

Case No. D2/22

Profits tax – whether the Organisation A was a charitable institution for the purpose of section 88 of the IRO – whether the profits derived from the Organisation A’s trade or business were applied solely for charitable purpose and were not expended substantially outside Hong Kong – whether such trade or business was exercised in the course of the actual carrying out of the expressed objects of Organisation A – sections 2(1), 14, 16F, 17(1)(c), 68(4), 88 of the Inland Revenue Ordinance

Panel: Lo Pui Yin (chairman), Chiu Chi Kong and Chung Koon Ying Louis.

Dates of hearing: 29 & 30 November 2021.

Date of decision: 26 April 2022.

The Organisation A is a Hong Kong-based company incorporated in 1955 as a company limited by guarantee. It was recognized as a charitable institution and exempt from tax under section 88 of the Inland Revenue Ordinance since 1955. The Organisation A’s objects include acquiring assets and liabilities of an unincorporated body, establishing premises and conveniences for the Country E Position F, conducting entertainment or sport activities, and promoting the welfare and guidance of the Country E Position F in Hong Kong.

The Organisation A has been operating premises at Address M (which is widely known as ‘Site Y’). The land at Address M was at first provided to the Organisation A by the Hong Kong Government under a Crown Land Licence and since 1992, under a tenancy agreement for a term of five years from 1 May 1992 and thereafter quarterly until such time the tenancy was determined at a rent of \$1 per annum (if demanded).

The Inland Revenue Department periodically reviews charitable institutions to ensure their charitable status. In 2007, the Organisation A was asked to complete a questionnaire on constitution, activities, audited accounts, and other matters. In 2008, solicitors acting for the Organisation A confirmed its status as a charitable institution, to which the Department acknowledged its charitable status. In 2016, the Department conducted another review and requested further information. In 2020, the Department informed the Organisation A that it was not a charity at law and is not exempt from tax. The Organisation A's case was referred to the Profits Tax Section for issue of the Profits Tax Return and assessment for Profits Tax for the year of assessment 2013/14.

The Department issued an assessment for Profits Tax to the Organisation A for the year of assessment 2013/14. The Organisation A objected, claiming that it was a charity and exempt from Profits Tax. They estimated their assessable profits at \$1,601,357, taking into account adjustments for capital allowances and exempted profits. The Inland Revenue Department maintained that the Organisation A was not a charity in

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law and ceased to recognize their tax exemption status from January 1, 2013. The revised Profits Tax computation was considered in order, except for the claim for deduction of redevelopment costs of \$1,142,988 under section 16F of the IRO.

Held:

1. The Appellant owns the onus to establish that it was at all material times a charity at Hong Kong law and within the meaning of section 88 of the IRO. To consider whether the Organisation A was a charitable institution under section 88 of the IRO, the three conditions of the law of charity as stated in Cheung Man Yu have to be satisfied. The Board held that the Organisation A was not a charitable institution under section 88 of the IRO for the purpose of exemption from taxation for the year of assessment 2013/14.
2. The Board held that the Appellant has failed to satisfy the first condition that the purpose of the institution must have charitable character (which must be within the spirit and intendment of the preamble to the Charitable Uses Act 1601). The Board is not able to analogise, infer or identify new social needs to accommodate the Appellant's contended purposes within the spirit and intendment of the preamble to the Charitable Uses Act 1601. The Board also considers the submission that there is a common thread of all the objects in the preamble as operations in 'social goods' that the government would need to take on if there are no charities providing them as a circular contention and thus rejected it.
3. The Board is of the view that the Appellant has failed to satisfy the second condition that the institution must exist for the benefit of the public. The Board is not satisfied that the class of persons sought to be benefited under the Organisation A's objects and activities, namely visiting Position G personnel, constitute an appreciably important section of the Hong Kong community as they are temporary visitors and not Hong Kong residents.
4. The Board therefore held that the third condition, namely the charitable institution must be exclusively charitable, is not satisfied by reason that the first condition is not satisfied.
5. The appellant's reliance on the fact that the Hong Kong Government's very favourable grant of use of prime harbourfront land to the Organisation A over the years and its recognition of the Organisation A as a charitable institution over the years cannot be accepted. The Board is of the view that the favourable attitude and actions of the Hong Kong Government over the years towards the Organisation A cannot be a substitute of the legal analysis that has to be undertaken to determine whether the Organisation A was at the material time a charitable institution.

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6. In respect of the Appellant's claim for deduction of 'redevelopment costs' in the amount of \$1,142,998 under section 16F of the IRO, the Board finds that on the evidence, the Appellant has failed to establish, on balance of probabilities, that the expenditure claimed was 'on the renovation or refurbishment' of a building or structure other than a domestic building or structure.
7. Ruling the two issues against the Appellant, the Board determines that the Appellant has failed to discharge the burden of proof it has under section 68(4) of the IRO to show that the Profits Tax Assessment for the year of assessment 2013/14 imposed on it was excessive or incorrect.

Appeal dismissed.

Cases referred to:

Cheung Man Yu v Lau Yuen Ching & Ors [2007] 4 HKC 314
Tudor on Charities (9th Ed)
Re Cranston [1898] 1 IR 431
Scottish Burial Reform and Cremation Society v Glasgow Corporation [1968] AC 138
Re Strakosch [1949] Ch 529
Income Tax Special Purposes Commissioner v Pemsel [1891] AC 531
Incorporated Council of Law Reporting for England and Wales v Attorney General [1972] Ch 73
Attorney General v Ross [1986] 1 WLR 252
Weir v Crum-Brown [1908] AC 162
Tribune Press Lahore v Income Tax Commissioner Punjab [1939] 3 All ER 469
Goodman v Mayor of Saltash [1882] 7 App Cas 633
Verge v Somerville [1924] AC 496
Inland Revenue Commissioner v Baddeley [1955] AC 572
Inland Revenue Commissioners v Glasgow (City) Police Athletic Association [1953] AC 380
Dean Leigh Temperance Canteen (Trustees) v Inland Revenue Commissioners (1958) 38 TC 315
New Zealand Flax Investments Ltd v Federal Commissioner of Taxation (1983) 61 CLR 179
Commissioner of Inland Revenue v Barclay, Curle & Co Ltd [1969] SC (HL) 30
Inland Revenue Commissioners v Guthrie (1952) 33 TC 327
Samarkand Film Partnership (No 3) v Her Majesty's Revenue Commissioners [2017] EWCA Civ 77
Inmarsat Global Limited v Her Majesty's Revenue Commissioners [2021] UKUT 0059
Attorney General v National Provincial & Union Bank of England [1924] AC 262
Williams' Trustees v Inland Revenue Commissioners [1947] AC 447
Li Kim Sang Victor v Chen Chi Hsia [2016] 1 HKLRD 1153

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Stefano Mariani, Counsel, instructed by Messrs Deacons, for the Appellant.
Law Tak Him Ryan, Counsel, instructed by the Department of Justice, for the Commissioner
of Inland Revenue.

Decision:

Introduction

1. This Appeal was lodged by the Appellant, the Organisation A, against the determination of the Acting Deputy Commissioner of Inland Revenue dated 29 April 2021 dismissing the Appellant's objection to the Assessment for Profits Tax raised for the year of assessment 2013/14 and revising the Assessment to one with Assessable Profits of \$2,745,867 (with Tax Payable thereon of \$443,068) ('the Determination').

2. The Appellant's notice of appeal, which was lodged with the Clerk to the Board of Review by its legal representative, states the following grounds of appeal:

- '(1) The amounts assessed by the Respondent ... were excessive and unwarranted in fact and/or in law.
- (2) The Appellant was at all material times a charity at Hong Kong law and within the meaning of section 88 of the [Inland Revenue Ordinance], and was accordingly exempt from profits tax.
- (3) To the extent that the Appellant, being a charity, carried on a trade or business in Hong Kong during the relevant period: (i) the trade or business in question was exercised in the course of the actual carrying out of its charitable objects; (ii) the profits thereof were applied solely for charitable purposes and not expended substantially outside of Hong Kong, such that the said profits were in any event exempt from profits tax by virtue of section 88 of the Ordinance.
- (4) If the Appellant were to any extent not exempt from profits tax under section 88, such that any part of its profits were chargeable to profits tax (which is denied), it should have, in computing the amount of assessable profits for those purposes, been allowed a deduction for redevelopment expenditure as claimed by it under and in accordance with section 16F of the Ordinance because such expenditure was allowable capital expenditure incurred by it in the production of profits chargeable to profits tax.
- (5) The [assessment] was otherwise incorrect.'

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3. This Board held the hearing of this Appeal on 29 and 30 November 2021. The Appellant was represented by Mr Stefano Mariani of Deacons. The Commissioner of Inland Revenue ('the Revenue') was represented by Mr Ryan Law on the instructions of the Department of Justice.

4. The Appellant called oral evidence. Mrs B, a Position C and Position D of the executive committee of the Organisation A, testified on behalf of the Appellant. She was cross-examined by Mr Law for the Revenue. The Appellant did not call any other oral evidence. The Appellant referred to documents submitted before this Board.

5. The Revenue did not call any oral evidence. The Revenue referred to documents submitted before this Board.

6. This Appeal raises two sets of issues. The first set of issues concern section 88 of the Inland Revenue Ordinance (Chapter 112) ('IRO'). The second set of issues concern section 16F of the IRO.

7. Section 88 of the IRO is the provision for exempting '*charitable institution or trust of a public character*' from taxation. It provides:

'Notwithstanding anything to the contrary in this Ordinance contained there shall be exempt and there shall be deemed always to have been exempt from tax any charitable institution or trust of a public character:

Provided that where a trade or business is carried on by any such institution or trust the profits derived from such trade or business shall be exempt and shall be deemed to have been exempt from tax only if such profits are applied solely for charitable purposes and are not expended substantially outside Hong Kong and either—

(a) the trade or business is exercised in the course of the actual carrying out of the expressed objects of such institution or trust; or

(b) the work in connection with the trade or business is mainly carried on by persons for whose benefit such institution or trust is established.'

8. Section 14 of the IRO is the charging provision for Profits Tax on a 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 a year of assessment from such trade, profession or business, which, by reason of section 2(1) of the IRO, includes the letting or sub-letting by any corporation to any person of any premises or portion thereof. Section 16F of the IRO provides for a deduction from profits chargeable to tax as follows:

'(1) Notwithstanding anything in section 17, in the basis period for any year of assessment, a person who incurs capital expenditure on the renovation or refurbishment of a building or structure other than a

domestic building or structure may claim the expenditure as an outgoing or expense, to the extent that it is incurred in the production of profits chargeable to tax under this Part, as an expense incurred in the production of profits and a deduction from those profits is allowed in accordance with this section.’

Section 17(1)(c) of the IRO makes provision that no deduction shall be allowed in respect of ‘*any expenditure of a capital nature or any loss or withdrawal of capital*’.

9. In the sections of this Decision that follow, this Board shall consider the Determination and the evidence placed before it by the parties to this Appeal and make findings of fact. Then this Board shall consider the submissions of the Appellant and the Revenue in the light of the facts found and determine this Appeal.

The Factual Background

10. The Appellant and the Revenue have not agreed on a set of agreed facts. This Board finds the following facts, extracted from documents that this Board considers to be indisputable, to be the background against which the Determination can be understood:

- (1) The Organisation A was incorporated in Hong Kong as a company limited by guarantee in 1955.
- (2) At the time of incorporation, the Acting Registrar of Companies exercised the power under section 21 of the then Companies Ordinance (Chapter 32) to direct the registration of Organisation A with limited liability without the addition of the word ‘Limited’ to its name upon satisfaction that the company was ‘formed the purpose of promoting objects of the nature contemplated by section 21 of the said Companies Ordinance, and that it is the intention of the said Association that the income and property of the Association, whensoever derived, shall be applied solely towards the promotion of the objects of the Association, as set forth in the Memorandum of Association of the said Association, and that no portion thereof shall be paid or transferred, directly or indirectly, by way of dividend or bonus, otherwise howsoever by way of profit, to the person who are members of the said Association’.¹
- (3) The Organisation A’s memorandum and articles of association states the objects of the Organisation A in clause 3 of the memorandum of association. The objects that are relevant to this Appeal are:

‘(a) To acquire and take over any part or all of the assets and

¹ The objects contemplated by the then section 21 of the Companies Ordinance were: ‘*promoting commerce, art, science, religion, charity or any other useful object*’.

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liabilities of the present unincorporated body known as the [Position F]'s Guides.

- (b) To establish, maintain and conduct a fleet landing, premises and all other conveniences which the General Committee under its powers in the Articles and Bye-laws of the [Organisation A] shall determine for the guidance and welfare of [Country E] [Position F], as from time to time may be visiting Hong Kong.
- (c) To establish, maintain and conduct any film or theatre or any other form of entertainment or sport and to organize or subscribe to advise upon and assist tours and excursions in Hong Kong or elsewhere for the benefit of [Country E] [Position F] and their legal dependents and friends.
- (d) To establish, maintain and conduct laundry services, money exchanges, canteens, lounges, and giftshops of all kinds anywhere in Hong Kong for the benefit of [Country E] [Position F].
- ...
- (f) To acquire by purchase, lease or otherwise, lands and to maintain the same, and lease or let out buildings, offices, or premises not immediately required for use by the [Organisation A] and to furnish, alter, enlarge, repair, uphold and maintain such buildings and premises, and generally to purchase, take on lease or in exchange, hire or otherwise acquire, property and any rights or privileges which the [Organisation A] may think necessary or convenient for the purposes of the [Organisation A].
- ...
- (m) To procure for the [Organisation A] recognition by all proper authorities and by the public and generally to do all things necessary or desirable for the promotion of the welfare and guidance of [Country E] [Position F] in Hong Kong.
- (n) To carry on or conduct any other business or proceedings which may seem to the [Organisation A] capable of being conveniently carried on or conducted in connection with the objects herein, or calculated directly or indirectly to advance the objects herein or any of them, or to enhance the value of, or render profitable, any of the [Organisation A]'s property or rights.

...’.

- (4) The articles of association of the Organisation A provides that the management of the affairs and business of the Organisation A shall be vested in the General Committee. The composition of the General Committee is 36 Position Ds of whom 2 shall be elected from among Country E Position G stationed in Hong Kong, 3 from the Organisation H in Hong Kong, 4 from the various religious bodies and 27 from voting Position Ds of the Organisation A at the annual general meeting of the Organisation A. Also, the Position J assigned to Country E Department K, Hong Kong and Position L, Organisation A shall be ex officio Position Ds of the General Committee in addition to any other representatives of religious bodies who may be elected Position Ds of the General Committee. The General Committee shall elect a Chairman, a Vice-chairman, Secretary and Treasurer from amongst their number, and it shall have the power to appoint from among their number an Executive Committee consisting of not less than 5 Position Ds and to delegate to the Executive Committee any of its powers and duties as it considers necessary. The office of Chairman of the Executive Committee shall be held by the Chairman or Vice-Chairman of the General Committee. The office of Executive Committee Secretary shall be held by the Position L, Organisation A.
- (5) The Inland Revenue Department issued a letter dated 10 August 1955 stating that the Commissioner of Inland Revenue agreed that the Organisation A, as a ‘charitable institution’, was exempt from liability to tax under section 88 of the IRO.²
- (6) The Inland Revenue Department issued a letter dated 1 April 1965 confirming that the Organisation A was exempt from tax under section 88 of the IRO ‘by reason of being a charitable, ecclesiastical or education institution of a public character’, so that it was not liable to interest tax deduction.
- (7) The Organisation A has been operating premises at Address M (which is widely known as ‘Site Y’). The land at Address M was at first provided to the Organisation A by the Government (“Hong Kong Government”) under a Crown Land Licence and since 1992, under a tenancy agreement for a term of five years from 1 May 1992 and thereafter quarterly until such time the tenancy was determined at a rent of \$1 per annum (if demanded).
- (8) The Inland Revenue Department conducted periodic reviews of institutions and trusts which had in the past been recognized as

² The decision applied also to exemptions under similar provisions in the Stamp Duty Ordinance (Chapter 117), the Business Registration Ordinance (Chapter 310) and the Estate Duty Ordinance (Chapter 111).

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charitable institutions or trusts of a public character for the purposes of section 88 of the IRO for the purpose of ‘satisfying’ whether these institutions and trusts were still ‘charitable’. In 2007, the Inland Revenue Department wrote to the Organisation A asking it to complete a questionnaire on matters including changes in the constitution/trust deed, activities, trade or business, audited accounts, subsidiaries and donation receipt.

- (9) In 2008, solicitors acting for the Organisation A wrote to the Inland Revenue Department asking the department to confirm whether the letter of 1 April 1965 was still valid and subsisting. The reply of the Inland Revenue Department was that the Organisation A was ‘a charitable institution which is exempt from tax under section 88 of the Inland Revenue Ordinance with effect from 10 August 1955 and the letter dated 1 April 1965 attached to your letter is still valid.’
- (10) In 2016, the Inland Revenue Department conducted another periodic review of the tax exempt institutions and trusts and sent a questionnaire to the Organisation A. The department’s review led to further correspondence asking for further information, documents and explanations in 2017. In April 2018, an Acting Assessor of the Inland Revenue Department wrote to the Organisation A with reference to its objects in clause 3 of its memorandum of association and asked the Organisation A to explain in detail how its objects fell into one or more of the charitable purposes according to law. After considering the reply of the Organisation A, the Acting Assessor wrote in September 2018 to the Organisation A asking for information or comments on the views taken by the Revenue on the charitable purposes the Organisation A claimed that its objects were compatible, bearing in mind that a charity must be established exclusively for charitable purposes according to law. Another Acting Assessor wrote in 2019 to the Organisation A seeking detailed information on its community relations projects in order to understand the activities it carried out. The Organisation A replied.
- (11) On 18 March 2020, the Assessor of the Inland Revenue Department wrote to the Organisation A stating the Revenue’s view that the Organisation A ‘is not a charity at law and hence cannot be exempt from tax under section 88 of the IRO’ and setting out detailed legal analysis for coming to this view. The letter also informed the Organisation A that its case had been referred to the Profits Tax Section for issue of the Profits Tax Return and assessment for Profits Tax for the year of assessment 2013/14.
- (12) On 20 March 2020, the Assessor of the Inland Revenue Department issued to the Organisation A an assessment for Profits Tax for the year of assessment 2013/14 of assessable profits of \$6,040,790 with tax

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payable thereon of \$986,730.

- (13) The Organisation A objected to the assessment for Profits Tax under (12) above through its legal representative. The objection contended that the Organisation A had been and remained a charity under the laws of Hong Kong and was therefore exempt from Profits Tax and that the assessment was in any event excessive, incorrect and unwarranted in fact and/or law. The legal representative also submitted the Organisation A's return which stated that the assessable profits for the year of assessment 2013/14 was 'nil'. The legal representative further contended that even if the Organisation A's surplus were taxable, the Revenue should take into account adjustments for capital allowances and exempted profits.
- (14) On the presumption that tax exemption was not applicable, the Organisation A estimated its assessable profits at \$1,601,357 as shown below after making the following adjustments to its surplus:

	\$
Surplus for the year	2,544,960
<u>Add:</u> Non-deductible unrealised and realised	
loss on trading securities	595,784
Non-deductible net exchange loss	328,000
Depreciation of fixed assets	94,891
Amortisation of investment property	<u>443,923</u>
	4,007,558
<u>Less:</u> Depreciation allowances	30,026
Prescribed fixed assets deductions	30,440
Commercial building allowance	399,531
Exempt or non-taxable interest income	1,602,018
Dividend income	<u>344,186</u>
Assessable Profits	<u>1,601,357</u>

- (15) The Organisation A's legal representative later provided a revised Profits Tax computation to rectify a computation error with particulars as follows:

	\$
Profits per (14) above	1,601,357
<u>Add:</u> Depreciation allowances over-claimed	<u>1,522</u>
Assessable Profits	<u>1,602,879</u>

- (16) The Assessor of the Revenue maintained that the Organisation A was not a charity in law and notified the Organisation A by a letter dated 29 April 2021 that the tax exemption status of the Organisation A was ceased to be recognized with effect from 1 January 2013.

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- (17) The Assessor of the Revenue considered the revised Profits Tax computation in (15) above was in order except for the claim for deduction of redevelopment costs of \$1,142,988.

The Determination

11. The Acting Deputy Commissioner's Determination indicated that the issue for determination were '(a) whether the profits derived by the [Organisation A] should be exempt from Profits Tax under section 88 of the IRO; and (b) where the answer to (a) is in the negative, whether the redevelopment costs should be deductible under section 16F of the IRO'.

12. The Acting Deputy Commissioner considered first whether the Organisation A was exempt from tax under section 88 of the IRO. Having stated the law of Hong Kong on 'charity', which considers the question of charitable purposes and noted the Organisation A's contention that its charitable purpose was 'the public benefit of Hong Kong', the Acting Deputy Commissioner considered that the Organisation A must demonstrate that its objects were (i) of a charitable nature; (ii) beneficial to the Hong Kong community; and (iii) exclusively charitable, in order for its objects to be regarded as charitable under 'public benefit'.

13. The Acting Deputy Commissioner stated that she was unable to accept that the Organisation A had established that its objects were of benefit to the Hong Kong community within the spirit and intendment of the preamble to the Charitable Uses Act 1601, upon noting that nothing in its memorandum and articles of association expressly stated any objects for the public benefit and its objects expressly stated that it was established for the benefit of Country E Position F and its activities were organized for the benefit of Country E Position F, a class of persons that did not constitute the general public (or a sufficient section) of the Hong Kong community. The Acting Deputy Commissioner also stated that she was not satisfied that the Organisation A was exclusively charitable in the legal sense, since the claimed benefits to the Hong Kong community were only incidental in nature. Therefore, the Acting Deputy Commissioner considered that the Organisation A could not be regarded as a charity in law and the tax exemption under section 88 of the IRO was not applicable.

14. The Acting Deputy Commissioner turned to the proviso to section 88 of the IRO. She was of the view that the business activities of the Organisation A, including the letting and provision of shop services, did not satisfy all the exemption conditions stipulated in the proviso. The Acting Deputy Commissioner noted that there was no information before her regarding whether the profits of the Organisation A were applied solely for charitable purposes and not expended substantially outside Hong Kong and that the Organisation A did not elaborate how its trade or business was exercised in the course of actually carrying out of its expressed objects. Given that Site Y was leased to restaurants and retail shops and open to the visiting Position F personnel and other visitors, the Acting Deputy Commissioner was of the view that the letting activity and the operation of Site Y facilities were no different from the operations conducted by commercial concerns and was a separate adventure different and distinct from the Organisation A's objects, namely the provision of

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hospitality or other services for the visiting Position F personnel. Accordingly, she was not satisfied that the letting activity and the operation of Site Y facilities could be regarded as being exercised in the course of the actual carrying out of the Organisation A's expressed charitable objects (if any). Together with the absence of any claim by the Organisation A that the work in connection with its trade or business was carried on by persons for whose benefit it was established, the Acting Deputy Commissioner reached the conclusion that the proviso did not apply. As a result, the profits of the Organisation A in question were chargeable to Profits Tax.

15. The Acting Deputy Commissioner finally turned to the deductibility of the redevelopment costs under section 16F of the IRO. The Acting Deputy Commissioner noted that the legal representative of the Organisation A did not provide the relevant documents to establish the nature of the redevelopment costs and the Organisation A's claim was that the redevelopment costs were incurred for seeking consent of the Statutory Body N. The references to the redevelopment costs in the notes to the profits and loss account suggested that the redevelopment costs were for work related to making applications to different authorities regarding the rezoning and redevelopment of Site Y. In fact no refurbishment or renovation work was carried out. The Acting Deputy Commissioner therefore reached the view that the redevelopment costs were not incurred in renovation or refurbishment of a building or structure, and so they were not deductible under section 16F of the IRO.

16. The Deputy Commissioner therefore rejected the Appellant's objection and revised the Profits Tax Assessment for the year of assessment 2013/14 to the following:

	\$
Profits per revised computation at paragraph 10(15) above	1,602,879
<u>Add: Redevelopment costs</u>	<u>1,142,988</u>
Assessable Profits	<u>2,745,867</u>
Tax Payable thereon	<u>443,068</u>

The Appellant's Evidence

17. The Appellant called Mrs B to give evidence on its behalf. Mrs B signed a witness statement stating that the facts and matters deposed in it were within her personal knowledge and true to the best of her knowledge, information and belief.

18. Mrs B testified that she became a Position D of the Executive Committee (or, in her own words, the Board) in about 1996. Her late husband was involved in the establishment of the Organisation A back in the early 1960s and he was on the Executive Committee at the time when she became a Position D of the Executive Committee. When they were on the Executive Committee, the Executive Committee made decisions on renovation and other administrative matters.

19. Mrs B was asked about the objectives of the Organisation A when it was founded in Hong Kong. She stated that the Organisation A's aim was to act as an ambassador for the Hong Kong Government towards visiting Position G personnel, which

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at the time of its founding, were the personnel of Country E Position G. These visiting Position G personnel were very young people. The Organisation A provided services to these ‘young [Position G]’ to make sure that they behaved themselves and did not ‘go wild’ when they were in Hong Kong, especially against the taking of dangerous drugs. Before the Position G personnel disembarked, Position D(s) of the Organisation A would go on board the Position G ships to give a talk to the Position G personnel, teaching them the situation of Hong Kong, what they could do and what they should not do. During cross-examination, Mrs B indicated that the Organisation A did the education by giving talks to visiting Position G personnel back in the 1960s, 1970s and the 1980s and since the late 1980s, members of the Organisation A had ceased visiting the Position G ships to give talks to the visiting Position G personnel.

20. Mrs B confirmed that one of the missions of the Organisation A was to benefit the public in Hong Kong from the economic benefits of Position G visits. She elaborated that this referred to the visiting Position G personnel spending money in Hong Kong in restaurants, souvenir shops, etc. She added that while the Organisation A wanted to make sure that the visiting Position G personnel enjoyed their stay in Hong Kong and had a good impression of Hong Kong, it would be good for the Hong Kong economy if they did spend money in Hong Kong during the time of their stay.

21. Mrs B also mentioned that back at the time of the establishment of the Organisation A, the visiting Country E Position G would need repairs, provisions and other services and it was considered that a local association of Hong Kong residents would organize such services for the visiting Country E Position G, rather than Country E Position G itself becoming directly involved in the matter. And the Organisation A was set up to help with getting in touch with the service providers.

22. Mrs B was asked about the activities of the Organisation A. Organisation A published a free guidebook containing information about Hong Kong for the visiting Position G personnel. At Site Y, telephone booths were set up to allow the visiting Position G personnel to call home on the expense of the Organisation A, and later when mobile phones were widely used, the Organisation A gave them telephone cards to call home. There was an information booth to answer questions of the visiting Position G personnel. Space was also made available in the premises so that the Position G personnel could relax; there were a library, a game room, and provision of snacks and water. Counselling and pastoral services was available to some visiting Position G personnel who would need someone to talk to. Prior to 2000, Organisation A organized local tours and other activities, such as playing basketball with local students and painting of walls, for the visiting Position G personnel.³ Mrs B was shown during cross-examination, replies of the Organisation A that answered to a request for a list of activities, which included providing in the building at Site Y, a place that the visiting Position G personnel could relax in, shop or dine, free transportation to and from the Organisation A’s facility, free lockers, free spaces for meetings/tours and free Wi-Fi.

³ Mrs B disagreed with the suggestions that Organisation A did not do the education activities and did not organize the community building projects.

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23. Mrs B was asked whether there was any part of the premises at Site Y that were designated only for the visiting Position G personnel. She answered that her understanding was that there was a library designated for the visiting Position G personnel; this was a room with books to read, computer(s) to use, and a table to play table tennis.

24. Mrs B referred to the guidebook and stated that it was small, easy to put inside one's pocket, and was in simple terms to tell the visiting Position G personnel, some of whom would have only high school standard of education, about Hong Kong and finding their way around Hong Kong. The guidebook was funded by advertising and was free for everybody who came by Site Y. The guidebook could be picked up at Site Y. Copies of the guidebook were distributed to the different consulates that had a Position G visit. Copies were also provided to the Organisation P. Copies could also be picked up at the restaurants, bars and clubs that advertised in the guidebook. Mrs B indicated that the guidebook's first priority target was the visiting Position G personnel, although the Organisation A did not exclude Hong Kong people. The Organisation A published the guidebook for the visiting Position G personnel as they did not come to Hong Kong through the airport but on board their ships, they knew the Organisation A first as they were coming to Hong Kong, they could not pick up a tourist guide somewhere else like tourists coming in from the airport. The publication of the guidebook was part of the Organisation A's service for the visiting Position G personnel.

25. Mrs B stated that Organisation A's operations had served not only Country E Position G but also the visiting Position G of other countries. The Organisation A had served the Position G of more than 15 countries. When a Position G ship came to visit, volunteers from the Organisation A's membership came to Site Y to help with guidance to the visiting Position G personnel.

26. Mrs B confirmed that in the period between 2013 and 2014, the Organisation A played the part of a host to the visiting Position G personnel, so as to make them feel at home and enjoy their trip in Hong Kong and help them if they needed anything. Catholic priests and ministers would give counselling services to the visiting Position G personnel who might feel homesick or a bit depressed having been out in the ocean for too long. There were also volunteers from the membership of the Organisation A; they would spend time at Site Y. In case visiting Position G personnel needed help in languages, the Organisation A had volunteers who could interpret.

27. Mrs B stated that the Organisation A had staff to pay salaries to and needed to generate an income to keep going. In 2013, there were about six staff members, including a Position Q, a receptionist, a bookkeeper/accountant, and two or three caretaker/security/minor staff. The Organisation A charged for advertising by restaurants at Address M area in the guidebook and also service fees and rents of the owners of the shops and restaurants at Site Y. The Organisation A never asked for donations.

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28. Mrs B was asked about the Position Q, Mr R.⁴ She stated that Mr R was in charge of the daily operations of the Organisation A and he should have good knowledge about the activities of the Organisation A.

29. Mrs B stated that she believed that the annual charge of \$1 for the Organisation A to use the land at Site Y was a symbolic charge so that the Organisation A could do something for the visiting Position G personnel and for the people in Hong Kong.

30. Mrs B stated her belief that the service charge or rent the Organisation A charged of the shops and restaurants operating at Site Y were set not at a commercial rate, so that the shops and restaurants would operate at a lower cost and provide goods and services to the visiting Position G personnel at a cheaper price. If a merchant was interested in joining, the Organisation A's Committee would discuss that and consider if the merchant was suitable to be included at Site Y.

31. Mrs B was asked about the two types of tenancy the Organisation A offered to the owners of the shops and restaurants at Site Y. She was shown a tenancy agreement produced with her witness statement and she indicated that she had not seen that tenancy agreement before.

32. Mrs B was asked about the project to renovate and refurbish the premises at Site Y. She stated that the premises had become old, damaged and deteriorated, so the Organisation A thought of renovating it in order to provide better services for the people who came to visit. The Organisation A sourced a consulting company to do architectural studies and make a plan of the how the building would look after renovation. Even a model of the new building was made. But the project could not proceed because the Organisation A was not sure whether it could stay at Site Y through renewing the lease with the HKSAR Government. At the time, the lease was renewed every three months and the Organisation A could not afford having spent for the renovation and then told to move after the next three months. There was no clear commitment from the HKSAR Government on whether or not the Organisation A could stay at Site Y. Therefore the project came to a halt.

33. Mrs B was asked during cross-examination for more details of the project. She stated that there were different options. One was to renovate the whole building, the other was rebuilding the whole building. The Organisation A came to the conclusion to repair and refurbish instead of taking down the whole building and rebuild because the Organisation A could not afford it at the time. She understood the rezoning discussion with the HKSAR Government was about moving away from the original site and finding another place to rebuild the building, and the redevelopment discussion was about building another building at a different site. The Organisation A's Committee approved the engagement of a consultant. She believed that the services of the consultant engaged was to consider all different options of redevelopment, rezoning and refurbishing and give advice. She was shown the invoices of the consultant. Her replies were that she had not seen those invoices and she did not directly deal with the related payments. She knew there were payments

⁴ Mr R was the signatory to the letters of the Organisation A that replied to the enquiries made by the Revenue between 2016 and 2019.

required for the project. She did not know what the consultant did to be paid the sums shown on the invoices. The decision of the Committee were executed and follow on by the Organisation A's Position Q. She was also shown the invoices of other service providers who apparently were assisting the consultant. She had not seen those invoices and had little knowledge about the services rendered. She was not involved with all the details. She was further shown the approval letter of the Statutory Body N and it was suggested to her that the redevelopment cost spent in engaging the various companies was for the consideration of rezoning and redevelopment of Site Y as opposed to the renovation and refurbishment of the building at Site Y. She disagreed and indicated that a consultant was retained because the Organisation A had to submit a plan to the Statutory Body N about the future of Site Y, and that was a matter that the Organisation A could not do by itself. The first purpose of the premises was still to take care of the visiting Position G personnel and the Organisation A also wanted to open the facilities to the public.

34. Mrs B also mentioned that she learnt that back in time, the visiting Country E Position G offloaded their provisions in Hong Kong and sent them to the squatter areas in Hong Kong. The inhabitants of the squatter areas, including her grandmother, received food and other products.

35. Mrs B further mentioned that there were many cases of the 'young [Position G]' coming back to Hong Kong with their parents and family members to Hong Kong after visiting Hong Kong as Position G personnel and having known Hong Kong to be such a good place. There were visitors who came back to Hong Kong holding a decade old guidebook.

36. Mrs B accepted that she was not involved directly in the letting of the premises at Site Y; that she was not involved in the making of the agreement with the HKSAR Government for the use of the land at Site Y; that she was not involved in the management of the staff; that she was not involved in the organizing of particular school and nursing home visits; and that she had no knowledge of the detailed accounts of the Organisation A.

The Issues in this Appeal

37. It is stated at the Introduction above that this Appeal involves two sets of issues. The first concerns section 88 of the IRO. Here, there are two issues: (1) Whether the Organisation A was a charitable institution for the purpose of section 88 of the IRO; and (2) Whether the profits derived from the Organisation A's trade or business were applied solely for charitable purposes and were not expended substantially outside Hong Kong; and whether such trade or business was exercised in the course of the actual carrying out of the expressed objects of Organisation A.

38. The second concerns section 16F of the IRO and this arises if this Board holds that the surplus of the Organisation A in the year of assessment 2013/14 was chargeable to Profits Tax. Section 16F(1) of the IRO provides for a deductible expense from Profits where a person incurs in a year of assessment capital expenditure on the renovation or refurbishment of a building or structure other than a domestic building or structure, to the

extent that it is incurred in the production of Profits chargeable to tax. However, section 16F(4)(c) of the IRO provides that section 16F does not apply to capital expenditure incurred by a person to enable a building or structure to be used for a purpose different from that for which it was used immediately before the capital expenditure was incurred.

39. Section 66(3) of the IRO provides that save with the consent of the Board of Review and on such terms as the Board of Review may determine, an appellant may not at the hearing of his appeal rely on any grounds of appeal other than the grounds contained in his statement of grounds of appeal given to the Board of Review in accordance with section 66(1). Section 68(4) of the IRO provides that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.

The Appellant's Submissions

40. Mr Mariani's submissions for the Appellant on section 88 of the IRO were, in summary, that the Organisation A was a charitable institution; that the Organisation A's surplus or profits were applied solely for charitable purposes and were not expended substantially outside Hong Kong; and that the Organisation A's trade or business, identified by the streams of income of letting income and advertising income, was exercised in the course of the actual carrying out of its expressed objects.

41. Mr Mariani referred to Cheung Man Yu v Lau Yuen Ching & Ors [2007] 4 HKC 314 (CA) as the leading authority in Hong Kong on what is a charity. Tang VP's judgment for the Court of Appeal stated in [24] the three conditions for qualifying as a public charity in Tudor on Charities (9th Ed): '*First, the purposes of the institution must have charitable character, that is, they must be within the spirit and intendment of the preamble to the Charitable Uses Act 1601. Secondly, the institution must exist for the benefit of the public and thirdly, it must be exclusively charitable.*'

42. Mr Mariani next asked this Board to consider the preamble to the Charitable Uses Act 1601 as the authoritative statement, in principle, of charitable objects: '*The relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriages of poor maids, the supportation, aid and help of young tradesmen, handicraftmen and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes.*' The Appellant submitted that the charitable uses found in it did not necessarily march fully with the current jurisprudence and needed adaptation to the social, cultural, historical and economic context of the present day Hong Kong. Therefore, the Appellant asked this Board to view the charitable objects listed in the preamble as thematic rather than prescriptive; the list indicates broadly the kinds of objects that are regarded as charitable but it is not an exhaustive list or straitjacket. This would allow one to ascertain by analogy or by inference what is charitable, as well as having regard to the effect of court decisions '*which have endeavoured to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied*'; see Re Cranston [1898] 1 IR 431 (CA,

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Ireland) at 442; Scottish Burial Reform and Cremation Society v Glasgow Corporation [1968] AC 138 (HL) at 154; and Re Strakosch [1949] Ch 529 (CA, Eng) at 538. Mr Mariani also submitted that the common thread in the preamble was that the charitable objects listed therein were all operations that one might regard as ‘social goods’ and if charities did not do them, the government and some other public body would have to take on part of that rule or to shoulder or bear part of the burden. Coming within the spirit and intendment of the preamble does not require satisfaction of ejusdem generis. Further, the Appellant asked this Board to adopt a benignant or generous construction in respect of how an object can be regarded as being thematically within the spirit and intendment of the preamble where there is any doubt on whether the expressed objects of the Organisation A are charitable; it is better, from a purposive standpoint, to have charities than to have none at all.

43. Mr Mariani invited this Board to consider the memorandum of association of the Organisation A, particularly clause (b), (c), (d) and (m), for the objects of the Organisation A. He submitted that the Organisation A’s primary object is rendering assistance, guidance and support to visiting Country E Position G personnel. Historically, when the Organisation A was founded, the foreign Position G that regular visited Hong Kong was Country E Position G. Later on, the Organisation A provided its services to any visiting Position G, while Country E Position G had remained the largest component.⁵ By reference to Lord Macnaughten’s statement in Income Tax Special Purposes Commissioner v Pemsel [1891] AC 531 (HL) at 583, Mr Mariani submitted that the Organisation A is for purposes beneficial to the community in Hong Kong which does not fall into one of the heads of relief of poverty, advancement of education and advancement of religion. To support this submission, Mr Mariani relied on five matters: (i) The Hong Kong Government had, for over six decades and only until recently, been satisfied that the Organisation A was for public benefit;⁶ (ii) The guidebook, published by the Organisation A, encouraged visiting Position G personnel to abide by the laws of Hong Kong, and be mindful of the customs, social norms and culture of Hong Kong people. It helped with the creation of a positive and helpful image of Hong Kong; (iii) the Organisation A encouraged meaningful and positive interaction between the visiting Position G personnel and the Hong Kong community; (iv) the Organisation A took an active role in promoting a positive global image of Hong Kong; it perceived itself as an ambassador for Hong Kong; and (v) the Organisation A provided not only material benefit or conveniences at its premises but also services if needed by the visiting Position G personnel; it was holistic support for them, and the fact that the individual visiting Position G personnel could do as he or she pleased was a logical non sequitur. Thus to welcome visiting Position G personnel to a city that is one of the world’s pre-eminent ports and regards itself as Asia’s World City is within the spirit and intendment of the preamble of the Charitable Uses Act 1601. Mr Mariani also posed the counterfactual scenario of the costs to be borne by the Hong Kong Government and the Hong Kong community if the Organisation A did not exist and lots of foreign Position G

⁵ The Organisation A provided a list of ship and personnel visits by year to the Revenue. For examples, in 1983, 84 Country E Position G ships with 97,241 personnel on board visited Hong Kong; in 2013, 13 Country E Position G ships and 4 Position G ships of other countries with a total of 15,500 personnel on board visited Hong Kong; and in 2014, 12 Country E Position G ships and 1 ship of another country with a total of 12,430 personnel on board visited Hong Kong.

⁶ Reliance was placed on the previous confirmations from the Revenue and the Government’s leasing of the prime real estate of Site Y to the Organisation A for \$1 annually if demanded.

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personnel came landing in Hong Kong not knowing where to go, what to do and how to interact with the locals.

44. In so far as it may be said that the Organisation A's objects were insufficiently clear to qualify it as a charity, Mr Mariani referred to Incorporated Council of Law Reporting for England and Wales v Attorney General [1972] Ch 73 (CA, Eng) at 88G-H, where Russell LJ considered that in a case in which the object could not in the view of the court be thought otherwise than beneficial, '*the proper question to ask is whether there are any grounds for holding it to be outside the equity of the [Charitable Uses Act 1601]*'. From this Mr Mariani submitted that to be a charity, there is not required perfection in form in the drafting of the institution's constitution. Rather it requires first the establishment of a case of *prima facie* public utility, and then the decision-maker shall evaluate whether notwithstanding such public utility, there might be good reasons to deny charitable status. Therefore, a generous construction of the Organisation A's objects should be adopted for the purposes to be held,⁷ on their face, beneficial to the Hong Kong community and of public utility, and this Board should only decline to find the objects to be charitable if there is some principled basis for doing so.

45. Mr Mariani also submitted that reference could be had to the actual operations of the institution if there were any doubt on its objects; see Attorney General v Ross [1986] 1 WLR 252 (Ch D) at 264 and Incorporated Council of Law Reporting (above) at 91C-F (per Sachs LJ).⁸ If the institution's operations are of public utility, then one should refer back to the general proposition that a charity ought to be found unless there were good reasons for not doing so.

46. Mr Mariani turned to the Determination and submitted that the Revenue had a restrictive understanding of public benefit in Hong Kong, making these two points: (i) The benefit of a charitable institution to a given community does not need to be reducible into some quantifiable measurable material benefit; see Tribune Press Lahore v Income Tax Commissioner Punjab [1939] 3 All ER 469 (PC) at 477. The Organisation A promoted the orderly harmonious integration of visiting Position G personnel in Hong Kong. While this may necessarily give rise to a direct material benefit, it could be an object or an effect that is of broader public utility; (ii) The Hong Kong Government had perceived the Organisation A to be of public benefit to Hong Kong; this was evident in its letting of Site Y site to the Organisation A for a nominal sum. He also referred to Goodman v Mayor of Saltash (1882) 7 App Cas 633 at 642, which was said to establish the proposition that a gift for the general benefit of a locality is in principle charitable.

47. Mr Mariani next made submissions against the Revenue's point in the Determination that the number of people who would stand to benefit from the Organisation A did not comprise a sufficiently large sector of the public in Hong Kong. First, reference was made to Verge v Somerville [1924] AC 496 (PC) at 499, where the Privy Council stated

⁷ Or a benignant construction, per Weir v Crum-Brown [1908] AC 162 (HL) at 167.

⁸ Mr Mariani underlined this with the quotation that: 'The necessity for this course is all the more obvious when the purposes of an ancient institution become the subject of examination, remembering that if it started as a charity it so remains.'

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that the inhabitants of a parish or town or any particular class of such inhabitants may be the objects of a charitable gift but not private individuals or a fluctuating body of private individuals, to support his observation that for so long as visiting Position G personnel were in Hong Kong, they ought to be regarded as part of the Hong Kong community. Their numbers were by no means immaterial, there were tens of thousands of them. It was ungenerous to characterize the visiting Position G personnel as not part of the Hong Kong public, as this would leave open the question as to how long one has to stay in Hong Kong in order to be part of the public. Mr Mariani added in this respect that the Organisation A had always maintained that it brought a benefit to the Hong Kong community as a whole, and especially with those section of the Hong Kong community which interacted, whether by choice or by coincidence, with visiting Position G personnel. In this relation, while the number of persons benefitted may be small, what is relevant are the beneficiaries who may, in principle, if they so wish, avail themselves of the benefit; see Inland Revenue Commissioner v Baddeley [1955] AC 572 (HL) at 592. So, it was submitted that the Organisation A's operations were in principle available to a broad range of inhabitants of Hong Kong, including in particular, any one offering goods or services or wishing to have social or personal relations with visiting Position G personnel.

48. Mr Mariani acknowledged that section 88 of the IRO's language of 'shall be exempt and there shall be deemed always' to have been exempt does not mean that a charity can never cease to be charity, but he submitted that a charity needs not do the full range of everything it ever did to qualify as a charity in any given year. Nothing in the case law suggested that a charity must do the full range of its potential operations in any given year of assessment in order to satisfy section 88 of the IRO. It was only sufficient that its objects and operations, seen together, be sufficient to warrant a finding that the objects were on the balance of probabilities charitable.

49. Turning to the requirement of the objects being exclusively charitable, Mr Mariani referred to Inland Revenue Commissioners v Glasgow (City) Police Athletic Association [1953] AC 380 (HL) at 405, where Lord Cohen said: '*If the main purpose of the body of persons is charitable and the only elements in its constitution and operations which are non-charitable are merely incidental to that main purpose, that body of persons is a charity notwithstanding the presence of those elements.*' Mr Mariani submitted that the Organisation A does not carry on any operations otherwise than in pursuant of its primary object or the only object of the Organisation A which was an end in and of itself, namely the assistance to visiting Position G personnel. This could be inferred from clause 5 of the memorandum of association, which requires the income and property of the Organisation A to be applied solely towards the promotion of the objects of the Organisation A and no portion of it shall be paid or transferred by way of profit to its Position Ds; and clause 8 of the memorandum of association, which provides that in the event of a winding up, no one could participate in the profits or the residue or the surplus in the Organisation A's estate except for an entity having similar objects, subject to the jurisdiction of the High Court to apply the surplus of the Organisation A where there is no such entity. This inability to distribute profits either during the Organisation A's life time or upon its liquidation suggested a mode of operation that is distinguishable from that of a commercial undertaking. Mr Mariani therefore submitted that this requirement was met.

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50. In support of the submission that the Organisation A's surplus or profits were applied solely for charitable purposes and were not expended substantially outside Hong Kong, Mr Mariani referred to clause 5 of the Organisation A's memorandum of association and stated that if this Board was of the view that the Organisation A was a charity then it should follow from the limitation under clause 5 of the application of the surplus or profits of the Organisation A to its objects that its surplus or profits were applied solely for charitable purposes. And, there was no dispute from the Revenue that the Organisation A's surplus or profits were not expended substantially outside Hong Kong.

51. In support of the submission that the Organisation A's trade or business was exercised in the course of the actual carrying out of its expressed objects, Mr Mariani made these points:

- (1) Paragraph (a) of the proviso to section 88 of the IRO does not require the profits to arise from the actual carrying out of the expressed objects, simply 'in the course of', which reflects the need of some connection, such as 'in the process of'.
- (2) The Organisation A derived two streams of income, namely letting income and advertising income.
- (3) In Dean Leigh Temperance Canteen (Trustees) v Inland Revenue Commissioners (1958) 38 TC 315 (Ch D) at 323, the court construed a badly drafted deed to hold that the promoters declared their object was to promote the virtue of temperance (or abstinence from alcohol), and then found that for the promotion of that object, offering an alternative to alcohol was the means by which that object could be achieved, and that for achieving this object, which was considered to be charitable, operating canteens offering non-alcoholic beverages was in the furtherance of this object. Mr Mariani emphasized that any one, whether a teetotaler or not, could go to the canteen.
- (4) The Organisation A was leased Site Y by the Hong Kong Government at nominal rent. This was evidently meant to enable the Organisation A to pursue its object of assisting visiting Position G personnel. It was also plain that the Hong Kong Government wished that the Organisation A occupied Site Y for the advancement of its primary object of providing hospitality and guidance services to the visiting Position G personnel. At the time of the year of assessment 2013/14, the HKSAR Government gave no indication that it wished to re-enter Site Y site.
- (5) The Organisation A did not acquire Site Y as an investment asset. It got the site because the Hong Kong Government licensed the site to it.
- (6) The Organisation A had running expenditures. Letting Site Y to

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commercial tenants was making use of its only material asset to enable the Organisation A to be financially self-sufficient. The Hong Kong Government had not objected to the letting and the tenancy agreement between the Hong Kong Government and the Organisation A implicitly authorized such letting.

- (7) Site Y was the first point of contact with Hong Kong for the visiting Position G personnel and a hub in which they could gather and rest and from which they could begin the explore Hong Kong. Utilisation of Site Y by the Organisation A was fundamental to the pursuance of its primary object of providing facilities, goods and services to visiting Position G personnel. So, the letting of premises at Site Y was a means to an end.
- (8) The same reasoning applied to the advertising income, which arose in the course of the publication of the guidebook. The only reason the guidebook was published was to help the visiting Position G personnel. The guidebook was the physical manifestation of how the Organisation A hoped to advance its primary object. It was the means by which the Organisation A could communicate with the visiting Position G personnel on how to get around Hong Kong, what to do and what not to do. It was very much in the actual course of guiding and rendering services to them.
- (9) The Organisation A had no other way of funding itself.

52. Mr Mariani addressed the deduction of the redevelopment costs under section 16F of the IRO with these submissions:

- (1) Section 16F of the IRO provides an exception to the general rule under section 17(1)(c) of the IRO that expenditure of a capital nature is not deductible.
- (2) A deduction under section 16F of the IRO is only allowable to the extent that it relates to expenditure incurred in the production of chargeable profits. If there is no direct relationship between the expenditure and the profits, then the expenditure is not deductible. Therefore, it was submitted that a deduction under section 16F of the IRO should be available to reduce the amount of chargeable profits if this Board were to conclude that the letting income was chargeable to Profits Tax because it was not exempt under section 88 of the IRO.
- (3) This Appeal raises three questions for the consideration of this Board: (i) whether the expenditure was incurred on capital expenditure; (ii) whether it could be said to have been on the renovation or refurbishment of a building even though no refurbishment actually took place; and (iii) whether the expenditure should nevertheless be

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disallowed from being deductible because it was expenditure incurred by a person to enable a building or structure to be used for a purpose different from that for which it was used immediately before the capital expenditure was incurred.

- (4) Regarding whether the expenditure of redevelopment costs were related to renovation or refurbishment, it could be inferred from the evidence that the Organisation A engaged the consultant at significant expenditure in connection with the making of a submission to the Statutory Body N. It was said that the submission was made because if any work were to be done at Site Y the consent of the Statutory Body N was needed. Reference was made to the Tenancy Agreement which obliged the tenant (i.e. Organisation A) not to alter or demolish any building or structure erected on the premises without the prior consent in writing of the District Lands Officer. This was submitted as a ‘regulatory condition sine qua non’. There could have been no renovation or refurbishment on the scope envisaged by the Organisation A without permission from the Statutory Body N and without the plans setting out what the Organisation A could and could not do and the professional advice that assisted the Organisation A in making its decision. The Organisation A was under the impression that it had to incur the expenditure in order to progress its project at Site Y. The Organisation A’s auditors were satisfied of the reason for incurring the expenditure in the drawing up of the financial statements. Mr Mariani acknowledged that this Board may form the view that a deduction was allowable with respect to some consultants but not all of them.
- (5) As to ‘incurring’ of expenditure, reference was made to New Zealand Flax Investments Ltd v Federal Commissioner of Taxation (1938) 61 CLR 179 (HC Aust) at 207, where Dixon J described ‘incurred’ as meaning not only defrayed, discharged or borne, but including encountered, run into or fallen upon. This concept was intended to have a various or multifarious application and it was unsafe to attempt exhaustive definitions of it, though it did not include a loss or expenditure which is no more than impending, threatened or expected. Mr Mariani summarized that ‘incur’ meant something broader than actually applying it; one can run into expenditure for a capital asset without actually applying it to the purchase of that capital asset.
- (6) As to incurring ‘on the renovation or refurbishment’, it was submitted that to incur expenditure ‘on’ something did not mean applying it directly to that thing. Expenditure could be incurred in the sense of encountered. Thus expenditure could be encountered on the provision of a capital asset, albeit not directly applied to the capital asset. Expenditure could nevertheless have been incurred in the capital

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asset's provision.

- (7) Mr Mariani referred to Commissioner of Inland Revenue v Barclay, Curle & Co Ltd [1969] SC (HL) 30 at 52 as an illustration. The case was concerned with whether expenditure incurred in digging out land to install a drydock for manufacture and repairing of ships was expenditure incurred on the provision of that drydock, categorized in the legislation as 'plant and machinery'. The House of Lords rejected the Commissioner's contention that the provision should be read narrowly and applied only physically to the provision of the drydock and not also to the costs incurred for digging out land and making it ready for the drydock.⁹ So, it was submitted, expenditure on preparatory processes, that are a condition precedent to the capital expenditure, is deductible likewise.
- (8) That no refurbishment or renovation actually took place did not prevent the expenditure from being deductible; see Inland Revenue Commissioners v Guthrie (1952) 33 TC 327 (CS) at 330 and Samarkand Film Partnership (No 3) v Her Majesty's Revenue Commissioners [2017] EWCA Civ 77 at [101].
- (9) The expenditure in question was incurred in the production of chargeable profits. Expenditure incurred on improving the facilities at Site Y would have been incurred in the production of the chargeable profits arising from the letting of the facilities at Site Y.
- (10) Regarding the Revenue's claim that the expenditure was incurred to enable Site Y to be used for a purpose different from that for which it was used immediately before, it was submitted that there was no evidence that the Organisation A intended to change the mode of use of Site Y. A fortiori, the Organisation A could not change the mode of use of Site Y on the terms of its memorandum of association. The Organisation A was also bound by the tenancy agreement over use. The proposal to change the configuration of the structure in which the Organisation A hosted visiting Position G personnel did not mean that it envisaged using it for other purposes. What section 16F(4) sought to prevent was a scenario where a person, who holds a building for commercial or trading purposes, then decides to do something totally different with that building in commercial terms.

53. Mr Mariani, finally, submitted that Commissioner of Inland Revenue could not on the one hand said he did not know the reason why the Organisation A was treated as a charitable institution for 65 years and on the other hand held that the Organisation A's objects were not charitable, since the objects had not changed. Moreover, the Commissioner was satisfied that the Organisation A was a charitable institution on much less evidence than

⁹ See also Inmarsat Global Limited v Her Majesty's Revenue Commissioners [2021] UKUT 0059 (TCC).

what is now before this Board; see the correspondence between the Organisation A and the Revenue in 2007 and 2008. And there were several other times that the Revenue had asked of the charitable status of the Organisation A and then replied that it was satisfied that the Organisation A was a charitable institution.

The Revenue/Respondent's Submissions

54. Mr Law for the Revenue submitted that the Hong Kong authority on what is a charity was Cheung Man Yu (above) at [24]-[26]. He underlined that the Court of Appeal endorsed three separate and distinct requirements of charitable character, benefit to the public and exclusively charitable. He disagreed that the generous construction for charitable purpose the Appellant advocated was consistent with Hong Kong law. Mr Law referred to Attorney General v National Provincial & Union Bank of England [1924] AC 262 (HL), which concerned a gift in a will for the application of part of the estate 'for such patriotic purposes or objects ... in the British Empire' was a good charitable bequest. The contention that 'patriotic purposes or objects in the British Empire' came within the fourth division in Lord Macnaughten's statement in Pensel (above) was rejected. Viscount Cave LC explained at 265 that in relation to the fourth division, '*... it is not enough to say that the trust in question is for public purposes beneficial to the community or for public welfare; you must also show it to be a charitable trust.*' Viscount Cave also made the point that the charitable purpose cannot be too vague or uncertain; it cannot depend on the state of mind of the person who uses the expression. Mr Law further referred to Williams' Trustees v Inland Revenue Commissioners [1947] AC 447 (HL), which concerned an association incorporated with objects that included the promotion of Welsh interests in London and with a clause that prohibited the application of the property, capital or income subject to the trusts for any purpose not being charitable. Lord Simonds reiterated the two propositions of the spirit and intendment of the Charitable Uses Act 1601 and the four divisions from Pensel (above) and agreed with Viscount Cave LC's statement in National Provincial & Union Bank (above). Then Lord Simonds held that the claim must fail since the purpose of the trust deed was '*said to be beneficial to the community or a section of the community and for no other reason that its charitable character is asserted. It is not alleged that the trust is (a) for the benefit of the community and (b) beneficial in a way which the law regards as charitable.*'¹⁰ Mr Law furthermore referred to a recent Hong Kong case of Li Kim Sang Victor v Chen Chi Hsia [2016] 1 HKLRD 1153 (CFI), where Au Yeung J explained the legal principles regarding charitable organisations and charitable trusts at [71] to [75] based on Cheung Man Yu (above). Thus, Mr Law underscored the point that the applicable Hong Kong law requires the satisfaction of three requirements, as opposed to generous construction.

55. Examining the facts of this Appeal, Mr Law made these submissions:

- (1) The objects of the Organisation A in its memorandum of association that the Appellant had relied on as material made no mention of any

¹⁰ Mr Mariani submitted that the Williams' Trustees case should be distinguished on the factual circumstances. The House of Lord held against the claim because of poor pleadings and the lack of clarity in the language of the bequest in favour of 'Welsh people'.

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social, economic or reputational benefit to Hong Kong or any specific group of people in Hong Kong, other than Country E Position F. The Revenue's submission was that the objects were not ambiguous; they only relate to Country E Position F. Also, the correspondence of Organisation A to the Revenue stated that its purpose was to provide services to visiting Position G personnel.

- (2) This Board needed not consider the examples of mutually gainful and harmonious interactions with the Hong Kong community of education and community building activities because these activities ceased to be held in 2013, and in any event, from the correspondence of Organisation A to the Revenue, it was stated by the Organisation A's Position Q that all the community building projects were organized by the consulates of the different countries and not the Organisation A.
- (3) The Organisation A's claim, through Mrs B, that its mission was to assist visiting Position G personnel with a view to fostering good relations between them and the general public of Hong Kong, aiming to ensure that on the one hand the visiting Position G personnel would leave Hong Kong with a good impression of the city and on the other hand, the Hong Kong public would enjoy the economic, social and reputational benefits of Position G visits with least possible disruption to the norms, laws and customs of Hong Kong must fail. This claim had not been asserted in any contemporaneous document and any correspondence with the Revenue, including the letters of the legal representative. No concrete and detailed steps or activities were provided to allow consideration of the genuineness of the asserted matters. This claim was vague and uncertain; 'economic, social and reputational benefit of Hong Kong' are hard to determine judicially. The benefits related to this claim were too remote and only incidental to the objects of the Organisation A. Whether the visiting Position G personnel would spend money in Hong Kong, had positive social interactions and left with a good impression of Hong Kong mostly depended on their own actions and experience as individuals when they stayed in Hong Kong. The activities of the Organisation A of providing the visiting Position G personnel with facilities and a guidebook would not guarantee or lead to them spending a lot of money or having good social or reputational effect to Hong Kong.
- (4) The Organisation A could not establish that its object and its activities were for the benefit of the Hong Kong public or community. Two questions should be considered and satisfied: (i) Whether the purposes of the institution confer a benefit on the public or a section of the public; and (ii) whether the class of persons eligible to benefit constitute the public or a section of the public. The Organisation A's provision of the facilities and services at Site Y to visiting Position G

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personnel could not be argued as a benefit to the Hong Kong community. The group of persons the Organisation A stated as eligible to benefit were temporary visitors and not Hong Kong residents; they did not form part of the Hong Kong community.

- (5) The Organisation A was not exclusively charitable, since it was not charitable at all.

56. Mr Law submitted that if the Organisation A were found to be a charitable institution, then the issue arising out of the proviso of section 88 of the IRO had to be determined. Mr Law then submitted that the business and trade of the Organisation A, namely the letting of the property as well as the advertising on the guidebook, were not exercised in the actual carrying out of the actual carrying out of the Organisation A's objects. Mr Law referred to Dean Leigh Temperance Canteen (above), and submitted that that case established the requirement that in order to be regarded as exercised in the course of the actual carrying out of the charitable purpose, that charitable purpose must be the sole purpose of the business or activity. This meant that the letting out of property and the publication of the guidebook must have the sole purpose of promoting the Organisation A's objects. Mr Law asked this Board to consider how, on the information provided by Organisation A, the shops and restaurant were actually run, noting that any one could become a Position D of the Organisation A upon application and with membership, access to the shops and restaurant at Site Y, that the Organisation A had no control how its tenants operated the shops and restaurant, and that the tenants did not differentiate between Position F customers and non-Position F customers and ran their businesses on a commercial basis. From all these matters, it could not be said that by letting the shops and restaurant, Organisation A furthered its object of serving the visiting Position G personnel. Regarding the advertising income associated with the guidebook, Mr Law asked this Board to consider how the guidebook was distributed. Since any one could get a free copy of the guidebook at Site Y, copies were sent to the Organisation P for distribution to merchant sailors, copies were available at the restaurants and bars that advertised on it, and a copy could be downloaded from the internet, it could not be argued that the distribution of the guidebook was for the sole purpose of advancing the object of the Organisation A stated above. Mr Law also observed that the contents of the guidebook were not different from any tourist guide and it could not be argued that the guidebook itself was of the sole purpose of advancing the object of the Organisation A. Accordingly, the Organisation A would fail to meet the requirements of the proviso.

57. Turning to section 16F of the IRO, Mr Law's submissions were as follows:

- (1) In order to be able to make use of section 16F, the taxpayer not only needs to incur capital expenditure on the renovation or refurbishment of a non-domestic building, the taxpayer must also satisfy that the expenditure was incurred in the production of chargeable profits, so as to be deductible from those profits.
- (2) The redevelopment costs claimed was not incurred on renovation or refurbishment. The evidence before this Board, consisting of only

invoices, failed to show exactly what the project related to Site Y was about. Mrs B could not assist this Board to understand the scope of the project referred to in various descriptions on the invoices. Further on the face of the invoices, the descriptions suggested an application for rezoning. The Statutory Body N's approval was in respect of a proposed development.

- (3) Even if the redevelopment costs were in any way related to renovation or refurbishment of a building, there was no evidence showing that such costs were in the production of profits chargeable to Profits Tax.
- (4) Sub-section (4)(c) arguably would apply. On the face of the evidence before this Board, there was at least a possibility, if not a high possibility, that after the rezoning application, the building or the structure would be used for a different purpose.

58. Mr Law finally made the point that the activities of the Organisation A changed over time and there was no evidence on and no reasons before this Board on why in the past, the Organisation A was recognized or regarded by the authorities as a charitable institution. It was wrong for the Appellant to contend that since their activities remained the same, the criteria of the law remained the same, the recognition by the authorities of the Organisation A as a charitable institution over the years meant that it should be recognized as a charitable institution now or that the Revenue's case was misconceived. There was the need, on the part of the Revenue, to constantly review the charitable status of institutions. This was the reason for the Revenue to review and determine on the Organisation A's status. Mr Law urged this Board to consider the evidence before this Board in accordance with the law.

Discussion

59. This Appeal raises issues concerning the Organisation A that deserve and require anxious consideration by this Board within the framework of tax appeals. This is because the Organisation A was incorporated as a non-profit company limited by guarantee for the promotion of the objects stated in its memorandum of association and the Commissioner of Inland Revenue had recognized and confirmed that the Organisation A was a charitable institution from the year of its incorporation (i.e. 1955) up to at least 2008.

60. The framework of tax appeals requires the Appellant to establish that the assessment appealed against is excessive or incorrect by reason of the grounds of appeal in the statement of grounds of appeal lodged with the Clerk to the Board of Review. In the context of this Appeal, the Appellant has the onus to establish that it was 'at all material times a charity at Hong Kong law and within the meaning of section 88 of the [IRO], and was accordingly exempt from profits tax'.¹¹ While the Acting Deputy Commissioner had explained in her Determination the reasons why she was unable to accept that the

¹¹ See paragraph 2 above.

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Organisation A was a charitable institution under section 88 of the IRO,¹² it falls upon this Board to determine on the evidence before this Board and in accordance with the applicable law the principal question of whether the Organisation A was a charitable institution under section 88 for the purpose of exemption from taxation for the year of assessment 2013/14.

61. Having considered the evidence before this Board, this Board confirms that the factual matters stated in paragraph 10 above were not disputed and finds them as facts.

62. The Appellant called Mrs B to testify as a witness of fact. This Board has read Mrs B's witness statement and heard and observed her testimony. This Board finds that Mrs B was not personally involved in many of the aspects of the operations of Organisation A that her witness statement had described in detail. This Board accepts the submission of the Revenue that Mrs B was not a reliable witness. This Board is not satisfied that Mrs B's witness statement deposed facts and matters that were really within her personal knowledge and places no weight on the parts of Mrs B's witness statement that had not been confirmed by her testimony, the terms of which are summarized in paragraphs 18 to 36 above. On the other hand, this Board has taken into account Mrs B's testimony summarized in paragraphs 18 to 36 above in reaching its conclusions on the issues raised in this Appeal.

63. The first and principal issue that this Board determines in this Appeal is whether the Organisation A was a charitable institution under section 88 of the IRO for the purpose of exemption from taxation for the year of assessment 2013/14. Although the parties have accepted that the common law based law of charities applies in the interpretation of 'charitable institution' for the purpose of section 88 and both have referred to the Court of Appeal's judgment of Cheung Man Yu (above), which stated the three requirements of the law for a charity in the legal sense (or the technical meaning of 'charity' under Hong Kong law), they have appeared to differ on how the requirements should be applied, including in a situation where an ambiguity arises. This appears to be of some significance since the Appellant's case relies on the fourth division of charitable purposes expressed in Lord Macnaughten's statement in Pemsel (above), contending that the Organisation A was for 'other purposes', not falling within relief of poverty, advancement of education and advancement of religion, 'beneficial to the [Hong Kong] community'.

64. The first condition the Court of Appeal identified in Cheung Man Yu (above) is that the purposes of the institution must have charitable character, that is, they must be within the spirit and intendment of the preamble to the Charitable Uses Act 1601. This Board has reproduced the language of the preamble in paragraph 42 above. This Board notes that the language of the preamble refers to Position Z or Position F at two places, namely, 'the maintenance of sick and maimed soldiers and mariners' and 'the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes'. Of these two, the latter is concerned with relief of the poor from levies and taxes and therefore clearly irrelevant in the context of this Appeal. The former is concerned with the care and support of the sick and injured Position Z or Position F. Verge v Somerville (above) provides an analogical consideration; the Privy Council had no doubt that an object of restoring returned soldiers to their native land and there giving them a fresh start in life was

¹² See paragraph 13 above.

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charitable (at 506). However, this connects with and illustrates spirit and intendment or provides a theme (a concept that Mr Mariani had urged upon this Board) rather different from the contended purposes the Appellant gathered from the objects of the Organisation A in its memorandum of association and the activities of the Organisation A of rendering assistance, guidance and support to visiting Position G personnel and informing and promoting Hong Kong to visiting Position G personnel, so that the visiting Position G personnel would enjoy their visits in Hong Kong while being mindful of Hong Kong's laws, customs, society and culture.¹³ Although Mr Mariani had submitted on case law that prefers ascertainment of charitable character by analogy, inference and keeping the law moving as new social needs arise or old ones becoming obsolete, as well as for a generous or benignant approach in construing an object to be within the spirit and intendment of the preamble to the Charitable Uses Act 1601, this Board is unable to analogise, infer or identify new social needs to accommodate the Appellant's contended purposes within the spirit and intendment of the preamble to the Charitable Uses Act 1601. Putting the point in another way, this Board finds no similarity or connection in theme that enables accommodation of the Appellant's contended purposes. Another submission that Mr Mariani made was to suggest a common thread of all the objects in the preamble as operations in 'social goods' that the government would need to take on if there are no charities providing them. This Board rejects this submission; it is not only apparently circular but also one that introduces a generalization, based apparently on a notion coming from economics, that would, in this Board's opinion, remake the law on charitable character. Viscount Cave LC stated in National Provincial & Union Bank of England (above) at 265 that the fourth division of 'trusts for other purposes beneficial to the community' in Lord Macnaughten's statement in Pemsel (above) '*did not mean that all trusts for purposes beneficial to the community are charitable, but that there were certain charitable trusts which fell within that category; and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning. So here it is not enough to say that the trust in question is for public purposes beneficial to the community or for public welfare; you must also show it to be a charitable trust.*' This Board finds this to be a difficulty that the Appellant has not overcome,¹⁴ and holds that the Appellant has failed to satisfy the first condition.

65. The second condition is that the institution must exist for the benefit of the public. The Court of Appeal in Cheung Man Yu (above) also endorsed in [26] the statement in Tudor on Charities on public character, which requires the institution to be for the benefit of the community or an appreciably important section of the community, and this requirement may involve the condition of two closely related questions: (i) whether the purposes confer a benefit on the public or a section of the public; and (ii) whether the class of persons eligible to benefit constitutes the public or a section of it.

¹³ In this connection, this Board has considered Mrs B's testimony summarized in paragraphs 19, 20, 22, 23, 24, 25 and 26 above. This Board accepts Mrs B's testimony in those paragraphs as matters of fact coming from her personal knowledge.

¹⁴ This difficulty can be further complicated by an uncertainty on whether the 'soldiers' within the spirit and intendment of the Charitable Uses Act 1601 were restricted to those owing allegiance to the monarch and whether the expression extended to at least those allied to the monarch. This Board is initially inclined towards an extended meaning of the expression, but due to the absence of submissions from the parties at the hearing on the issue, would refrain from expressing a concluded view.

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66. This Board is unable to agree that the class of persons sought to be benefitted under the Organisation A's objects and activities, namely visiting Position G personnel,¹⁵ constitute an appreciably important section of the Hong Kong community, given that they were and are, as Mr Law had submitted, temporary visitors and not Hong Kong residents. As to the two related questions, this Board finds that the objects and activities of the Organisation A did not confer a benefit on the Hong Kong public or a section of the Hong Kong public, given that the visiting Position G personnel referred to in the objects and aimed at in the activities may not, for the same reason submitted by Mr Law, be regarded or treated as a section of the Hong Kong public. On the other hand, depending on what 'the class of persons eligible to benefit' may mean, it can be said that some of the operations organized or permitted by the Organisation A could benefit the Hong Kong public in that any person can become a Position D of the Organisation A and on that basis gain access to the premises of the Organisation A at Site Y. This contention, however, relies on different provisions of the memorandum and articles of the Organisation A and on what can be regarded as the incidental of its activities. Therefore, this contention does not materially affect this Board's consideration of the second condition. So, this Board holds that the second condition is not satisfied.

67. The third condition is that the charitable institution must be exclusively charitable. Because the Organisation A cannot satisfy the first condition on the basis of the objects and activities that it has relied on, Mr Mariani's submission based on clauses 5 and 8 of the Organisation A's memorandum of association loses its force. This Board holds that the third condition is not satisfied.

68. Before concluding the discussion on the character of the Organisation A as an institution, this Board would comment on three submissions from the Appellant. They include the general proposition, advanced by Mr Mariani, that a charity ought to be found unless there are good reasons for not doing so; the reliance, repeatedly by Mr Mariani, of the Hong Kong Government's leasing of Site Y to the Organisation A at nominal rent; and the recognition of the Organisation A as a charitable institution by the Commissioner of Inland Revenue for the 65 years between 1955 and 2020.

69. This Board understands these three submissions as presenting together a case that since it could be inferred from the Hong Kong Government's very favourable grant of use of prime harbourfront land to the Organisation A over the years and its recognition of the Organisation A as a charitable institution over the years that the Organisation A was

¹⁵ This Board agrees that the objects and activities of the Organisation A did bring tangible benefits to visiting Position G personnel. The facilities and services available at Site Y, including the counselling and translation services by pastoral members and other members of the Organisation A, provided the visiting Position G personnel a place of rest, help and information. The Organisation A's pocket sized guidebook not only was informative in simple English language but also contained particular contents of use by Country E Position G personnel and other visiting Position G personnel, including information on the Office AA catering for Country E Position G personnel, information on Country E Post Office X, information on credit unions, information on Position L services, information for Country E nationals on purchasing 'Chinese-type goods', information on phone cards, internet and Wi-Fi services provided at Site Y, and information to show to taxi drivers for getting back to Site Y.

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at least a corporation of *prima facie* public utility, its status as a charitable institution should only be denied with good reasons. And if good reasons could not be found, this Board should uphold the Organisation A as a charitable institution.

70. This Board is unable to accept the case so presented. The general proposition itself sought to pursue a line of reasoning rather different from that of the Hong Kong law set out in Cheung Man Yu (above). The favourable attitude and actions of the Hong Kong Government over the years towards the Organisation A cannot be a substitute of the legal analysis that has to be undertaken to determine whether the Organisation A was at the material time a charitable institution; it is the law that regards the organization concerned as charitable.

71. The Organisation A failed to meet the three conditions endorsed in Cheung Man Yu (above) at the material time. This Board holds that the Organisation A was not a charitable institution under section 88 of the IRO for the purpose of exemption from taxation for the year of assessment 2013/14.

72. Given that this Board has concluded that the Organisation A was not a charitable institution under section 88 of the IRO for the purpose of exemption from taxation for the year of assessment 2013/14, it is strictly unnecessary for this Board to discuss the issues arising from the proviso to section 88 of the IRO. But, in the light of the submissions of the parties and in case that this Board were found to have erred, this Board provides a brief statement of its consideration of the issues arising from the proviso. Firstly, this Board agrees that the Organisation A's trade or business, at least that of letting out of premises, was in the course of the actual carrying out of its expressed objects. The Organisation A was leased Site Y by the Hong Kong Government, and had maintained it as a fleet landing, premises and other conveniences for visiting Position G, with reference to the object in clause 3(b) of the Organisation A's memorandum of association. Letting out premises at Site Y to tenants had enabled the Organisation A to have a stream of income to pay its staff and fund its activities.¹⁶ Secondly, the Organisation A was obliged by virtue of clauses 5 and 8 of its memorandum of association to apply its profits solely for its objects (or purposes). Thirdly, the Organisation A's profits were not expended substantially outside Hong Kong.

73. Finally, the Appellant has made a claim for deduction of 'redevelopment costs' in the amount of \$1,142,988 under section 16F of the IRO. The Organisation A furnished the Revenue its audited financial statement for the year of assessment 2013/14 which included 'redevelopment costs' as an operating expense.¹⁷ In reply to the Revenue's

¹⁶ In this connection, this Board has considered Mrs B's testimony summarized in paragraphs 27, 28 and 30 above. This Board accepts Mrs B's testimony in those paragraphs as matters of fact coming from her personal knowledge.

¹⁷ The relevant note to the profit and loss account in the audited financial statement stated as follows: '[Site Y] situated at [Address M] was no longer available for ship landing since 2011 due to Victoria Harbour reclamation. Then, the association had been working with the Government to review and study the possible rezoning and/or redevelopment of Address M with the aim of retention of its facility situated there. The association had to hire architect to resolve the relevant zoning, lands, planning, design and technical issues and lodge the relevant applications to different government authorities. Upon redevelopment and/or

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enquiry expressing the view that this item of ‘redevelopment costs’ was capital expenditure and therefore non-deductible, the legal representative of the Appellant sought to explain in a letter dated 14 July 2020 that it was expenditure for refurbishment or renovation falling under section 16F in relation to the charge of Profits Tax on the income from the letting of premises. Particularly, it was said that the Organisation A incurred the expenditure to instruct consultants to draw up plans and to produce presentation material to enable it to apply to the Statutory Body N for approval of proposed refurbishment works and the Statutory Body N’s written approval was enclosed, together with a table showing the date and amount of expenditure incurred and the name of the relevant contractor.¹⁸ The Revenue had requested the Organisation A for the agreements entered into with the contractors, invoices issued by the contractors and relevant information and documents to support the claim for deduction of ‘redevelopment costs’, but the Organisation A did not provide any further information and documents before the Acting Deputy Commissioner made the Determination.

74. For the purpose of this Appeal, the Appellant furnished this Board as an exhibit to Mrs B’s witness statement a table of expenses and a set of invoices from three companies. These invoices, on their face, indicate services rendered by: (i) Company S (by its Position T, Mr U, charging by the hour) of ‘Development Management Fee & Expenses’ for ‘Development of [Organisation A], [Site Y], [Address M]’ in the total amount of \$495,000; (ii) Company V for the project of ‘[Site Y] – S12A Application Drawings Submission’ in the amount of \$140,000; and (iii) Company W for ‘Planning Advisory and Subsequent Section 12A Planning Application (Rezoning Request) in Respect of [Address M]’ in the total amount of \$437,988.10.¹⁹ The total sum of expenditure that could be claimed on the basis of these invoices was \$1,072,988.10.

75. Mrs B was asked about the project concerning the premises at Site Y and the invoices. Her testimony in those respects have been summarized in paragraphs 32 and 33 above. This Board had taken Mrs B’s testimony into account in the examination of the Organisation A’s claim for deduction of ‘redevelopment costs’ under section 16F of the IRO.

76. The Appellant’s case for the section 16F deduction, as conveyed by Mr Mariani, was that by reference to the Tenancy Agreement with the Hong Kong Government, the Organisation A was obliged not to alter or demolish any building or structure erected on the premises without the prior consent in writing of the District Lands Officer. This was submitted as a ‘regulatory condition sine qua non’. It could be inferred from the evidence that the Organisation A engaged the consultants at significant expenditure to make an application to the Statutory Body N because the consent of the Statutory Body N was needed

rezoning, the association’s facilities can be properly utilized for commercial, cultural, institutional and recreational land use in order to fulfil its charitable objects and to attract more visitors. ...’.

¹⁸ The Revenue had noted that the total payment to contractors shown in the table was \$1,072,988.10 which was less than the amount of ‘redevelopment costs’ of \$1,142,988 claimed by Organisation A.

¹⁹ Three invoices were issued by Company W. The first was to request payment ‘upon submission of the Tree Survey’. The second was to request payment ‘upon submission of the preferred preliminary conceptual landscape design’ and ‘upon submission of the draft supplementary planning statement’. The third was to request payment of ‘disbursement’.

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if any work were to be done at Site Y. The Organisation A was under the impression that it had to incur the expenditure in order to progress its project at Site Y.²⁰

77. This Board accepts, and it seems that it is not disputed, that the premises at Site Y were at the material time a building or structure other than a domestic building or structure. Next, this Board considers the evidence said to be supportive of the claim that the expenditure claimed was ‘on the renovation or refurbishment’ of those premises. The invoices before this Board were for the preparation of a rezoning application to the Statutory Body N in respect of Site Y at Address M and for the management of the development of Site Y. ‘Development’ is a wide expression in relation to buildings and structures and it can encompass renovation or refurbishment on the one hand, and demolition and rebuilding on the other hand.²¹ The Statutory Body N’s written approval letter is of no assistance to the issue because it relates to a different application (one made under section 16 of the IRO) considered several years after whereas the invoices were for the preparation of a section 12A rezoning application.²² Although Mrs B’s testimony sought to suggest that Organisation A considered options regarding the old, damaged and deteriorated premises at Site Y and concluded in favour of repairing and refurbishment and not demolition and rebuilding, she was not able to state the time frame of the discussion and decision-making of the relevant committee of the Organisation A and particularly, she was only able to say that the consultant was engaged by the Organisation A and the consultant was to consider all different options of redevelopment, rezoning and refurbishment and give advice. Her understanding of rezoning involved moving the building to another location and rebuild, which appeared to be different from what Company W were preparing for Organisation A in the year of assessment 2013/14, namely a rezoning application in respect of ‘[Site Y], Address M’. She did not directly deal with payments and had not seen the invoices before the hearing.²³ Therefore, this Board finds that on the evidence, the Appellant has failed to establish, on balance of probabilities, that the expenditure claimed was ‘on the renovation or refurbishment’ of a building or structure other than a domestic building or structure.

78. This Board can be brief on the remaining issues relating to the claim under section 16F of the IRO: (i) This Board would have accepted the submission that expenditure on preparatory processes, including on the obtaining of a necessary regulatory consent, could be deductible as capital expenditure; (ii) This Board would have accepted the submission that the fact that no refurbishment or renovation actually took place did not prevent the expenditure from being deductible; (iii) This Board would have accepted the

²⁰ Mr Mariani suggested to this Board nearing the end of his reply that he would seek to ask the Organisation A to locate the application paper submitted to the Statutory Body N for provision to this Board. This Board was concerned whether Mr Mariani proposed to re-open the Appellant’s case, and Mr Mariani replied in the negative.

²¹ Mrs B’s testimony was that she understood ‘redevelopment’ to be rebuilding the building, including rebuilding the building at a different site.

²² Generally speaking, a rezoning application under section 12A of the Town Planning Ordinance (Chapter 131) usually seeks more significant changes than a planning permission application under section 16 of the same. The former seeks to change the plan in respect of the site, whereas the latter seeks permission to perform works on the site within the framework of the applicable plan.

²³ The invoices themselves show that the invoices of Company S and Company W were addressed to Mr R, the Position Q of Organisation A (see paragraph 28 above), and the invoice of Company V was addressed to Organisation A, care of Company S.

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submission that the expenditure claimed to have incurred would have been incurred in the production of chargeable profits of the Organisation A, namely the profits arising from its business of letting out of the premises at Site Y; (iv) This Board would have held that there was insufficient evidence before this Board to enable this Board to determine, one way or the other, that the building or structure at Site Y would be used for a purpose different from that for which it was used immediately before the expenditure was incurred; (v) Even if the Appellant were to succeed substantively in its claim under section 16F, the deduction that it could possibly establish on the evidence would have been only \$1,072,988.10.

Decision

79. This Board determines that the Appellant has failed to discharge the burden of proof it has under section 68(4) of the IRO to show that the Profits Tax Assessment for the year of assessment 2013/14 imposed on it was excessive or incorrect. The Appellant's appeal is dismissed. The Profits Tax Assessment for the year of assessment 2013/14 that the Acting Deputy Commissioner of Inland Revenue, by her Determination dated 29 April 2021, had revised to Assessable Profits of \$2,745,867 with Tax Payable thereon of \$443,068, is affirmed.