but not by any written instrument.

Issue 2 – Whether the vesting of HK Securities is by way of universal succession or transfer

Given the conclusion on Issue 1 above, it is not necessary for the COA to deal with Issue 2. However, for the sake of completeness, the COA commented that the legal effects provided under the provisions of the Luxembourg Law meet the essential criteria of a universal succession by law despite the absence of the word “transmission” in those provisions. As such, the vesting is by way of a universal succession.

Issue 3 – Even if there was a transfer of HK Securities, whether the transfer was exempt from stamp duty by virtue of being a transfer under which no beneficial ownership in HK Securities was passed

Given the conclusions on Issues 1 and 2 above, the COA considered it unnecessary to deal with this issue.

Issue 4 – Whether interest was payable on the stamp duty refunded (this issue was not raised at the DC)

The COA ordered that the stamp duty assessment be annulled and the full amount of stamp duty paid be refunded to the appellant. After the hearing, the appellant made a claim for interest on the stamp duty refunded on the basis of restitution (as a common law right) and based on section 49 of the District Court Ordinance (DCO)³.

The COA refused the appellant's claim for interest on the basis that the statutory appeal regime under the Stamp Duty Ordinance (SDO) does not intend to provide for the right to interest on any stamp duty refunded. In addition, the COA held that the statutory appeal regime under the SDO is intended to provide a complete and exhaustive regime on the circumstances and terms upon which an overpaid stamp duty is to be recovered. The court therefore does not have the additional power to exercise any discretion to order interest on the stamp duty refunded under the DCO.

The takeaway

The COA's judgement in this case has set a legal precedent in Hong Kong on the stamp duty implications arising from an overseas merger. The judgement illustrates that the passage of Hong Kong stock (and immovable properties situated in Hong Kong) from the merging entity to the merged entity (i.e. the surviving entity) upon a merger effected under foreign law may not be chargeable with Hong Kong stamp duty. However, it should be noted that the Hong Kong stamp duty implications of an overseas merger will largely depend on the relevant provisions of the merger law of the foreign jurisdiction where the merger takes place (which can vary across jurisdictions) and the terms of the merger instrument, if any. Each case should therefore be analysed based on its specific facts and circumstances. Businesses wishing to undertake an overseas merger that involves the transfer of Hong Kong stock or immovable properties should consider the legal effect of the relevant foreign merger law and plan ahead carefully.

Separately, the COA's judgement is in line with the Inland Revenue Department's latest position that there will be no stamp duty implication on the succession of Hong Kong stock or immovable properties upon a court-free company amalgamation under the Companies Ordinance in Hong Kong, as such succession is by operation of law and does not involve any instrument chargeable with stamp duty.

Endnotes

1. The COA's judgement in the case can be accessed via this link:
https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=137289&currpage=T
2. The DC's judgement in the case can be accessed via this link:
https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=120899&QS=%2B&TP=JU
3. Section 49 of the DCO provides that the District Court may include simple interest on the debt or damages in respect of which a judgement is given by the District Court at the rate the Court thinks fit.

Let's talk

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