



Hong Kong Institute of
Certified Public Accountants
香港會計師公會

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Hon. Chan Kam-lam
Chairman, Bills Committee on
Inland Revenue (Amendment) (No.2) Bill 2009
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Mr. Chan,

Inland Revenue (Amendment) (No. 2) Bill 2009

Amendments relating to the operation of the Board of Review

The Institute agrees with the proposed amendments relating to the operation of the Board of Review ("BOR"), contained in the Inland Revenue (Amendment) (No.2) Bill 2009 ("the Bill"), which are fairly limited in scope and non-controversial. They provide that:

- (a) Members will be nominated by the chairman of the BOR, rather than a government official, to hear appeals.
- (b) In addition to continuing to be able to handle an ongoing case if his or her appointment expires before the case is completed, a retired member will be allowed to handle a case that he or she has handled before in the additional sets of circumstances outlined in paragraph 5 of the Legislative Council Brief on the Bill.
- (c) Where both the chairman and a deputy chairman are involved in hearing a case, either the chairman or the deputy chairman will be the presiding officer of the hearing and only the presiding officer will have the casting vote.

While we support the proposed changes contained in this Bill, we also note that the Court of Final Appeal ("CFA") has raised questions about whether the existing structure of the BOR properly facilitates the hearing of complex tax appeals. The judges in the case of *ING Baring Securities Ltd v Commissioner of Inland Revenue* asked whether it is time to establish a tribunal served by a full-time members.

In this regard, the Institute believes that the proposed changes do not go far enough to address the concerns of the CFA and would suggest that the government consider making more extensive changes to the operation of the BOR. In our view, there are, in particular, two important aspects that require attention, namely the composition of

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the BOR and the "case stated" procedure applicable in appealing decisions of the BOR to the court. Our specific recommendations are contained in the appendix.

Other technical amendments to improve the administration of the ordinance

The Institute supports the other technical amendments to the Inland Revenue Ordinance contained in the Bill, which seem reasonable.

If you have any questions on the Institute's submission, please do not hesitate to contact me at 2287 7084 or peter@hkicpa.org.hk.

Yours sincerely,

Peter Tisman
Director, Specialist Practices

PMT/EC/ay
Encl.

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Proposals for Changes to the Operation of the Board of Review

Composition

1. While the majority of tax appeals lodged in Hong Kong may involve simple and straightforward matters, the Board of Review ("BOR") also regularly hears cases involving more complex matters.
2. The Court of Final Appeal ("CFA") case of *ING Baring Securities Ltd v Commissioner of Inland Revenue* (FACV 19/2006) ("*ING Baring*") involved a complex tax appeal. The judges in that case raised certain questions about the operation of the BOR, including whether the BOR is appropriately constituted and staffed to handle complex tax appeals such as *ING Baring*.
3. The Institute has previously expressed concern that the BOR does not appoint tax practitioners with significant tax expertise who are currently practising tax professionals. This denies the BOR access to a considerable body of practical tax expertise. In addition, given the large pool of members of the BOR, many of the lay members hear very few cases each year and accordingly do not have the opportunity to develop an expertise in taxation matters. Various reasons are given for the exclusion of practising tax experts, but primarily these reasons are related to the question of conflicts of interest.
4. In our view, this approach contributes to problems, such as potential inconsistencies in the findings of different boards, and is also a factor to be considered in the current handling of complex tax cases.
5. The issue of inconsistencies was recognised by the BOR in its obiter comments in the case of D126/02, where, during the hearing of that case, there were four pending appeals raising exactly the same legal and factual issues before four differently constituted BORs.
6. The BOR in D126/02 stated that, "unless the appeals were co-joined or set down in the same tribunal inconsistent findings were possible." The BOR continued that, "whilst inconsistent results may, in legal theory, be justified on the basis that different boards may hear different evidence and form their own impression of witnesses, this would hardly be comprehensible to a taxpayer who obtains an adverse result from the board. Any such contingency would speak ill of the administration of justice as a whole and generates unfairness to the particular taxpayer. This should be avoided if at all possible."
7. While strictly speaking, in terms of legal precedent, each board may not be bound by earlier BOR decisions, nevertheless it is in the interests of good and transparent decision-making that, in any particular case, the board should be aware of earlier BOR decisions that may be considered relevant to the case in hand. In reaching a decision, generally, a board should have regard to and, where appropriate, acknowledge earlier BOR decisions on the same topic.

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Other jurisdictions

8. The Institute has previously considered the position regarding tax appeals in other jurisdictions and noted in particular the procedures in place, until recently, in the United Kingdom ("UK"), where there were two levels of tax tribunals or "commissioners" equivalent to Hong Kong's BOR.
9. The "general commissioners" dealt with the more simple and non-technical cases, while the more technical and complex cases were heard by the "special commissioners", who possessed significant tax expertise and experience and were usually legally qualified. The commissioners were supported by a qualified clerk in the process of categorising cases as simple or complex.
10. Although, following a review of tribunals in the UK, the general and special commissioners were recently replaced by a First-tier Tribunal (Tax), individual panels are still constituted according to the needs of the case and may be heard by legally-qualified judges, non-legally-qualified expert members, or a mix of the two.

"Case stated" procedure

11. Appeals from the BOR to the courts are by way of the "case stated" procedure, which has been criticised by the CFA. The Institute supports the comments of McHugh NPJ and the other judges in the CFA decision in *Lee Yee Shing v CIR* (FACV 14/2007), who stated (at paragraphs 40-42 and 109), that an appeal from the BOR that was "limited to questions of law seems more likely to further the administration of justice than the case stated procedure", and that the interest of justice may be better served "by abandoning the case stated procedure and substituting an appeal on questions of law".

Specific recommendations

12. In the light of the above, the Institute considers that a full-time panel, comprising individuals with significant tax expertise, should be established within the BOR to hear the more complex cases. This would provide the BOR with a high level of tax expertise whilst resolving the question of conflicts of interest, as the panel members would be employed full time at the BOR. More specifically, we recommend:
 - A full-time legally qualified clerk should be appointed to the BOR.
 - The BOR should establish a specialist panel of four or five persons employed as full-time members. This panel would deal with the complex cases. All specialist panel members should have considerable tax experience, preferably, not less than ten years. One of these full-time members would be appointed as the chair of the BOR, with the other panel members appointed as deputy chairs.

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- It may be appropriate for the specialist chairman of the BOR to be a judge or person with the relevant qualifications for such an appointment.
 - The specialist panel members' employment should be for a set period. Once the panel is established there should be a staggered appointment of panel members, so that there is a renewal of the expertise on the panel on a regular basis. We believe that a contract period of three to five years may be suitable.
 - Complex BOR cases should be heard by three full-time panel members.
 - With regard to simple cases, there are advantages to retaining the existing BOR procedures, which are simple, inexpensive and informal. These provide an accessible form of hearing for smaller and/or simpler tax cases. Such cases should continue to be dealt with by part-time members of a general panel of the BOR (which will include deputy chairmen). However, we suggest that this panel of general members of the BOR should be smaller than the present pool to ensure general members develop a greater expertise in taxation matters.
 - Where members of the specialist panel are not engaged in hearing specialist cases (or writing the decisions on these cases), they could be engaged to sit as the chairman of BORs hearing non-complex tax cases, to ensure that there is a continuity in the administration of the tax system, and that, in reaching a decision, individual boards have regard to and, where appropriate, acknowledge previous BOR decisions on the same topic.
13. Separately, we recommend that the case stated procedure be replaced by an appeal on questions of law, as proposed by the CFA in the *Lee Yee Shing* case.