HCIA 1/2021
[2022] HKCFI 1133

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
INLAND REVENUE APPEAL NO 1 OF 2021

BETWEEN

NEWFAIR HOLDINGS LIMITED Applicant

and

COMMISSIONER OF INLAND REVENUE Respondent

Before: Hon Au-Yeung J in Court
Date of Hearing: 21 December 2021
Date of Judgment: 20 April 2022

J U D G M E N T

A. INTRODUCTION

1. This is the rolled-up hearing of the application by the applicant ("**Newfair**") for leave to appeal and, if leave is granted, to appeal against the decision dated 19 January 2021 ("**Decision**") of the Board of Review ("**Board**"), whereby the Board dismissed Newfair's appeal against the determination dated 8 October 2018 of the Deputy Commissioner of Inland Revenue. The Board decided 2 issues against Newfair under section 14 of the Inland Revenue Ordinance, Cap 112 ("**Section 14**"), holding that: (1) Newfair carried on a business in Hong Kong ("**1st Issue**"); and (2) Newfair's profits of that business arose in or were derived from Hong Kong ("**2nd Issue**").

2. For ease of reference, all abbreviations in the Decision will be adopted herein.

3. In the present application, it is Newfair's case that the Board, having identified the correct legal principles, wrongly applied them to the facts of this case, took into account irrelevant factors and came to a conclusion that was wrongly premised on what Newfair was rather than what it did.

4. On the other hand, the Respondent ("**Commissioner**") supports the Board's Decision that Newfair, being interposed between the Dutch purchaser and the Suppliers, earned its profits by being an entity in Hong Kong with a Hong Kong bank account. The Commissioner opposes the grant of leave to appeal and contends that Newfair falls far short of the high burden of showing that the Board's Decision was contrary to the only true and reasonable conclusion.

B. FACTS AS FOUND BY THE BOARD

B(1). Set up of Newfair

5. Newfair was wholly owned by a Dutch company, **VBZH**. VBZH had only 2 shareholders – Mr Taal and Mr Le Poole. **VBZH Group** had its principal place of business in the Netherlands. The principal business carried on by the Group was the distribution in the European markets electronic products sourced from manufacturers in the Far East.

6. Newfair was incorporated on 9 October 2013 and has since 15 October 2013 been the wholly-owned subsidiary of VBZH.

7. Newfair's registered office ("**HK Office**") was the office of an accounting firm. Newfair never physically operated at the HK Office and never engaged any employees. All office work was done by staff of other entities connected with the Group, namely Mr Bos, the purchasing manager of **VBABV** (a member of the Group).

8. One of 2 directors of Newfair was Mr Le Poole. His only involvement recorded in the Decision was signing of the MSA (Master Sales Agreement) and conducting some negotiations with SMiT and PPL ("**Suppliers**").

9. Newfair had a bank account with HSBC in Hong Kong.

B(2). Master Agreements

10. By a Distribution Agreement dated 17 October 2013, Newfair as purchaser entered into an MPA (Master Purchase Agreement) with SMiT to purchase CAMs. The MPA was signed by Mr Taal on behalf of Newfair.

11. By a parallel Distribution Agreement, Newfair as seller entered into the MSA with VBABV as purchaser, whereby VBABV would acquire exclusive European distribution rights to the merchandise. The MSA was signed by Mr Le Poole on behalf of Newfair and on behalf of VBABV as its general manager. Both of the contracting parties intended Hong Kong to be Newfair's principal place of business, where the acceptance of orders was supposed to take place.

12. Both the MPA and MSA were negotiated, concluded and executed outside Hong Kong. Before Newfair was established, merchandise was sent to VBABV directly from the Suppliers. The reason for the contractual architecture involving Newfair's

interposition between VBABV and the Suppliers was for fiscal efficiency as counselled by tax advisors of the Group.

B(3). Newfair's mode of operations

13. Newfair only sourced from the Suppliers and only sold to VBABV. The purchase prices were determined through negotiations mainly between Mr Taal and the Suppliers, and only outside Hong Kong. Once the transactions were agreed, Mr Bos would attend to the follow up work with the Suppliers by email.

14. The Suppliers were both incorporated in HK but operating their manufacturing business in Mainland China. They would ship directly to VBABV from Shenzhen to the port of Rotterdam.

15. Newfair would sell the merchandise at a mark-up of about 35%. VBABV would, in turn, distribute the merchandise on a wholesale basis to customers in the European markets at a further mark-up of about 40%.

16. All the purchase orders and invoices bore the registered address of Newfair's HK Office, and the transactions were exclusively conducted by email.

17. Newfair's transactions were conducted by Mr Bos (and, sometimes, Mr Buel who was administrator of a company not belonging to the Group) and the Suppliers. Mr Bos was based in the Netherlands and never travelled to Hong Kong for business purposes.

18. All the emails from Mr Bos bore the address of the HK Office.

19. The Hong Kong bank account was used to pay the Suppliers and receive all the revenues.

C. DECISION OF THE BOARD

20. On the 1st Issue, the Board rejected Newfair's submissions, holding that the following 3 **Pivotal Factors** tipped the scale against Newfair in the Commissioner's favour:

(1) The Hong Kong bank account received all of Newfair's sales and paid all of Newfair's Suppliers. Had the Hong Kong bank account been in the Netherlands, that presumably would have exposed Newfair to the Dutch tax jurisdiction.

(2) Although from the perspective of Newfair, the transactions were managed by Mr Bos in the Netherlands, the Suppliers were all Hong Kong companies, managing the shipments from Hong Kong and not in Mainland China.

(3) Under the MSA, the parties intended Hong Kong to be the principal place of business, where the acceptance of the orders was supposed to take place.

21. On the 2nd Issue, the Board also rejected Newfair's submissions:

(1) The Board could not accept that Newfair did nothing to earn the profits in Hong Kong. Newfair actively operated its Hong Kong bank account to buy merchandise from Suppliers and to receive revenue from its buyer. This was an essential part of its chain of business activities.

(2) Newfair held title to the merchandise on sold to VBABV and it amounted to valuable assets held in Hong Kong.

(3) Newfair did not merely split the mark-up from profits arising from the ultimate sale of merchandise overseas. Its role in the Group could not be divorced from the fiscal advantages which Newfair was established to bring. Newfair's interposing business model did amount to identifiable profit-generating activity imputable to Newfair's earning of its 35% mark-up between Newfair and VBABV.

D. PROPOSED GROUNDS OF APPEAL

22. The 4 proposed grounds of appeal are as follows:

(1) That the Board erred in holding that the 3 Pivotal Factors were jointly and severally sufficient to constitute the carrying on of a trade or business in Hong Kong by Newfair.

(2) That the Board erred in concluding that the proximate source of Newfair's profits was the remote operation of its Hong Kong bank account and that by extension Newfair derived it profits in substance from operations or transactions it effected in Hong Kong;

(3) That the Board erred in regarding Newfair's legal title in the merchandise it acquired from Chinese suppliers in Hong Kong was a relevant factor in determining the locality of its profits; and

(4) That the Board erred in concluding, without any evidence of Netherlands law, that the interposition of Newfair between VBABV and its Chinese suppliers was an operation generating Newfair's profits in Hong Kong and that such profits had a Hong Kong source.

23. Ground 1 engages the 1st Issue, whereas Grounds 2-4 engage the 2nd. The appeal will be allowed if Newfair succeeds on either Issue.

E. LEAVE TO APPEAL

24. The relevant principles on leave to appeal have recently been summarized by this Court in *Cheng Hung Kit v CIR* [2021] HKCFI 233 §§2-6:

(1) Under s.69(3)(e) IRO, leave to appeal must not be granted unless the Court is satisfied that a question of law is involved in the proposed appeal and that:

(a) the proposed appeal has a reasonable prospect of success; or

(b) there is some other reason in the interests of justice why the proposed appeal should be heard.

(2) A proposed appeal has a reasonable prospect of success if it is reasonably arguable, although it is not necessary to show that the proposed appeal will probably succeed.

(3) The applicant must identify the point of law involved or any specific legal error or question.

(4) A finding of fact may only be challenged as an error of law if:

(a) The decision was based on a finding of fact or inference from facts which was perverse or irrational;

(b) There was no evidence to support the finding;

(c) The decision was made by reference to irrelevant factors; and

(d) The decision was made without regard to relevant factors.

See: *Kwong Mile Services Ltd v CIR* (2004) 7 HKCFAR 275, §§31-34, Bokhary PJ; and

(5) The appellate court should not disturb the decision of the Board on fact-finding unless it regards that decision as contrary to the true and only reasonable one: *Kwong Mile*, §37, Bokhary PJ.

25. In *Kwong Mile*, it is further said that it is not necessary to identify a specific error of law; if the decision cannot be supported, the court will infer that the decision-making authority misunderstood or overlooked relevant evidence or misdirected itself in law (at §32, Bokhary PJ).

26. Application of Section 14 to the trading pattern of a taxpayer necessarily involves a question of law. Having heard Mr Mariani, Solicitor Advocate for Newfair, I am satisfied that Newfair does not seek to overturn primary findings of facts of the Board.

Rather, the 4 proposed grounds of appeal challenge the application of legal principles to the business model of Newfair and do involve arguable points of law with reasonable prospect of success. I grant leave to appeal on all the grounds.

F. LEGAL PRINCIPLES UNDER SECTION 14 OF IRO

27. Section 14(1) provides that:

> "… profits tax shall be charged for each year of assessment on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business …"

28. The guiding principle is to ascertain what the taxpayer has done to earn the profits in question and where it has done it: *CIR v Hang Seng Bank* [1991] 1 AC 306, 318E-F, Lord Bridge. Three conditions must be satisfied before a charge to tax can arise under Section 14:

(1) the taxpayer must carry on a trade, profession or business in Hong Kong;

(2) the profits to be charged must be from the trade, profession or business carried on by the taxpayer in Hong Kong; and

(3) the profits must be profits arising in or derived from Hong Kong.

29. These principles have been applied by the Court of Final Appeal in *Kwong Mile,* at 283A-D, Bokhary PJ, and *ING Baring Securities (Hong Kong) Ltd v CIR* (2007) 10 HKCFAR 417 at §6 (Chan PJ), §37 (Ribeiro PJ) and §§125-131 (Lord Millett NPJ).

30. Only the profit-producing activities of the taxpayer should be taken into account, but not the activities of its affiliated companies, notwithstanding that they are in the same corporate group: *ING Baring* at §134, Lord Millett NPJ.

G. GROUND 1

G1. Legal principles on carrying on of trade or business

31. In *CIR v Bartica Investment Limited* (1996) 4 HKTC 129, Cheung J (as he then was), it is said that the Court asks 2 questions, both of which are of fact (pp162 & 166):

(a) Whether the taxpayer carries on a business at all; and

(b) If so, whether the taxpayer carries on business in Hong Kong.

32. There is no dispute that Newfair carried on a business or trade. The only question is whether it did so "in Hong Kong".

33. "Carrying on" a business implies a repetition or series of acts (not just a single transaction) in the pursuit of commercial gain: *DEF v CIT* [1961] 27 MLJ 55, at 59B – C, *per* Buttrose J of the Singaporean Court of Appeal.

34. "Carrying on of 'business'" usually calls for some activity on the part of the taxpayer. Any gainful use to which the body corporate put its property may in principle amount to the carrying on of a business: *American Leaf Blending Co Sdn Bhd v DGIR* [1979] AC 676, 684C-D, Lord Diplock, an authority relied on by the Board.

35. The central management and control test is <u>not</u> applicable; the question is simply whether the business activities were carried out in Hong Kong: *Bartica*, p166.

36. Where a business generates profits from the purchase and resale at a commission, it will in general be taken to carry on that business in the jurisdiction where the relevant contracts for sale and purchase was made: *Grainger & Son v Gough* [1896] AC 325, an authority relied on by the Board.

G(2). Application of the legal principles to Ground 1

37. It is agreed that Newfair carried on a trade or business. The only question is whether the Board's conclusion that Newfair carried on that business "in Hong Kong" was so wrong that it was contrary to the true and only reasonable conclusion from the evidence.

38. Newfair's case is that it carried on a merchandise trade and that, as a commercial matter, the operations that gave rise to its profits were sales of merchandise to VBABV, as the Commissioner assessed tax on those profits. All the contracts were concluded outside Hong Kong.

39. On the other hand, Mr Julian Lam, counsel and Ms Jess Chan, for the Commissioner, are at pains in emphasizing to the Court that the business of Newfair was not trading in merchandise, but that the unique business model of Newfair was its interposition between VBABV and the Suppliers to achieve Dutch fiscal advantage. Its *business model* did amount to profit-generating activity imputable to Newfair's earning of the 35% mark-up as profits.

40. Each business is unique and application of the legal principles must be applied to the peculiar facts of a business. I bear in mind the submission of Mr Lam and Ms Chan in the following analyses.

41. On the Board's findings, Newfair did not have employees, officers or agents in Hong Kong, nor did it negotiate or conclude any profit-making contracts in Hong Kong. In terms of local assets, it had a Hong Kong bank account and that was all. The HK Office is not an asset in itself, but was there to meet the bare minimum required of a company

incorporated under the Companies Ordinance. As Mr Mariani describes, the HK Office was but a "brass plate". The Commissioner has not asserted that any substantive commercial operations were carried out there and the Board did not find to the contrary.

42. The subject merchandise contracts were entered into outside Hong Kong. There is no suggestion that the merchandise contracts were a sham. There could not be any other suggestion that Mr Taal and Mr Bos were Newfair's agents acting in China and the Netherlands respectively. The Commissioner could not disregard contracts, or other juristic acts that existed as having no significance: *Kwong Mile*, §9.

43. In my view, had the Board properly applied *American Leaf* and *Grainger v Gough* (to which its attention was drawn) to the facts it found, Newfair did not have a business "in Hong Kong".

44. With regard to the 1st Pivotal Factor, the Board did not find that Newfair merely held an account but that Newfair had operated it (i) to receive revenue; and (ii) to pay the Suppliers.

45. With respect to the Board, the sales revenue was generated from the merchandise contracts; the "activity" of receipt of the revenue did not generate revenue. That was different from the case of *Bartica*, §166, where the taxpayer operated its bank account in Hong Kong and not remotely and it was the funds in the bank account itself that generated profits. The "activity" of paying the Suppliers was an administrative act after the profit-generating contracts were entered into. Neither "activities" could show that Newfair had a business "in Hong Kong".

46. With regard to the 2nd Pivotal Factor, I agree with Mr Mariani that where the Suppliers managed the shipments to VBABV was irrelevant to where Newfair carried on its business. The Board expressly stated that from the perspective of Newfair, the Suppliers' transactions were in each case managed by Mr Bos in the Netherlands. If the trade and business of a member of the group is irrelevant to deciding whether the taxpayer within the group is carrying on a business or trade in Hong Kong, then the locality of the Suppliers' business is all the more irrelevant.

47. With regard to the 3rd Pivotal Factor, based on Clause 2.4 of the MSA, the Board inferred, as a matter of contractual interpretation that the parties intended Hong Kong to be the principal place of business, where the acceptance of the orders was supposed to take place. Newfair never identified a place of business with which it had a stronger connection than Hong Kong.

48. In my view, designating a principal place of business was not the same as identifying the place where the profits actually arose for the purpose of Section 14. In any case, there was no finding that acceptance of the orders took place in Hong Kong.

49. Mr Lam submits that Newfair did not earn the 35% mark-up because of its sourcing activities. The relationship between VBABV and the Suppliers was already present before Newfair came into the picture. Whatever negotiation was done, whatever

the terms of the contracts, Newfair would have a profit represented by the 35% mark-up upon resale to VBABV. It was on that 35% mark-up that the Commissioner imposed tax. And Newfair did not have presence anywhere other than Hong Kong.

50. Mr Lam submits that the interposition of Newfair between the Suppliers and VBABV *in Hong Kong* was the crucial factor in making Newfair's business model effective. Hence the presence of Newfair together with the associated arrangements in Hong Kong were the effective cause of the production of Newfair's profits.

51. In my view, what Mr Lam describes was the *role* of Newfair within the Group but not its *acts/operations* that gave rise to profits. I agree with Mr Mariani that Section 14 does not impose tax liability on what an entity *is*, as opposed to what it *does*. The fact that the interposition of Newfair brought about pre-determined profits and tax benefit for the Group did not undermine Mr Mariani's legal proposition under Section 14.

52. Accordingly, without disrespect, the Board has failed to identify a valid activity or operation of Newfair "in Hong Kong", and focused wrongly on the 3 Pivotal Factors (whether individually or collectively). The Board's conclusion on Issue 1 was contrary to the only true and reasonable conclusion – that Newfair did not have a business in Hong Kong. Ground 1 is made out.

H. GROUNDS 2 TO 4

H(1). Legal principles on source of taxpayer's profits

53. Grounds 2 to 4 concern the question of source of the taxpayer's profits.

54. A distinction should be drawn between Hong Kong profits and offshore profits. Profits earned offshore are not assessable to tax: *CIR v Hang Seng Bank Ltd*. In that case, Hang Seng Bank acquired foreign currencies in the course of its business. It invested the surplus through overseas banks in the purchase outside Hong Kong of certificates of deposit, bonds and gilt-edged securities, which were sold overseas shortly before maturity. Instructions for purchase and sale were given through correspondent banks in Singapore and London. The funds used and accruing from these transactions were debited and credited to accounts of Hang Seng Bank with other banks overseas. All the relevant operations which resulted in the profits in question were being earned and directed from Hong Kong (at 317G-318A & 318C). The Privy Council held that the Hang Seng Bank was not liable to tax as the profits were earned offshore.

55. The following principles are distilled from established authorities.

56. The inquiry must turn on the nature of the operations or transactions which gave rise to the profit: *ING Baring*, §35, Ribeiro PJ.

57. The broad guiding principle is to consider what the taxpayer has done to earn the profit in question and where he has done it, *ING Baring*, §37, Ribeiro PJ, citing

CIR v Hang Seng Bank, at 322H-323A, Lord Bridge; and *CIR v HK-TVB International Ltd* [1992] 2 HKLR 191, 198 lines 11-12, Lord Jauncey.

58. There is absence of a universal test but the need is to grasp the reality of each case, focussing on effective causes without being distracted by antecedent or incidental matters. The focus is to establish the geographical location of the taxpayer's profit-producing transactions themselves as distinct from activities antecedent or incidental to those transactions. Such antecedent activities will often be commercially essential to the operations and profitability of the taxpayer's business, but they do not provide the legal test for ascertaining the geographical source of profits for the purposes of Section 14, *ING Baring*, §38, Ribeiro PJ, citing *Kwong Mile Services* at §§12 & 43.

59. Only those operations which produce the profits in question are relevant, and they arise in the place where the service of the taxpayer is rendered or profit-making activities are carried on: *ING Baring*, §129, Lord Millett NPJ.

60. The operations of other members of the same group are not relevant: *ING Baring*, §134, Lord Millett NPJ.

61. Judging the source of profits as one of "practical reality" does not mean that one should disregard the accurate legal analysis of transactions. Legal concepts must enter into the question when one considers the locality of profits: *Kwong Mile Services* at §§9-10, Bokhary PJ. It is not a technical matter but a commercial one: *ING Baring*, §131, Lord Millett NPJ.

62. As regards the source of profits arising from merchandise trade, if the profit was earned by the exploitation of property assets, or dealing in commodities by buying and reselling at a profit, the profit will have arisen in or derived from the place where the contracts of purchase and sale were effected: *CIR v Hang Seng Bank*, Lord Bridge, at 323A-B.

H(2). Source of Newfair's profits

63. Grounds 2-4 artificially separate the factors that the Board relied on. I shall deal with the 3 grounds together.

64. As Mr Mariani submits, the transactions that generated the profits of Newfair were the purchase of merchandise from the Suppliers, and the resale of the same at a mark-up to VBABV. That was the basis on which the financial statements of Newfair were drawn up and the margin on which the Commissioner himself assessed Newfair to profits tax. All the operations that gave rise to the contracts for sale and purchase of the merchandise were done offshore.

65. On this, the Commissioner makes 2 comments:

(1) The Commissioner submits that the Board did *not* find as a fact that all the operations for "*the formatio*n of" the contracts for purchase and sale were effected outside of Hong Kong. In §§5.2 and 5.3 of the Decision, the Board was merely summarizing certain facts from the relevant documents without forming any view on the location of the operations for the formation of the contracts for sale and purchase.

(2) Contrary to what is asserted in Mr Mariani's submission, *Hang Seng Bank*, *HK-TVB* or *ING Baring* do not say anything about the location of the "*operations for the formation of contracts for the sale and purchase* ...". Even if there is a general rule that one should only look at the place where the contracts of purchase and sale were effected, that is not the same as looking at the place of the operations for the formation of those contracts.

66. I am unable to accept Mr Lam's arguments. The negotiations and conclusion of the contracts were effected outside Hong Kong. Mr Lam has not identified what other operations necessary for the "formation" of contracts were effected in Hong Kong. Neither has the Board.

67. Mr Lam also submits that Newfair has not been able to identify any alternative place which it says is the true source of its profits, but he concedes that that is not part of the legal test. In any case, the burden was on the Commissioner to satisfy the requirement in Section 14 that the profits of Newfair had a Hong Kong source. Newfair has demonstrated and the Board has found that all the commercial operations relevant to the production of Newfair's profits were done outside Hong Kong. The Commissioner plainly has failed to discharge the burden of proof.

68. The Commissioner relies on *CIR v Magna Industrial Co Ltd* [1997] HKLRD 173, 175I-176I and contends that the Board could weigh other relevant factors before reaching its factual decision as to the true source of the profit. These questions may be asked: How were the goods procured and stored? How were the sales solicited? How were the orders processed? How were the goods shipped? How was the financing arranged? How was payment effected? The Board must look at the totality of the facts and find out what the taxpayer did to earn the profit.

69. In the present case, the Board obviously did not stop at mechanically considering where the relevant merchandise contracts were entered into but also took into account other factors as suggested in *Magna Industrial.*

70. Firstly, the Commissioner did not find that Newfair merely passively kept deposits in a bank account in Hong Kong but that Newfair actively operated the account to pay the Suppliers and received revenue from the buyer as earnings. The Board considered such banking transactions were causative of earnings, without which Newfair would not be capable of earning any profits whatsoever. It did not matter whether Newfair operated its bank account physically over the counter of a branch of the bank or via internet banking.

71. I have explained in paragraph 45 above why the operation of the Hong Kong bank account could not amount to profit-producing operations. They were incidental acts done after the formation of the profit-generating contracts: *ING Baring, Kwong Mile*. The Board had placed reliance on an irrelevant factor.

72. Secondly, the Board relied on Newfair's legal title to the merchandise on sold to VBABV, which amounted to valuable assets in Hong Kong. Mr Lam concedes that whilst legal title could be a relevant factor, the Board has come to the conclusion on legal title without investigation. Accordingly, there being no evidence to support this finding, there was an error of law.

73. Thirdly, the Board found that there was fiscal significance in the "internal mark-up regime within the Group". In so finding the Board had taken into account the role of Newfair in being interposed, for tax mitigation purposes, between VBABV and the Suppliers. The Board found that Newfair's business model did amount to identifiable profit-generating activity imputable to Newfair's earning of its 35% mark-up between Newfair and VBABV.

74. Mr Lam supports the Board's finding that the source of Newfair's profits were in Hong Kong. He says it was wholly appropriate for the Board to focus on the matters which Newfair used to effect its business model, namely the operations of the Hong Kong bank account and the booking of the 35% mark-up in Hong Kong. By contrast, the contracts for sale and purchase and the so-called sourcing activities were simply "formalities" to effect Newfair's inter-positioning between VBABV and Suppliers.

75. Mr Mariani criticises the Board for coming to that conclusion without evidence as to Netherlands law. That criticism was not justified because it was not in dispute that the interposition came about as a result of counsel by tax advisors of the Group (paragraph 3.3 of the Decision). How much tax advantage could be gained was irrelevant and no expert evidence was required.

76. However, Mr Mariani was correct that the Commissioner could not impose tax liability on what a business entity was as opposed to what it did. The tax planning prevented profits accrued from a commercial operation from being charged to tax but it was not a commercial operation to generate and did not generate profits.

77. Moreover, the Commissioner's contention that the merchandise contracts and sourcing activities were simply "formalities" was not supported by a finding of the Board. One cannot disregard accurate legal analyses of transactions which were genuine profit-generating contracts.

78. In summary, it can be seen that the other factors (apart from where the merchandise contracts were entered into) that the Board took into account cannot withstand scrutiny, even if one were to bear firmly in mind the special business model of Newfair. Those other factors were wrong focuses. Accordingly, the Board's decision as to the true source of Newfair's profit was contrary to the only true and reasonable conclusion – that

the profits of Newfair were offshore and did not arise from commercial operations in Hong Kong. Grounds 2-4 are made out.

I. CONCLUSION

79. For the foregoing reasons, I find that the Board has erred in coming to its conclusion on both Issues. I therefore grant leave to appeal, allow the appeal and set aside the Board's decision.

80. On a *nisi* basis, I order the Commissioner to bear the costs of Newfair, summarily assessed at $220,000.

81. I thank Mr Julian Lam, Ms Jess Chan and Mr Mariani for their assistance.

(Queeny Au-Yeung)
Judge of the Court of First Instance
High Court

Mr Stefano Mariani, Solicitor Advocate of Deacons, for the Applicant

Mr Julian Lam, instructed by the Department of Justice and Ms Jess Chan (Senior Government Counsel) of the Department of Justice, for the Respondent