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Panel on Financial Affairs
Meeting on 4 January 2010

Background brief
on legislative proposals to enhance the efficiency of the existing tax appeal mechanism

Purpose

This paper sets out the background of the case stated procedure as stipulated in section 69 of the Inland Revenue Ordinance (Cap. 112) (the Ordinance) and summarizes Members' views expressed on related issues during the scrutiny of the Inland Revenue (Amendment) (No. 2) Bill 2009¹.

Background

2. The Board of Review is a statutory body constituted under section 66 of the Inland Revenue Ordinance (Cap. 112) (the Ordinance) to hear tax appeals. It is an independent tribunal consisting of members appointed by the Chief Executive. The Board of Review has a chairman, several deputy chairmen, and not more than 150 other members. For the purpose of hearing appeals, hearing panels comprising three or more members (including the chairman or a deputy chairman) will be formed by the nomination of the Chief Secretary. Under section 69 of the Ordinance, if an appellant or the Commissioner of Inland Revenue (the Commissioner) would like to seek the opinion of the Court of First Instance on question of law arising from the decision of the Board of Review, the party concerned may make an application requiring the Board to state a case (the case stated procedure). An extract of section 69 is at **Appendix I**.

¹ The Inland Revenue (Amendment) (No. 2) Bill 2009 was introduced into the Legislative Council in June 2009, seeking to amend the Ordinance to smooth the operation of the Board of Review to hear tax appeals and to improve the administration of the Ordinance.

3. The Inland Revenue Department (IRD) issues departmental interpretation and practice notes (DIPN) to provide explanations and examples to facilitate taxpayers' understanding of and compliance with the relevant provisions of the Ordinance. The interpretation and practices in relation to section 69 is provided in DIPN No. 6, which was issued in 1999 and last revised in 2006. The relevant extract of DIPN No. 6 is at **Appendix II**.

Views and concerns expressed by Members and the Administration's response

4. When scrutinizing the Inland Revenue (Amendment) (No. 2) Bill 2009, Members examined the proposal to empower a retired member of the Board of Review to handle a case that he had handled before in three specified circumstances to enhance the efficiency of the Board. In this connection, Members noted that two of these circumstances arose from the case stated procedure stipulated in section 69(5) under which the court might upon a question of law confirm, reduce, increase or annul the assessment determined by the Board of Review, or might remit the case to the Board with the opinion of the court thereon. Some Members expressed concern about the consistency of the proposed arrangement with that of other review/appeal boards.

5. The Administration advised that similar to the Board of Review, four other appeal boards adopted the case stated procedure and allowed retired members to continue to hear an on-going appeal. None of the governing legislations of these four appeal boards had explicit provisions to allow a retired member to continue to handle a previous case in circumstances arising from case stated procedure. However, the Administration pointed out that there had been three applications only for these four appeal boards to state a case to the court in the past three years, while the Board of Review received 33 such applications in the same period. Therefore, the Administration considered that there was a practical need for the Board of Review to be granted the proposed flexibility in redeploying retired members.

6. Some members of the Bills Committee were concerned whether cases remitted by the Court of the First Instance to the Board of Review for rehearing might give rise to fresh hearing of the case and involve examination of new evidence or facts by the Board. The Administration explained that while the decision of the court on a question of law might require the Board of Review to revise the assessment, the case stated procedure would not give rise to fresh hearing of the case concerned as the court would only give opinion on the nature of income taxable, instead of the details of assessment to be made by the Board of Review.

7. The Bills Committee also noted the views of the Hong Kong Institute of Certified Public Accountants that the case stated procedure should be abandoned and replaced by an appeal on questions of law, as the latter could more likely further the administration of justice. The Administration advised that the suggestion of

HKICPA relating to the case stated procedure of the Board of Review involved policy issues beyond the scope of the Bill, which would be considered separately.

Latest development

8. The Administration proposes to abolish the case stated procedure so that the party concerned can lodge direct appeal to the Court of First Instance. Besides, the Administration proposes to empower the Board of Review to impose pre-hearing directions and sanctions for non-compliance in order to smooth its operation. The Administration will brief the Panel on Financial Affairs on the above legislative proposals at the meeting on 4 January 2010. The Administration plans to introduce the relevant bill in the latter half of the 2009-2010 legislative session.

Relevant papers

9. The relevant papers are available at the following links:

Minutes of the Bills Committee on Inland Revenue (Amendment No.2) Bill 2009 meeting on 27 October 2009 (Appendix)

<http://www.legco.gov.hk/yr08-09/english/bc/bc07/minutes/bc0720091027.pdf>

Submission from Hong Kong Institute of Certified Public Accountants (English version only)

<http://www.legco.gov.hk/yr08-09/english/bc/bc07/papers/bc071006cb1-2664-1-e.pdf>


DIPN No. 6 issued by the Commissioner of Inland Revenue

http://www.ird.gov.hk/eng/pdf/e_dipn06.pdf

Council Business Division
Legislative Council Secretariat
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Chapter: 112  Title: INLAND REVENUE ORDINANCE Gazette Number: 12 of 2004
Section: 69 Heading: **Appeals to the Court of First Instance** Version Date: 25/06/2004

Appendix I

(1) The decision of the Board shall be final:

Provided that either the appellant or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance. Such application shall not be entertained unless it is made in writing and delivered to the clerk to the Board, together with a fee of the amount specified in Part II of Schedule 5, within 1 month of the date of the Board's decision. If the decision of the Board shall be notified to the Commissioner or to the appellant in writing, the date of the decision, for the purposes of determining the period within which either of such persons may require a case to be stated, shall be the date of the communication by which the decision is notified to him. (Amended 49 of 1956 s. 50; 11 of 1985 s. 6; 4 of 1989 s. 4; 56 of 1993 s. 28; 12 of 2004 s. 15)

(1A) The Secretary for Financial Services and the Treasury may by order amend the amount specified in Part II of Schedule 5. (Added 12 of 2004 s. 15)

(2) The stated case shall set forth the facts and the decision of the Board, and the party requiring it shall transmit the case, when stated and signed, to the Court of First Instance within 14 days after receiving the same.

(3) At or before the time when he transmits the stated case to the Court of First Instance, the party requiring it shall send to the other party notice in writing of the fact that the case has been stated on his application and shall supply him with a copy of the stated case.

(4) Any judge of the Court of First Instance may cause a stated case to be sent back for amendment and thereupon the case shall be amended accordingly.

(5) Any judge of the Court of First Instance shall hear and determine any question of law arising on the stated case and may in accordance with the decision of the court upon such question confirm, reduce, increase or annul the assessment determined by the Board, or may remit the case to the Board with the opinion of the court thereon. Where a case is so remitted by the court, the Board shall revise the assessment as the opinion of the court may require.

(6) In any proceedings before the Court of First Instance under this section, the court may make such order in regard to costs in the Court of First Instance and in regard to the sum paid under subsection (1) as to the court may seem fit.

(7) Appeals from decisions of the Court of First Instance under this section shall be governed by the provisions of the High Court Ordinance (Cap 4), the Rules of the High Court (Cap 4 sub. leg. A), and the Orders and Rules governing appeals to the Court of Final Appeal. (Amended 92 of 1975 s. 58; 79 of 1995 s. 50)

(8) (Repealed 12 of 2004 s. 15)

(Amended 92 of 1975 s. 59; 25 of 1998 s. 2)

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**Extracted from the Departmental Interpretation and Practice Notes No. 6
issued by the Inland Revenue Department**

51. There is no provision for the awarding of costs to either the appellant or the Commissioner on an appeal to the Board of Review.
52. Under section 85(2)(d) of the Ordinance, the Board of Inland Revenue may prescribe any procedure to be followed in relation to an appeal to the Board of Review.
53. A decision of the Board of Review is final, subject to the rights of appeal to the Court of First Instance as explained in Part (C).

(C) APPEALS TO THE COURTS

Transfer of appeals to the Court of First Instance

54. Where a valid notice of appeal is given to the Board of Review and within 21 days after the date that the notice of appeal has been received by the Clerk to the Board, or such further time as the Board may permit upon written application by the appellant or the Commissioner, the appellant or the Commissioner may, by notice in writing to the other party, request the appeal to be transferred to the Court of First Instance for hearing and determination. At the same time a copy of such notice should be sent to the Board.

55. If the other party agrees to the request and gives his consent in writing to the Board within 21 days after the date of such notice, or such further time as the Board may permit upon written application by the appellant or the Commissioner, the Clerk to the Board will transmit the appeal to the Court of First Instance - section 67. Appeals so transmitted cannot be withdrawn unless with the permission of the Court.

Appeals to the Court of First Instance by way of case stated

56. If either the appellant or the Commissioner is dissatisfied with a decision of a Board of Review, they may make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance - section 69.

57. Applications requiring the Board to state a case must be made in writing and delivered to the Clerk to the Board of Review within one month of the date of the Board's decision, or the date of the communication by which the decision is notified if the decision is notified to the appellant or the Commissioner in writing. A fee as specified in Part II of Schedule 5 of the Ordinance must accompany the application for a case stated.

58. Guidance on the law and practice of stating a case pursuant to section 69(1) of the Ordinance has been provided by the courts. The classic case is that decided by Barnett J. in *Commissioner of Inland Revenue v. Inland Revenue Board of Review and Another* [1989] 2 HKLR 40. The following guidelines laid down in that case are relevant :

- (a) An applicant for a case stated had to identify a question of law which it was proper for the court to consider.
- (b) The Board of Review is under a statutory duty to state a case in respect of that question of law.
- (c) The Board has a power to scrutinize the question of law to ensure that it is one which it is proper for the court to consider.
- (d) If the Board is of the view that the point of law is not proper, it may decline to state a case.
- (e) Unless there is no evidence to support a finding of primary fact, or unless the primary facts cannot support an inference found by the Board, whether the onus of proof is discharged is a question of degree which depends upon the evaluation by the Board as a tribunal of fact. To impugn the Board's evaluation would be to undermine the whole purpose of the Board as a fact-finding tribunal.
- (f) The court would interfere with an inference drawn from primary facts or with a conclusion drawn from a combination of primary facts and inference, if the true and only reasonable inference or conclusion was not the one reached by the Board. Where the primary facts themselves were disputed, it was

necessary for the applicant to demonstrate that there was simply no evidence to support such findings.

59. A judge of the Court of First Instance may hear and determine any question of law on a stated case and may confirm, reduce, increase or annul the assessment determined by the Board of Review, or may remit the case to the Board with the opinion of the Court thereon. In that event the Board will revise the assessment in accordance with the opinion of the Court.

Right to appeal directly to Court of Appeal

60. Under section 69A, either the appellant or the Commissioner may, with the leave of the Court of Appeal, appeal against the decision of the Board of Review directly to the Court of Appeal instead of the Court of First Instance. Leave to appeal may be granted on the ground that in the Court's opinion it is desirable that, by reason of the amount of tax in dispute or of the general or public importance of the matter or its extraordinary difficulty or for any other reason, the appeal be heard and determined by the Court of Appeal.

Appeals from decisions of the Court

61. Appeals from decisions of the Court of First Instance to the Court of Appeal or to the Court of Final Appeal are governed by the provisions of the High Court Ordinance (Cap. 4), the Rules of the High Court (Cap. 4A), and the Orders and Rules governing appeals to the Court of Final Appeal.

Costs

62. In any proceedings before the Court, the Court may make such order as to costs as it may seem fit.