

LEGISLATIVE COUNCIL BRIEF

INLAND REVENUE (AMENDMENT) (NO. 2) BILL 2009

INTRODUCTION

At the meeting of the Executive Council on 2 June 2009, the Council ADVISED and the Chief Executive ORDERED that the Inland Revenue (Amendment) (No.2) Bill 2009 (“the Bill”), at Annex, should be introduced into the Legislative Council. The Bill seeks to smooth the operation of the Board of Review (“the Board”), a statutory body constituted under the Inland Revenue Ordinance (“IRO”) to hear tax appeals, and to improve the administration of the IRO.

JUSTIFICATIONS

2. To smooth the operation of the Board and to improve the administration of the IRO, we propose to introduce some technical amendments to the IRO and consequential amendments to the Tax Reserve Certificates Ordinance (“TRCO”) by the Bill. The proposed amendments are summarised in the following paragraphs.

Amendments Relating to the Operation of the Board of Review

3. The Board currently has no authority to correct mistakes in its written decisions on tax appeals if the correction would prejudice one of the parties, notwithstanding that such mistakes are obvious clerical mistakes. We propose to empower the Board to do so.

4. Under the existing provisions, the Chief Secretary for Administration shall nominate members of the Board to hear appeals. However, in practice, it has been the chairman of the Board who nominates members to form hearing panels. The Department of Justice advised that this practice should not affect the validity of the Board’s

decision. That said, to reflect the independence of the Board and to formalise the existing practice, we propose to amend the IRO so that members are to be nominated by the chairman of the Board, rather than a government official, to hear appeals.

5. Currently, the IRO provides that a member may continue to handle an ongoing case even if his appointment expires before the completion of the case. However, a retired member is not empowered to handle a case he has handled previously in the following circumstances –

- (a) when the court remits a case to the Board for rehearing;
- (b) when the Board has dismissed a case, but later on accepts the appellant's application for re-hearing; and
- (c) when the appellant or the Inland Revenue Department ("IRD"), dissatisfied with the Board's decision, requests the Board to state a case on a question of law for the opinion of the Court of First Instance.

In the above circumstances, if the members (particularly the chairman or a deputy chairman) who have handled the case previously have retired, the Board may have to nominate other members to handle the case. The new members may need to spend tremendous effort and time to acquaint themselves with the case. To enhance the Board's efficiency, we propose that a retired member be allowed to handle a case that he has handled before in the above circumstances, and be remunerated for performing such functions.

6. Currently, three or more members of the Board may hear a case, and one of them must be the chairman or a deputy chairman of the Board, who will have the casting vote on the case. If an appeal is heard by both the chairman and a deputy chairman, we propose to make it clear that either the chairman or the deputy chairman will be the presiding officer of the hearing and only the presiding officer has the casting vote. This is to reflect the existing practice.

Other Technical Amendments to Improve the Administration of IRO

Profits tax

7. Interest payment on money borrowed to finance capital expenditure incurred in purchasing machinery or plant is explicitly deductible from profits tax payable if the expenditure qualifies for

depreciation allowance. However, as machinery and plant for research and development, prescribed fixed assets or environmental protection machinery have been allowed a 100% upfront deduction in the year of purchase and they no longer qualify for depreciation allowance, any interest payment on capital expenditure incurred in purchasing such machinery and plant and assets are not explicitly deductible from profits tax. To correct this disparity, we propose to allow interest payment on capital expenditure incurred in purchasing such machinery and plant and assets to be explicitly deductible from profits tax.

Salaries tax and tax under personal assessment

8. A taxpayer may claim home loan interest deduction for a particular year within six years after that year. A taxpayer having been allowed home loan interest deduction may also revoke the claim within six months after the deduction is allowed. In case such a claim is revoked, the IRD should be entitled to raise additional assessment of tax payable for the relevant year accordingly. However, the IRO stipulates that an additional assessment can only be raised within six years after the relevant year.

9. Therefore, technically, a taxpayer can withhold claiming the home loan interest deduction for a particular year until the sixth year after, and revoke the claim within six months after the deduction is allowed. In such a case, the IRD may be time-barred to raise an additional assessment for that particular year. To plug this loophole, we propose to empower the assessors to make additional assessments, within two years after the revocation, of the home loan interest deduction claims if the revocation is made after the six-year statutory period.

Property tax

10. Common parts of a building are co-owned by all owners of the individual flats of the building. Where rental income is received for the use of common parts of a building (e.g. the outer wall), all owners of the building should be chargeable to property tax. However, in reality, it may be difficult to raise a property tax assessment on all owners of a building in respect of the rental income received for the use of the common parts. We therefore propose to amend the definition of “owner” in the IRO so that a property tax assessment can be raised on the Owners’ Corporation registered under the Building Management Ordinance (Cap. 344) or the person who receives rental income on common parts of a building (e.g. the building management company).

IRD staff breaching secrecy provisions

11. If an IRD staff member breaches the secrecy provisions of the IRO, the IRD currently can only bring prosecution against that staff member within six months from the date when the offence is committed. We propose to extend the period within which prosecution of such offences may be brought from six months to six years to align with similar provisions under the Business Registration Ordinance. The extension applies only to offences committed on or after the commencement of the Bill (when enacted).

Tax Reserve Certificates (TRCs)

12. Taxpayers who lodge objections to their tax assessments may be asked to purchase TRCs as security for the holdover of the tax in dispute. Taxpayers may claim back any remaining balance of their TRCs with interest after the objections are finalised. However, there has been an accumulation of unclaimed balances in the TRC deposit account long after the finalisation of objections, and the Director of Audit considers this situation unsatisfactory. To help clear the unclaimed balances more effectively after finalisation of objections, we propose to empower the Commissioner of Inland Revenue to repay the remaining balances of TRCs with interest to relevant taxpayers unilaterally without asking the taxpayers to surrender their TRCs. Consequential amendments to the TRCO and its subsidiary legislation will also be made to reflect the proposal.

Miscellaneous

13. A number of minor textual amendments to the IRO have also been proposed for achieving consistency or removing spent provisions.

THE BILL

14. The main purposes of the Bill are to smooth the operation of the Board and to improve the administration of the IRO. The Bill is divided into 5 Parts –

- (a) Part 1 provides for the short title of the Bill;

- (b) Part 2 contains amendments relating to the administration of the IRO;
- (c) Part 3 contains amendments relating to the Board;
- (d) Part 4 contains miscellaneous and minor amendments to the IRO and its subsidiary legislation; and
- (e) Part 5 contains consequential amendments to the TRCO and its subsidiary legislation to introduce changes in line with amendment made to section 71(7) of the IRO.

LEGISLATIVE TIMETABLE

15. The legislative timetable will be as follows –

Publication in the Gazette	12 June 2009
First Reading and commencement of Second Reading debate	24 June 2009
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

IMPLICATIONS OF THE PROPOSAL

16. The proposal is in conformity with the Basic Law, including provisions concerning human rights. The proposal will not affect the binding effect of the existing provisions of the Inland Revenue Ordinance and Tax Reserve Certificates Ordinance and their subsidiary legislation. It has no financial, economic, sustainability, productivity, or environmental implications. Civil service implications, if any, will be absorbed within the existing provision of IRD.

PUBLIC CONSULTATION

17. We briefed Members of the Legislative Council Panel on Financial Affairs on the Bill on 6 April 2009. No members expressed any disagreement with any of the technical proposals.

PUBLICITY

18. A press release will be issued on 12 June 2009. A spokesman will be available to answer media and public enquiries.

ENQUIRY

19. In case of enquiries about this Brief, please contact Mr Kenneth Cheng, Principal Assistant Secretary for Financial Services and the Treasury (Treasury), at 2810 2370.

**Treasury Branch
Financial Services and the Treasury Bureau
10 June 2009**

INLAND REVENUE (AMENDMENT) (NO. 2) BILL 2009

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A BILL

To

Amend the Inland Revenue Ordinance –

- (a) to improve the operation of the Board of Review;
- (b) to provide for the deduction allowed for interest expenses incurred in the acquisition of prescribed fixed assets and specified machinery or plant;
- (c) to enable the Commissioner of Inland Revenue (“the Commissioner”) to make a property tax assessment on persons who receive rent on any common parts of any land or building;
- (d) to empower an assessor to make an additional assessment of the tax payable in consequence of a taxpayer’s revocation of a claim for deduction of home loan interest after the statutory period;
- (e) to extend the period within which a prosecution may be instituted for an offence relating to breach of secrecy;
- (f) to enable the Commissioner to refund to a taxpayer the balance remaining in the Tax Reserve Certificates accounts without requiring the taxpayer to return the tax reserve certificate to the Commissioner; and
- (g) to make minor and textual amendments,

and to make consequential amendments.

Enacted by the Legislative Council.

PART 1

PRELIMINARY

1. Short title

This Ordinance may be cited as the Inland Revenue (Amendment) (No. 2) Ordinance 2009.

PART 2

AMENDMENTS RELATING TO ADMINISTRATION OF INLAND REVENUE ORDINANCE

2. Interpretation

(1) Section 2(1) of the Inland Revenue Ordinance (Cap. 112) is amended by repealing the definition of “owner” and substituting –

““owner” (擁有人), in respect of land or buildings or land and buildings, includes –

- (a) a person holding the land or buildings or land and buildings directly from the Government;
- (b) a beneficial owner;
- (c) a tenant for life;
- (d) a mortgagor;
- (e) a mortgagee in possession;
- (f) a person with adverse title to land receiving rent from buildings or other structures erected on that land;
- (g) a person who is making payments to a co-operative society registered under the Co-operative Societies Ordinance (Cap. 33)

for the purpose of the purchase of the land or buildings or land and buildings;

- (h) a person who holds land or buildings or land and buildings subject to a ground rent or other annual charge;
- (i) (in so far as common parts are concerned) a corporation registered under section 8 of the Building Management Ordinance (Cap. 344) or a person who, on the person's own behalf or on behalf of another person, receives any consideration, in money or money's worth, in respect of the right of use of any common parts solely or with another; and
- (j) an executor of the estate of an owner;".

(2) Section 2(1) is amended by adding –

““Board of Review” (稅務上訴委員會) means the Board of Review referred to in section 65;

“common parts” (公用部分), in relation to any land or buildings or land and buildings –

- (a) means the whole of the land or buildings or land and buildings, except such parts as have been specified or designated in an instrument registered in the Land Registry as being for the exclusive use, occupation or enjoyment of an owner; and
- (b) includes, unless so specified or designated in the instrument mentioned in paragraph (a), those parts of a building specified in

Schedule 1 to the Building Management Ordinance (Cap. 344);”.

**3. Establishment of Board of Inland Revenue.
Power of Chief Executive to appoint a
Commissioner and other officers**

Section 3(1)(c) is amended, in the Chinese text, by repealing “投票所得的多數票” and substituting “過半數票”.

4. Ascertainment of chargeable profits

Section 16(2)(e)(i) is repealed and the following substituted –

- “(i) capital expenditure incurred by the borrower on the provision of –
- (A) any machinery or plant, where the expenditure qualifies for an allowance under Part VI;
 - (B) any machinery or plant for research and development, where the expenditure may be deducted under section 16B;
 - (C) a prescribed fixed asset (as defined in section 16G(6)), where the expenditure may be deducted under section 16G; or
 - (D) any environmental protection machinery (as defined in section 16H(1)), where the expenditure may be deducted under section 16I; or”.

**5. Cessation of source of profits in years of
assessment commencing on 1 April 1975**

Section 18D(2) is amended, in the proviso, by repealing “, subject to subsection (3),”.

6. Approved charitable donations (Part IVA)

Section 26C(1) is amended, in the Chinese text, by repealing “不小於” and substituting “不少於”.

7. Home loan interest

Section 26E is amended by adding –

“(6A) If a person revokes a claim under subsection (6) after 6 years from the expiration of the year of assessment to which the claim relates, an assessor may, within 2 years after the revocation, make an additional assessment of the tax payable in consequence of the revocation and for this purpose, section 60(1) applies to the additional assessment as if it were an assessment made under that section.”.

8. Power to issue search warrant

Section 51B(4) is amended by repealing “shall be guilty of an offence: Penalty a fine at level 3” and substituting “commits an offence and is liable on conviction to a fine at level 3”.

PART 3

AMENDMENTS RELATING TO BOARD OF REVIEW

9. Constitution of the Board of Review

(1) Section 65(1) of the Inland Revenue Ordinance (Cap. 112) is amended by adding “and determining” after “hearing”.

(2) Section 65(4) is repealed and the following substituted –

“(4) For the purpose of hearing and determining an appeal –

(a) the Board comprises 3 or more members of the panel as follows –

(i) the chairman or a deputy chairman nominated by the chairman; and

(ii) at least 2 more members of the panel nominated by the chairman;

- (b) the member mentioned in paragraph (a)(i) is to preside at the hearing;
 - (c) the clerk must summon the members mentioned in paragraph (a)(i) and (ii) to attend meetings of the Board at which the appeal is to be heard;
 - (d) the quorum for a meeting of the Board hearing the appeal is 3 members; and
 - (e) a matter arising at a meeting of the Board is determined by a majority of votes of the members present and voting on the matter and, if there is an equality of votes, the member presiding has a casting vote in addition to his or her original vote.”.
- (3) Section 65(7) is repealed and the following substituted –
- “(7) If a person ceases to be the chairman, a deputy chairman or a member of the panel and, at the time of that event, the person is or has been involved in the hearing or determination of an appeal by the Board, that person may continue to –
- (a) hear and determine the appeal; or
 - (b) perform any other function as a member of the Board in relation to the appeal in accordance with section 68(2C) or 69(1) or (5) until the appeal is finally disposed of by the Board.”.

10. Right of appeal to the Board of Review

Section 66(1A) is amended by repealing “This subsection shall apply to an appeal relating to any assessment in respect of which notice of assessment is given on or after 1 April 1971.”.

11. Section added

The following is added –

“68A. Power of Board of Review to correct clerical mistakes and other errors

The Board of Review may correct –

- (a) any clerical mistake in any decision of the Board made in relation to an appeal; or
- (b) any error in any decision of the Board arising from any accidental slip or omission.”.

PART 4

MISCELLANEOUS AND MINOR AMENDMENTS TO INLAND REVENUE ORDINANCE AND ITS SUBSIDIARY LEGISLATION

Division 1 – Inland Revenue Ordinance

12. Provisions regarding payment of tax

(1) Section 71(7)(d) of the Inland Revenue Ordinance (Cap. 112) is amended by repealing everything after “under paragraph (c),” and substituting –

“the Commissioner must repay to the holder of the certificate –

- (i) the principal value represented by the certificate or part of the certificate; and
- (ii) the interest on that value, calculated in accordance with the rules from the date of issue of the certificate to the date of the final determination of the objection or appeal; and”.

(2) Section 71(11) is amended by repealing “the rate fixed by the Chief Justice by notice in the Gazette under section 50” and substituting “the rate determined by the Chief Justice by order under section 50(1)(b)”.

13. Penalties for failure to make returns, making incorrect returns, etc.

(1) Section 80(1) is amended by repealing “shall be guilty of an offence: Penalty a fine at level 3” and substituting “commits an offence and is liable on conviction to a fine at level 3”.

(2) Section 80(1A) is amended by repealing “shall be guilty of any offence: Penalty a fine at level 6” and substituting “commits an offence and is liable on conviction to a fine at level 6”.

(3) Section 80(1AB) is amended by repealing “shall be guilty of an offence: Penalty a fine at level 3” and substituting “commits an offence and is liable on conviction to a fine at level 3”.

(4) Section 80(2) is amended by repealing “shall be guilty of an offence: Penalty a fine at level 3” and substituting “commits an offence and is liable on conviction to a fine at level 3”.

(5) Section 80(2B) is amended by repealing “shall be guilty of an offence: Penalty a fine at level 4” and substituting “commits an offence and is liable on conviction to a fine at level 4”.

(6) Section 80(2C) is amended by repealing “shall be guilty of an offence: Penalty a fine at level 6” and substituting “commits an offence and is liable on conviction to a fine at level 6”.

14. Breach of secrecy and other matters to be offences

(1) Section 81 is amended by renumbering it as section 81(1).

(2) Section 81(1) is amended by repealing “shall be guilty of an offence: Penalty a fine at level 5” and substituting “commits an offence and is liable on conviction to a fine at level 5”.

(3) Section 81 is amended by adding –

“(2) Proceedings in respect of an offence under this section must not be commenced after 6 years from the commission of the offence.

(3) Subsection (2) applies only to an offence committed on or after the commencement of the Inland Revenue (Amendment) (No. 2) Ordinance 2009 (of 2009).”.

15. Penal provisions relating to fraud, etc.

(1) Section 82(1) is amended by repealing everything after paragraph (g) and substituting –

“commits an offence.”.

(2) Section 82 is amended by adding –

“(1A) A person who commits an offence under subsection (1) is liable –

(a) on summary conviction to –

- (i) a fine at level 3;
- (ii) a further fine of treble the amount of tax which has been undercharged in consequence of the offence or which would have been undercharged if the offence has not been detected; and
- (iii) imprisonment for 6 months; and

(b) on indictment to –

- (i) a fine at level 5;
- (ii) a further fine of treble the amount of tax which has been undercharged in consequence of the offence or which would have been undercharged if the offence has not been detected; and
- (iii) imprisonment for 3 years.”.

16. Appeals against assessment to additional tax to Board of Review

Section 82B(3) is amended by adding “68A,” after “68,”.

17. Transitional provisions

(1) Section 89(2)(a) is amended by repealing “; and” and substituting a full stop.

(2) Section 89(2)(b) is repealed.

18. Allowances

Schedule 4 is amended, under the subheading “For the years of assessment 1998/99 to 2002/03 inclusive”, in the second column, by repealing “or percentage”.

19. Schedule 6 amended

Item 9 of Part II of Schedule 6 is repealed and the following substituted –

“9. The Council of Europe Development Bank (formerly known as The Council of Europe Social Development Fund).”.

20. Transitional provisions relating to the Inland Revenue (Amendment) (No. 2) Ordinance 1993

Schedule 7 is repealed.

**Division 2 – Specification of Arrangements
(Government of the Kingdom of Belgium Concerning Air
Services) (Double Taxation) Order**

21. Repeal

The Specification of Arrangements (Government of the Kingdom of Belgium Concerning Air Services) (Double Taxation) Order (Cap. 112 sub. leg. U) is repealed.

PART 5

CONSEQUENTIAL AMENDMENTS TO TAX RESERVE CERTIFICATES ORDINANCE AND ITS SUBSIDIARY LEGISLATION

Division 1 – Tax Reserve Certificates Ordinance

22. Power of Commissioner to issue tax reserve certificates and maintain accounts

(1) Section 3(1A) of the Tax Reserve Certificates Ordinance (Cap. 289) is repealed and the following substituted –

“(1A) If a person applies for the purchase of a certificate other than pursuant to the proviso to section 71(2) of the Inland Revenue Ordinance (Cap. 112), the person (“applicant”) must make an application to the Commissioner for an account to be maintained in the applicant’s name unless an account is already being maintained in the applicant’s name.”.

(2) Section 3(1AB) is repealed and the following substituted –

“(1AB) If an account is maintained in the name of an applicant, the Commissioner, for each payment received from the applicant for the purchase of a certificate in the circumstances mentioned in subsection (1A), must make an entry in the account instead of issuing a certificate for the payment.”.

Division 2 – Tax Reserve Certificates (Fourth Series) Rules

23. Schedule 1 amended

Schedule 1 to the Tax Reserve Certificates (Fourth Series) Rules (Cap. 289 sub. leg. A) is amended, in Form 2, in the second paragraph of the “*REVERSE OF FORM*” –

(a) in subparagraph (b), by repealing “; and/or” and substituting a full stop;

- (b) by repealing subparagraph (c).

Explanatory Memorandum

The object of this Bill is to amend the Inland Revenue Ordinance (Cap. 112) (“the Ordinance”) to improve the operation of the Board of Review and the administration of the Ordinance. The Bill contains 5 parts.

2. Part 1 provides for the short title of the Bill (when enacted).
3. The Bill contains no commencement clause. The Bill (when enacted) will come into operation on the day on which it is published in the Gazette.
4. Part 2 contains amendments relating to the administration of the Ordinance –

- (a) Clause 2 adds the definitions of “Board of Review” and “common parts” to section 2(1) of the Ordinance. The clause also amends the definition of “owner”.
- (b) Clause 3 amends the Chinese text of section 3(1)(c) of the Ordinance to improve the Chinese rendition of “a majority of votes”.
- (c) Clause 4 amends section 16(2)(e) of the Ordinance to allow for the deduction from assessable profits interest payable on capital expenditure incurred on the provision of machinery or plant for research and development, prescribed fixed assets and environmental protection machinery.
- (d) Clause 5 removes certain obsolete wording from section 18D(2) of the Ordinance.
- (e) Clause 6 rectifies a minor error in the Chinese text of section 26C(1) of the Ordinance.
- (f) Clause 7 amends section 26E of the Ordinance to empower an assessor to make an additional assessment of

the tax payable in consequence of a taxpayer's revocation of a claim for deduction of home loan interest after the statutory period of 6 years provided under section 60(1) of the Ordinance. The power may be exercised within 2 years of the revocation of the claim.

- (g) Clause 8 amends section 51B of the Ordinance to align the drafting style with the current drafting style of offence provisions.

5. Part 3 contains amendments relating to the Board of Review –

- (a) Clause 9 amends section 65(4) of the Ordinance to empower the chairman of the Board of Review (instead of the Chief Secretary for Administration) to nominate members to attend meetings of the Board at which appeals are to be heard. That clause also amends section 65(7) of the Ordinance to empower a person who ceases to be the chairman, a deputy chairman or a member of the panel to continue to perform certain functions relating to an appeal that the person was involved before, that is –

- (i) to review and set aside an order for dismissal of an appeal and proceed to hear the appeal under section 68(2C) of the Ordinance;
- (ii) to consider an application by an appellant or the Commissioner of Inland Revenue (“the Commissioner”) requiring the Board to state a case on a question of law for the opinion of the Court of First Instance under the proviso to section 69(1) of the Ordinance; and
- (iii) if the Court of First Instance remits the stated case to the Board under section 69(5) of the

Ordinance, to revise the assessment as the opinion of the court may require.

- (b) Clause 10 repeals an obsolete provision in section 66(1A) of the Ordinance.
- (c) Clause 11 adds a new section 68A to the Ordinance. New section 68A empowers the Board of Review to correct clerical mistakes or other errors (arising from any accidental slip or omission) in the decisions of the Board.

6. Part 4 contains miscellaneous and minor amendments to the Ordinance and its subsidiary legislation –

- (a) Clause 12 amends section 71(7)(d) of the Ordinance to empower the Commissioner to refund to holders of tax reserve certificates the principal value of the certificate together with interest without requiring the holders to return the certificate to the Commissioner where the certificate has not been accepted as tax payment. The clause also amends section 71(11) of the Ordinance to clarify that the rate of interest is the rate determined by the Chief Justice by order under section 50(1)(b) of the District Court Ordinance (Cap. 336).
- (b) Clauses 13, 14 and 15 respectively amend sections 80, 81 and 82 of the Ordinance to align the drafting style with the current drafting style of offence provisions. Under the current section 81 of the Ordinance, the period within which prosecution of an offence in respect of breach of secrecy may be brought is 6 months by virtue of section 26 of the Magistrates Ordinance (Cap. 227). That section 81 is amended to extend that period from 6 months to 6 years and the amendment applies only to offences committed on or after the commencement of the Bill (when enacted).

- (c) Clause 16 amends section 82B(3) of the Ordinance so that the new section 68A (relating to the Board's power to correct clerical mistakes and other errors) has effect with respect to appeals against additional tax under section 82B.
- (d) Clause 17 repeals section 89(2)(b) of the Ordinance which is obsolete.
- (e) Clause 18 repeals the unnecessary reference of "or percentage" in Schedule 4 to the Ordinance.
- (f) Clause 19 updates the name of "The Council of Europe Social Development Fund" as specified in Schedule 6 to the Ordinance to "The Council of Europe Development Bank".
- (g) Clause 20 repeals Schedule 7 to the Ordinance which is no longer necessary.
- (h) Clause 21 repeals the Specification of Arrangements (Government of the Kingdom of Belgium Concerning Air Services) (Double Taxation) Order (Cap. 112 sub. leg. U) which has ceased to have effect.

7. Part 5 contains consequential amendments to the Tax Reserve Certificates Ordinance (Cap. 289) and its subsidiary legislation to introduce changes in line with the amendment made to section 71(7)(d) of the Inland Revenue Ordinance (see clause 12).