

For discussion
on 4 January 2010

Legislative Council Panel on Financial Affairs

**Legislative Proposals to
Enhance the Efficiency of the Existing Tax Appeal Mechanism**

PURPOSE

This paper briefs Members on the following two legislative proposals to enhance the efficiency of the existing tax appeal mechanism –

- (a) to empower the Board of Review (BoR) to give pre-hearing directions for tax appeal hearings and to sanction non-compliance; and
- (b) to allow taxpayers and the Inland Revenue Department (IRD) to appeal directly to the court against the BoR's decisions, without having to ask the BoR to state a case to the court on questions of law.

BACKGROUND

Operation of the BoR

2. The BoR is an independent statutory body constituted under the Inland Revenue Ordinance (Cap. 112) (IRO) to hear and determine tax appeals. It provides a convenient and less costly channel for taxpayers to lodge tax appeals. Its statutory membership comprises a Chairman, a maximum of 10 Deputy Chairmen and 150 members. The Chairman and the Deputy Chairmen must be persons with legal training and experience. The BoR forms panels to hear individual tax appeals. Each hearing panel must comprise at least three members, including the Chairman or a Deputy Chairman as the panel chair. In 2006/07, 2007/08 and 2008/09, the BoR handled 120, 95 and 106 appeals respectively.

Non-compliance with BoR's pre-hearing directions

3. Currently, the BoR has no statutory power to give pre-hearing directions to the taxpayer or the IRD or to sanction their non-compliance. In practice, the BoR will give sufficient time for the taxpayers and the IRD to submit the documents before a hearing. In some complicated cases, the BoR will specify administratively what documents to be submitted by which party and by what time before a hearing in consultation with both the taxpayers and the IRD. However, late submissions occur from time to time, and parties sometimes even submit additional documents at the last minute. Such non-compliance with pre-hearing directions may lead to deferral or unnecessary lengthening of hearings, and hence would have a negative impact on the efficiency, the cost and the quality of hearings.

Appeal against BoR's decisions

4. After hearing an appeal, the BoR may confirm, reduce, increase or annul the IRD's tax assessment, or remit the case to the IRD for re-assessment. The BoR is the ultimate authority for fact finding, and its decisions cannot be challenged on the grounds of facts. To appeal against the BoR's decisions, the taxpayer or the IRD may make an application to the BoR for it to state a case on a question of law arising from its decision for the opinion of the court. The applicant will prepare a draft case on the proposed question(s) of law (known as "case stated") for the other party's comments. The applicant could agree with or make further comments on the other party's comments. The BoR will then consider the draft case stated together with comments made by both parties.

5. The BoR has the final responsibility for stating a case and is not bound by the draft case stated submitted to it. If so convinced that there exists a proper question of law, the BoR will then state a case on the question of law for the opinion of the Court of First Instance (CFI). The taxpayer or the IRD may also take the case stated by the BoR to the Court of Appeal (CA) direct without going through the CFI, if the CA grants the leave. However, if the BoR considers that there is no proper question of law, it will refuse to state a case. The taxpayer or the IRD may challenge the BoR's refusal to state a case by seeking judicial review.

6. Any judge of the CFI or CA may hear and determine any question of law arising out of a case stated by the BoR. The court may in accordance with

its decision on the question of law confirm, reduce, increase or annul the tax assessment determined by the BoR, or may remit the case with its opinion to the BoR. Where a case is so remitted by the court, the BoR shall revise the assessment as the opinion of the court may require.

PROPOSALS

Pre-hearing directions and sanction for non-compliance

7. To address the non-compliance problems mentioned at paragraph 3 above, we propose to amend the IRO to empower the BoR to give pre-hearing directions and to sanction non-compliance. As mentioned in paragraph 3 above, the BoR is already giving pre-hearing directions administratively. We consider it more appropriate to provide a proper legal basis for the BoR to make such directions.

8. The BoR will basically follow its existing practice. For simple and straight-forward cases, the BoR will issue the pre-hearing directions first, and both parties to the appeal will be given an opportunity to apply to the BoR for varying the directions. The BoR will take parties' views into account in deciding whether a direction needs to be amended. For more complex cases, the BoR may hold pre-hearing meetings with both parties to an appeal to determine the pre-hearing directions. To deter non-compliance with BoR's pre-hearing directions, we also propose to empower the BoR to dismiss any document not submitted in compliance with its pre-hearing directions.

9. In working out the detailed arrangement, we will make reference to the provisions of the Rules of the High Court (Cap. 4A) concerning the court's powers in case management and sanctioning non-compliance.

Direct appeal to the court against BoR's decisions

10. The existing case stated procedure for lodging appeals against BoR's decisions (as mentioned at paragraphs 4 and 5 above) has been criticised by both the court and tax professionals as being inefficient and costly. The process of producing a case stated is often time-consuming both for the applicant and for the BoR. It may not only lead to delay in lodging an appeal to the court, but also affect the BoR's capacity and efficiency in handling other appeals. Besides,

both the taxpayer concerned and the IRD may incur substantial legal expenses in reviewing the draft case stated or in challenging the BoR's refusal to state a case by judicial review.

11. To enhance the efficiency of the tax appeal system, we propose to abolish the case stated procedure, and allow taxpayers and the IRD to lodge appeals to the court directly on questions of law against the BoR's decisions. Under the proposed mechanism, if a taxpayer or the IRD is dissatisfied with the BoR's decision, they may apply to the CFI or CA for leave to appeal against that decision on questions of law. If CFI or CA grants the leave, the relevant court will hear and determine the appeal in the same way as they do currently (which is described in paragraph 6 above). If CFI or CA refuses to grant the leave, the taxpayer or the IRD may appeal to a higher court against the refusal.

12. Apart from avoiding the time-consuming and costly process for stating a case, another advantage of the proposed direct appeal mechanism is that the court would have more freedom in hearing an appeal as it would no longer be confined by the case stated by the BoR. In fact, in the judgment of a tax appeal (*Lee Yee-shing and Yeung Yuk-ching v CIR*), all five judges of the Court of Final Appeal agreed unanimously that for the reason of cost, efficiency and the interest of justice, the case stated procedure shall be abandoned and taxpayers (as well as IRD) be allowed to appeal directly to the court on questions of law.

13. The proposed new appeal system will be applicable to parties bringing appeals to the CFI or CA on or after a commencement date to be specified. Case stated applications received by the BoR before the proposed legislative amendments come into operation will be handled in accordance with the existing appeal system. Parties to be affected by the transitional arrangements will be duly informed.

CONSULTATION

14. We have consulted the Joint Liaison Committee on Taxation (JLCT) and the Judiciary on the proposals. Both the JLCT and the Judiciary support the proposals in principle. The JLCT would further deliberate on the proposed leave requirement in respect of lodging a direct appeal to the court on questions of law.

WAY FORWARD

15. We plan to introduce the relevant legislative amendments to the Legislative Council in the latter half of the current legislative session.

Financial Services and the Treasury Bureau
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