

For discussion
on 6 January 2014

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 legislative proposals to enhance the existing tax appeal mechanism, which includes -

- (a) empowering the Board of Review (Inland Revenue Ordinance) (“the Board”) to make directions on the practice or procedure relating to the hearing of a tax appeal and to sanction non-compliance;
- (b) providing privileges and immunities to the Chairman, Deputy Chairmen and members of the Board as well as to witness, party to any proceedings and representative or other person appearing before the Board; and
- (c) allowing taxpayers and the Commissioner of Inland Revenue (“CIR”) to appeal directly to the court against the decisions of the Board on questions of law without having the Board to agree to state a case for the court’s consideration.

BACKGROUND

Operation of the Board

2. The Board is an independent statutory body constituted under the Inland Revenue Ordinance (Cap. 112) (“IRO”) to hear and determine tax appeals. Its statutory membership comprises a Chairman, ten Deputy Chairmen and a maximum of 150 members. The Chairman and the Deputy Chairmen must be persons with legal training and experience. The Board forms panels to hear individual tax appeals. Each hearing panel must comprise at least three members, including

Chairman or a Deputy Chairman as chairperson of the panel. In the past five years, the Board received on average 85 appeal cases per year.

Non-compliance with the Board's directions

3. The Board is empowered under sections 68(6) and (10) of the IRO to order a person to attend before the Board and give evidence¹. The IRO, however, does not contain any provisions empowering the Board, as in the case of other statutory appeal boards (“SABs”), to issue directions to parties to the appeal or sanction non-compliance with such directions.

4. The Board has so far been issuing directions on the practice or procedure relating to the hearing of an appeal on an administrative basis. In handling simple cases, the Board issues “notice of hearing” to the taxpayers concerned and the CIR respectively, specifying the time limit for submitting documents before commencement of a hearing. As regards complicated cases, the Board will consult both the taxpayers concerned and the CIR before specifying administratively the documents to be submitted and the time for submission. However, late submissions occur from time to time. In some cases, fresh documents are produced on the dates of hearing and the hearing panel has to temporarily adjourn to study them before resuming the hearing. In the past five years, about 45% of the appeal cases involved late submission of documents by an average of about 18 days. Such non-compliance is undesirable as it affects the efficiency, cost and quality of hearings.

Lack of privileges and immunities

5. Unlike other SABs², the existing IRO does not provide privileges and immunities to the Chairman, Deputy Chairmen and members of the Board, as well as persons appearing before the Board. This is unfair to parties to the appeal and may affect the Board in delivering its statutory duty of determining tax appeals impartially without fear or favour.

¹ According to section 80 of the IRO, a person who without reasonable excuse fails to comply with section 68(6) commits an offence and is liable on conviction to a fine at level 3.

² Examples include the Administrative Appeals Board, Appeal Tribunal Panel (Buildings), Municipal Services Appeals Board and Telecommunications (Competition Provisions) Appeal Board.

Existing appeal process against the Board's decisions

6. After completing the hearing of an appeal, the Board may confirm, reduce, increase or annul the CIR's tax assessment, or remit the case to the CIR for re-assessment. The Board is the ultimate authority for fact finding, and its decisions cannot be challenged on the grounds of facts. Under section 69(1) of the IRO, either the taxpayer concerned or the CIR may make an application within the statutory time limit (i.e. within one month of the date of the Board's decision) for the Board to state a case on a question of law arising from the Board's decision³ for the opinion of the Court of First Instance ("CFI").

7. The Board has the final responsibility for stating the case, but it is not bound by the draft case stated submitted to it. The Board may therefore alter the draft case stated if it considers appropriate or necessary. If so convinced that there exists a proper question of law, the Board will state a case on the question of law for the opinion of the CFI. On the other hand, if the Board considers that there is no proper question of law, it will refuse to state a case. The taxpayer concerned or the CIR may challenge the Board's refusal to state a case by seeking judicial review.

Direct appeal on question of law

8. According to section 69A of the IRO, an appeal by way of case stated can be brought to the Court of Appeal ("CA") direct without a hearing before the CFI, provided that the CA has granted leave on the application by the taxpayer concerned or the CIR (commonly known as the "leapfrog arrangement"). In processing the above leave application, the CA will consider if it is desirable for the CA instead of the CFI to hear and determine the appeal having regard to the amount of tax in dispute, the general or public importance of the matter, or for any other reasons. Under those circumstances, the CA performs the same function as that of the CFI as prescribed in section 69 of the IRO.

9. Any judge of the CFI (or the CA under the leapfrog arrangement) may hear and determine any question of law arising out of a case stated by the Board. The court may, in accordance with its decision on the question of law, confirm, reduce, increase or annul the tax assessment determined by the Board, or may remit the case

³ The applicant has to prepare a draft case stated with the proposed question(s) of law arising from the Board's decision. The applicant should then send the draft case stated to the other party for comments. The applicant could agree with or make further comments on the other party's comments. The Board will then consider the draft case stated together with comments made by both parties.

with its opinion to the Board. Where a case is so remitted by the court, the Board shall revise the assessment as the opinion of the court may require.

Deficiencies of the case stated procedure

10. The existing case stated procedure for lodging appeals against the Board's decision on question of law is considered by the court⁴ and tax professionals as being inefficient and costly. On average, it takes six months for the Board to process an application for stating a case to the court. This would not only lead to delay in lodging an appeal to the court, but also affect the Board's capacity and efficiency in handling other appeals. Besides, both the taxpayer concerned and the CIR may incur substantial legal expenses in reviewing the draft case stated or in challenging the Board's refusal to state a case by judicial review.

PROPOSALS

Empowering issue of directions and sanction for non-compliance

11. To address the non-compliance issues mentioned in paragraphs 3 and 4 above, we have made reference to the approach commonly adopted by other SABs. As such, we propose amending the IRO to empower the chairperson of the hearing panel of the Board (i.e. the Chairman or a Deputy Chairman of the Board who will preside the hearing panel) to determine any matter of practice or procedure relating to the hearing of an appeal according to the circumstances of individual appeals.

12. To deter non-compliance with the Board's directions, we also propose empowering the Board to set aside any document not submitted in compliance with its directions. The Board's decisions are amenable to judicial review and hence the aggrieved party may lodge an appeal to the court against the Board's refusal.

Providing privileges and immunities

13. In line with the arrangement for other SABs, we propose amending the IRO to provide that -

⁴ In the judgment of a tax appeal (Lee Yee-shing and Yeung Yuk-ching v CIR), the Court of Final Appeal considered that for the reason of cost, efficiency and the interest of justice, the case stated procedure shall be abandoned and taxpayers (as well as the CIR) be allowed to appeal directly to the court on question of law.

- (a) the Chairman, Deputy Chairmen and members of the Board shall have, in the performance of their duties under the IRO, the same privileges and immunities as a judge of the CFI in civil proceedings in that court; and
- (b) the witness, party to any proceedings and representative or other person appearing before the Board shall be entitled to the same privileges and immunities as they would have in proceedings before the court⁵.

Streamlining appeal process against the Board's decisions

14. To avoid the time-consuming and costly process for stating a case, we propose abolishing the case stated procedure in the existing tax appeal mechanism. A taxpayer or the CIR will instead be allowed to apply direct to the CFI for leave to appeal against the Board's decision on question of law. The leave application should be made inter partes. If the CFI grants the leave to appeal, it will hear and determine the appeal in the same way as it does currently. If the CFI refuses to grant the leave to appeal, the taxpayer concerned or the CIR may appeal to a higher court against the refusal.

15. The existing leapfrog arrangement mentioned in paragraph 8 above shall remain unchanged, except that the requirement for case stated would be replaced by the requirement for leave to appeal granted by the CFI. The proposed approach can preserve the advantages of the current sifting exercise so that the issue of whether the appeals involve a question of law will be first dealt with by the lower court. If the CFI grants leave to appeal, the taxpayer concerned or the CIR will still have to apply for another leave from the CA. If the CFI refuses to grant leave, the appeal cannot be heard and cannot be leapfrogged. If the CA refuses to grant leave for leapfrogging, the appeal will be heard by the CFI.

16. The proposed arrangement will be applicable to parties bringing appeals to the CFI (or the CA under the leapfrog arrangement) on or after a commencement date to be specified. Case stated applications received by the Board before the proposed legislative amendments come into operation will be handled in accordance with the existing arrangement. Parties to be affected by the transitional arrangements will be duly informed.

⁵ Every officer of the Inland Revenue Department is bound by the provisions of section 4 of the IRO which imposes secrecy obligations and it is an offence of breach of secrecy. The proposed privileges and immunities are not intended to override section 4 of the IRO.

CONSULTATION

17. We have consulted the Joint Liaison Committee on Taxation (“JLCT”)⁶ and the Judiciary on the proposals. Both the JLCT and the Judiciary raise no objection to the broad directions of the legislative proposals.

WAY FORWARD

18. We plan to introduce the relevant legislative amendments into the Legislative Council in around May 2014.

Financial Services and the Treasury Bureau
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⁶ The JLCT is a discussion forum set up on the initiative of the accountancy and commercial sectors in 1987. It discusses various tax issues and reflects the views of the industry to the Government. The JLCT is not an advisory body established or appointed by the Government, though Government officials are invited to attend its meetings. The JLCT is an umbrella organisation comprising private sector representatives nominated by chambers of commerce, the Hong Kong Institute of Certified Public Accountants, the Taxation Institute of Hong Kong, the Law Society of Hong Kong, and the International Fiscal Association.