

HKEx LISTING DECISION

Cite as HKEx-LD62-3 (Published in November 2008) (Updated in July 2014 and withdrawn in October 2019)

[This Listing Decision is superseded by the amendments to the Companies Ordinance (with effect from 1 February 2019) that changed the basis for determining a “subsidiary” under Rule 1.01.]

Summary	
Name of Party	Company A - a Main Board listed company Subsidiary B – a non wholly-owned subsidiary of Company A Joint Venture – a jointly controlled company owned by Subsidiary B and a third party Project Company – a wholly owned subsidiary of the Joint Venture before the Disposal Investor X – an independent third party proposing to acquire 25% interest in the Project Company from the Joint Venture under the Disposal
Subject	Whether the Exchange would disregard the calculation of percentage ratios in respect of the Disposal and the Provision of Services and accept the alternative size tests submitted by Company A under Main Board Listing Rules 14.20 and 14A.80
Listing Rules	Main Board Listing Rules 14.20 and 14A.80
Decision	The Exchange decided to disregard the calculation of percentage ratios in respect of the Disposal and the Provision of Services and accept the alternative size tests submitted by Company A under Main Board Listing Rules 14.20 and 14A.80.

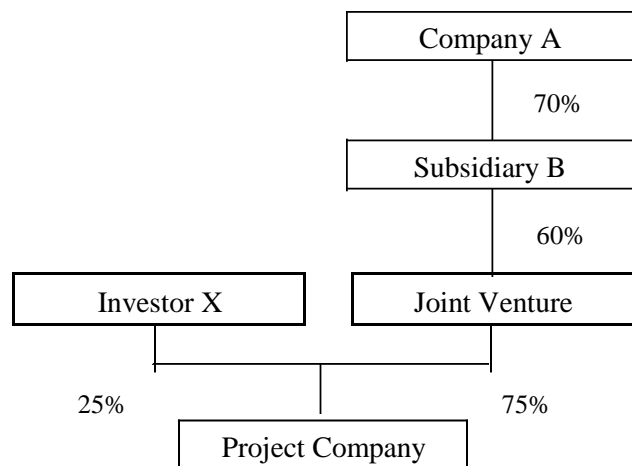
SUMMARY OF FACTS

1. The Joint Venture was owned as to 60% by Subsidiary B and 40% by a third party. Company A submitted that as Subsidiary B was unable to assert unilateral control over the Joint Venture, Company A had accounted for the Joint Venture as a jointly controlled entity in its accounts using the equity method of accounting in accordance with IAS 28.

2. Nevertheless, the Joint Venture was a “subsidiary undertaking” (as defined in the Companies Ordinance) of Subsidiary B and hence Company A, given Subsidiary B’s 60% shareholding in the Joint Venture. Accordingly, for the purposes of the Listing Rules, the Joint Venture was a subsidiary of Company A under the definition of “subsidiary” set out in Rule 1.01.

3. The Joint Venture proposed to enter into an agreement with Investor X pursuant to which the Joint Venture would dispose of its 25% equity interest in the Project Company to Investor X for cash consideration (the “**Disposal**”). It was also agreed that the Project Company would enter into a service agreement with Investor X pursuant to which it would provide advisory services to the Project Company for a term of 3 years in respect of the development and construction of properties undertaken by the Project Company (the “**Provision of Services**”) (together the “**Transactions**”).

4. The shareholding structure of the Project Company upon completion of the Disposal was as follows:



5. Upon completion of the Disposal, the Project Company would remain a subsidiary of the Joint Venture, and for the purpose of the Listing Rules, a subsidiary of Company A. Investor X, being a substantial shareholder of the Project Company, would become a connected person of Company A under Rule 14A.07, and the Provision of Services would constitute a continuing connected transaction for Company A under Rule 14A.31.
6. Company A was required to calculate the percentage ratios set out in Rule 14.07 to categorize the Disposal under Chapter 14 of the Main Board Listing Rules, and to determine the requirements under Chapter 14A of the Main Board Listing Rules in respect of the Provision of Services, in particular, whether any de minimis provision would apply.
7. Company A submitted that as the Joint Venture was only accounted for as a jointly controlled entity in Company A's consolidated accounts using the equity method of accounting, the application of Rule 14.07 to calculate the percentage ratios would be anomalous. Company A submitted that the percentage ratio calculations should be adjusted to take into account only Subsidiary B's proportionate interest in the Joint Venture i.e. 60%.

THE ISSUE RAISED FOR CONSIDERATION

8. Whether the Exchange would disregard the calculation of percentage ratios in respect of the Disposal and the Provision of Services and accept the alternative size tests submitted by Company A under Rules 14.20 and 14A.80.

APPLICABLE LISTING RULE OR PRINCIPLE

9. Main Board Listing Rule 1.01 defines "subsidiary" to include:
 - (a) a "subsidiary undertaking" as defined in the twenty-third schedule to the Companies Ordinance; ...
10. Main Board Listing Rule 14.04(6) defines "listed issuer" to mean:

a company or other legal person whose securities are already listed on the Main Board, ... and unless the context otherwise requires, includes its subsidiaries.
11. Main Board Listing Rule 14.06 provides that the transaction classification is made by using the percentage ratios set out in rule 14.07.
12. Main Board Listing Rule 14.20 provides that: the Exchange may, where any of the calculations of the percentage ratios produces an anomalous result or is inappropriate to the sphere of activity of the listed issuer, disregard the calculation and substitute other relevant indicators of size, including industry specific tests. The listed issuer must provide alternative tests which it considers appropriate to the Exchange for consideration.

13. Main Board Listing Rule 14A.80 provides that:

if any percentage ratio produces an anomalous result or is inappropriate to the activity of the listed issuer, the Exchange may disregard the ratio and consider alternative test(s) provided by the listed issuer. The listed issuer must seek prior consent of the Exchange if it wishes to apply this rule.
14. Main Board Listing Rule 14A.31(2) / 14A.76(1) provides that a connected transaction / continuing connected transaction is exempt from the reporting, announcement and independent shareholders' approval requirements of Chapter 14A where the transaction is on normal commercial terms and the value of the transaction falls below the de minimis thresholds set out in the rule, which are computed using the percentage ratios (other than the profits ratio).
15. Main Board Listing Rule 14A.32 / 14A.76(2) provides that a connected transaction / continuing connected transaction is exempt from the independent shareholders' approval requirements of Chapter 14A where the transaction is on normal commercial terms and the value of the transaction falls below the de minimis thresholds set out in the rule, which are computed using the percentage ratios (other than the profits ratio).

ANALYSIS

16. For the purposes of Chapters 14 and 14A of the Main Board Listing Rules, the term "listed issuer" (as defined under Rule 14.04(6)) and "listed issuer's group" (as defined under Rule 14A.06(22)) include the listed company itself and its subsidiaries. The requirements under these chapters apply to transactions undertaken by the listed company as well as any of its subsidiaries.
17. Rule 14.07 sets out five percentage ratios for assessing the impact of a transaction on the listed issuer. The percentage ratio calculation determines whether the transaction is subject to any disclosure, reporting and/or shareholders' approval requirements under Chapter 14 or 14A. Where the transaction is undertaken by the listed issuer's non-wholly owned subsidiary, each of the assets, profits and revenue attributable to the asset being acquired or disposed of and the consideration, and not the listed issuer's proportionate interest in such transaction, will form the numerator for the purpose of the relevant percentage ratios.
18. In present case, the Transactions were carried out by the Joint Venture. When considering whether the percentage ratios produced an anomalous result under Rules 14.20 and 14A.80, the Exchange noted that while the Joint Venture was a subsidiary of Company A for the purposes of the Listing Rules, it was accounted for by Company A using the equity method of accounting. As a result, the Joint Venture's (i) total assets, (ii) revenue and (iii) profits before taxation and minority interests were not reflected in Company A's accounts (and therefore the denominators of the percentage ratios) in the manner normally expected for a subsidiary consolidated into a listed issuer. The percentage ratios might overstate the impact of the Transactions on Company A. Accordingly, the Exchange accepted Company A's submission that the calculation of percentage ratios for the

Transactions carried out by the Joint Venture (which was not consolidated in Company A's accounts) produced an anomalous result.

19. Company A submitted alternative size tests for the Transactions adjusting the numerators for the assets ratio, profits ratio (not applicable to the Provision of Services), revenue ratio and consideration ratio by Subsidiary B's proportionate interest in the Joint Venture i.e. 60%. When considering the appropriateness of the alternative size tests the Exchange noted that the effect would be consistent with the application of the percentage ratios to a disposal by a listed company of its equity interest in an investment. The Exchange accepted that the alternative size tests were reasonable and appropriate for assessing the impact of the Disposal and Provision of Services on Company A.
20. Company A originally submitted alternative size tests for the Disposal and the Provision of Services that were calculated by adjusting the relevant percentage ratios by Company A's proportionate interest in the Joint Venture, i.e. 42% (which had taken into account Company A's proportionate interest in Subsidiary B of 70%). However, unlike the Joint Venture, Subsidiary B was a subsidiary consolidated in Company A's accounts. The Exchange did not consider that there were any special circumstances or reasons that warranted an exception to the percentage ratio calculation at the level of Subsidiary B and did not accept these alternative size tests.

DECISION

21. The Exchange decided to disregard the calculation of percentage ratios in respect of the Disposal and the Provision of Services and accept the alternative size tests submitted by Company A under Rules 14.20 and 14A.80.