

FACV No. 29 of 2008

**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO. 29 OF 2008 (CIVIL)
(ON APPEAL FROM CACV NO. 22 OF 2008)**

Between:

NGAI LIK ELECTRONICS COMPANY LIMITED Appellant

and

THE COMMISSIONER OF INLAND REVENUE Respondent

Court: Chief Justice Li, Mr Justice Bokhary PJ,
 Mr Justice Chan PJ, Mr Justice Ribeiro PJ and
 Sir Anthony Mason NPJ

Date of Judgment: 22 September 2009

JUDGMENT ON COSTS

Mr Justice Ribeiro PJ :

1. On 24 July 2009, the Court allowed the taxpayer's appeal, annulling five additional assessments made by the Commissioner in the purported exercise of her powers under section 61A

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of the Ordinance in respect of the years of assessment from 1991/92 to 1995/96. The Court ordered that the case be remitted to the Board with the opinion of the Court and that the Board be directed to remit the case to the Commissioner together with such opinion and with the Board's direction that fresh additional assessments be raised on the taxpayer in respect of three of those years of assessment (1993/94, 1994/95 and 1995/96) in accordance with the Court's judgment. The parties were given liberty to lodge written submissions as to costs here and below, which submissions have now been received.

2. The taxpayer seeks an order in its favour for costs here and below. It argues that it was compelled to undertake the series of appeals in order to achieve the annulment of the additional assessments which, as the Court has found, were raised on a fundamentally flawed basis.

3. The Commissioner argues for there to be no order as to costs here or below on the basis that the taxpayer's scheme has been held to engage section 61A and that the taxpayer succeeded only on some, but not all of its arguments.

4. In our view, the proper order is for the Commissioner to bear the costs of the appeal and of the proceedings below. The Court's judgment, annulling the five additional assessments has taken the Commissioner back to square one so far as any section 61A additional assessment is concerned – and only in relation to three of the five years of assessment initially targeted. It is appropriate that the taxpayer should have the costs of the litigation properly undertaken to obtain that result. The costs of any contest regarding the matters remitted properly fall to be dealt with, if necessary, on a separate basis.

5. The taxpayer additionally seeks leave to argue that the Court's remitter order should be varied in the manner it proposes so as to be "framed in less peremptory terms", enabling the Commissioner to conclude that an assessment in accordance with the Court's judgment is not possible. We do not consider there to be any basis for re-visiting the order made and such leave is refused.

6. We accordingly make the following orders, namely:

- (a) That the Commissioner pay to the taxpayer the costs of the appeal, including the costs of the written submissions as to costs filed in this Court, and the costs of the proceedings below; and
- (b) That the taxpayer's application for leave to contend that the Court's remitter order should be varied be dismissed.

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(Andrew Li)
Chief Justice

(Kemal Bokhary)
Permanent Judge

(Patrick Chan)
Permanent Judge

(R A V Ribeiro)
Permanent Judge

(Sir Anthony Mason)
Non-Permanent Judge

Mr Barrie Barlow SC (instructed by Messrs Lam & Co) for the appellant

Mr Ambrose Ho SC and Ms Joyce Leung (instructed by the Department of Justice) for the respondent