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Panel on Financial Affairs
Meeting on 6 January 2014

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

Purpose

This paper sets out the background of the legislative proposals to enhance the efficiency of the existing tax appeal mechanism. It also summarizes the major views and concerns raised by members of the Panel on Financial Affairs ("FA Panel") during the briefing on the legislative proposals in 2010.

Background

The Board of Review

2. The Board of Review ("BoR") is a statutory body constituted under section 65 of 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. Members of BoR are appointed by the Chief Executive, and comprise a chairman, a maximum of 10 deputy chairmen¹, and not more than 150 other members². A hearing panel is formed for hearing a tax appeal. The hearing panel comprises three or more members (including the chairman or a deputy chairman of BoR as the panel chair) nominated by the chairman of BoR³.

¹ The chairman and the deputy chairmen must be persons with legal training and experience.

² As at 5 December 2013, the Board is composed of one chairman, six deputy chairmen and 62 members.

³ With the passage of the Inland Revenue (Amendment)(No.2) Bill 2009 in February 2010, IRO has been amended so that members of the hearing panels are to be nominated by the chairman of BoR, instead of the Chief Secretary for Administration.

Non-compliance with the Board of Review's pre-hearing directions

3. Currently, BoR has no statutory power to give pre-hearing directions to the taxpayer or Inland Revenue Department ("IRD"), or to sanction their non-compliance. In practice, BoR will give sufficient time for the taxpayers and IRD to submit the documents before a hearing⁴. According to the Administration, late submissions to BoR occur from time to time, and parties sometimes submit additional documents at the last minute, which may lead to deferral or unnecessary lengthening of hearings.

Appeal against the Board of Review's decisions

4. After hearing an appeal, BoR may confirm, reduce, increase or annul IRD's tax assessment, or remit the case to IRD for re-assessment. BoR is the ultimate authority for fact finding, and its decisions cannot be challenged on the grounds of facts. Under section 69 of IRO, if an appellant or the Commissioner of Inland Revenue would like to appeal against BoR's decisions, the party concerned may make an application to BoR for it to state a case on a question of law arising from its decision for the opinion of the Court of First Instance ("CFI"), i.e. the case stated procedure. 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 may agree with or make further comments on the other party's comments. BoR will then consider the draft case stated together with comments made by both parties. A copy of section 69 of IRO is at **Appendix I**.

5. If BoR is convinced that there exists a proper question of law, it will then state a case on the question of law for the opinion of CFI⁵. The taxpayer/IRD may also take the case stated by BoR to the Court of Appeal ("CA") directly without going through CFI, if CA grants the leave. However, if BoR considers that there is no proper question of law, it will refuse to state a case. The taxpayer/IRD may challenge BoR's refusal to state a case by seeking judicial review ("JR").

6. 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 IRO. The interpretation and practices in relation to section 69 is provided in DIPN No. 6, which was issued

⁴ In some complicated cases, 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 IRD.

⁵ In stating a case, BoR is not bound by the draft case submitted by the relevant parties.

in 1999 and last revised in 2006. The relevant extract of DIPN No. 6 is at **Appendix II**.

Improvement to the operation of the Board of Review

7. The Inland Revenue (Amendment) (No.2) Bill 2009 was introduced into the Legislative Council ("LegCo") in June 2009. The Bill, amongst others, sought to improve the operation of BoR, including empowering BoR to correct mistakes in its written decisions on tax appeals even if the correction would prejudice one of the parties; and empowering, under specified circumstances, a retired member of BoR to handle an appeal case he had handled previously. The Bill was passed by LegCo on 3 February 2010. The Report of the Bills Committee on Inland Revenue (Amendment) (No.2) Bill 2009 is hyperlinked in **Appendix III**.

Legislative proposals to enhance the efficiency of the existing tax appeal mechanism

8. On 4 January 2010, the Administration briefed the FA Panel on the following legislative proposals to enhance the efficiency of the existing tax appeal mechanism –

- (a) Pre-hearing directions and sanction for non-compliance: To address the non-compliance problems mentioned in paragraph 3 above, the Administration proposed to amend IRO to empower BoR to give pre-hearing directions and to sanction non-compliance on a legal basis (instead of administrative basis), as well as to dismiss any document not submitted in compliance with its pre-hearing directions⁶.
- (b) Direct appeal to the court against Board of Review's decision: To enhance the efficiency of the tax appeal system, the Administration proposed to abolish the case stated procedure, and allow taxpayers and IRD to lodge appeals to the court (i.e. CFI or CA) directly on questions of law against BoR's decisions.

9. According to the Administration, it has consulted the Joint Liaison on Taxation and the Judiciary on the above two proposals, and both bodies supported the proposals in principle. On 6 July 2010, the Administration

⁶ According to the Administration, it will make reference to the provision of the Rules of the High Court (Cap. 4A) concerning the court's powers in case management and sanctioning non-compliance in working out the detailed arrangement under the legislative proposal.

wrote to update the FA Panel of its plan to introduce the legislative proposals to LegCo in the 2010-2011 legislative session after resolving a few unforeseeable legal issues arising in the course of drafting the legislative amendments.

Judicial review relating to the case stated procedure

10. During the drafting of the proposed legislative amendments, the Administration noted that CFI would, in mid January 2011, hear an application for JR relating to the case stated procedure under the existing tax appeal mechanism. Since the outcome of the JR might have impact on the scope of the above legislative proposals, the Administration informed the FA Panel by way of an information note in December 2010 that the legislative exercise was put on hold due to the said JR. In March 2012, CA ruled in favour of the Administration. As the judicial review has come to an end, the Administration has revived the legislative exercise and taken the opportunity to refine the legislative proposals.

Major views and concerns expressed by Panel members

11. The major views and concerns on the legislative proposals expressed by members at the meeting of the FA Panel held on 4 January 2010 are summarized in the ensuing paragraphs.

Empowering the Board of Review to give pre-hearing directions and to sanction non-compliance

12. Some members queried the justification for the Administration to empower BoR to give pre-hearing directions and to sanction non-compliance given that most tax appeal cases had been dealt with administratively all along. There was a concern that appellants representing themselves at the tax appeal hearings would be disadvantaged under the revised pre-hearing directions and arrangements of the proposal, particularly those who had no access to legal assistance in preparing appeal documents. As the nature of most tax appeals was simple and straightforward, the Administration was urged to draw up the pre-hearing directions the simplest way possible so as to save the appellants from unnecessary administrative and financial burdens.

13. Since the proposal would help tackle appeal cases lodged by appellants which sought to obtain substantial benefits through repeated deferral requests, a member suggested that the Administration should categorize the repeated deferral cases by analyzing the underlying reasons and consider devising

different legal provisions for application to the respective categories of cases. The Administration was requested to provide information on the number of hearings of BoR which had been deferred due to late submission of documents and the number of wasted days of BoR resulting from the late submission when it introduced the legislative proposal to LegCo.

14. Given that BoR was not empowered to authorize litigation cost in the case of non-compliance like court proceedings, a member expressed concern that if BoR dismissed any document not submitted in compliance with its pre-hearing directions, it might give rise to controversies at the subsequent stage of tax appeal in the event that such documents turned out to be an important piece of evidence in the appeal.

15. The Administration stressed that BoR members rendered assistance to the Board as part of their community service, and the efficiency and effectiveness of BoR's work should be enhanced by providing a proper legal basis for BoR to make pre-hearing directions, in particular having regard to incidents of repeated deferrals of submission of documents by appellants which were represented by legal/professional representatives. The Administration advised that it had taken into account the situation where the appellant opted to lodge an appeal without legal/professional representative in formulating the legislative proposals. The Administration would be mindful to institute flexibility, for example by establishing a mechanism for appellants to apply for extension of the deadline for submission of documents. The Administration assured members that the rights of the appellants would be safeguarded in the pre-hearing phase of the appeal system.

Abolition of the case stated procedure

16. Members noted that taxation and accounting professionals agreed that the proposal would enhance efficiency of the tax appeal system⁷. As regards whether there would be an increase/decrease in the number of tax appeal cases with the change in the appeal procedure under the proposal to abolish the case stated procedure, which took at least three months to complete under the existing appeal system, the Administration advised that, while the efficiency in processing an appeal case could be enhanced after the abolition, it did not envisage any major difference in the number of appeal cases.

⁷ The Bills Committee on Inland Revenue (Amendment) (No.2) Bill 2009 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.

Latest development

17. The Administration will brief the FA Panel on the legislative proposals to enhance the efficiency of the existing tax appeal mechanism at the meeting on 6 January 2014. In addition to the two legislative proposals mentioned in paragraph 8 above, the legislative proposals will include providing appropriate privileges and immunities to the chairman, deputy chairmen and members of BoR as well as to witness, party to any proceedings and representative or other person appearing before BoR. The Administration plans to introduce an amendment bill into LegCo in May 2014.

Relevant papers

18. A list of relevant papers is in **Appendix III**.

Council Business Division
Legislative Council Secretariat
2 January 2014

Chapter: 112	Title: Inland Revenue Ordinance	Gazette Number: E.R. 1 of 2012
Section: 69	Heading: Appeals to the Court of First Instance	Version Date: 09/02/2012

- (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 2 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 2 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; E.R. 1 of 2012)

**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.

Appendix III

List of relevant papers

Date	Event	Paper/Minutes of meeting
10 June 2009	-	Legislative Council Brief on Inland Revenue (Amendment) (No.2) Bill 2009 (FIN CR 1/2306/09)
6 October 2009	Meeting of the the Bills Committee on Inland Revenue (Amendment)(No.2) Bill 2009 ("Bills Committee)	Submission dated 4 September 2009 from the Hong Kong Institute of Certified Public Accountants to the Bills Committee (English version only) (LC Paper No. CB(1)2664/08-09(01))
4 January 2010	Meeting of the Panel on Financial Affairs	Administration's paper (LC Paper No. CB(1)765/09-10(04)) Background brief (LC Paper No. CB(1)763/09-10) Minutes (LC Paper No. CB(1)1152/09-10)
27 January 2010	Council meeting	Report of the Bills Committee on Inland Revenue (Amendment) (No.2) Bill 2009 (LC Paper No. CB(1)948/09-10)
December 2010	-	Information paper on "Legislative Proposals to Enhance the Efficiency of the Existing Tax Appeal Mechanism" (LC Paper No. CB(1)963/10-11(01))