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24 August 2015

The Honorable Mr. Kenneth Leung
Chairman
Bills Committee on Inland Revenue (Amendment) (No.3) Bill 2015
Legislative Council Secretariat
Hong Kong

Dear Mr. Leung,

Submission on the Inland Revenue (Amendment) (No.3) Bill 2015

We write to make submissions on the proposed introduction of a leave requirement for appeals from the Board of Review ("Board") to the Court of First Instance.

We refer to the prior Joint Liaison Committee on Taxation's submissions to the Financial Secretary dated 10 December 2010 and 10 February 2014 in this regard. While many of our comments have been adopted, we are disappointed that the administration did not take into account the JLCT's comments in relation to appeals in preparing the current version of the Bill.

Leave requirement

As previously submitted by the JLCT, we have serious concerns about the necessity of a leave requirement for appeals on questions of law from the Board to the Court of First Instance.

A decision of the Board is final, and leave is typically not required for final decisions in other civil litigation appeals. In civil litigation, a litigant is normally automatically entitled to appeal *as of right* on questions of law. In our view, appeals from Board decisions should be treated in the same way as other civil litigation.

We further note that the Board's jurisdiction also extends to determining cases under s.82A of the Inland Revenue Ordinance. Section 82A provides for a procedure for the Commissioner of Inland Revenue to assess penalties against a taxpayer in defined circumstances. The nature of s.82A is a criminal charge for human rights purposes, as commented on by the Court of Appeal in Chu Ru Ying v. CIR [2010] 2 HKLRD 1052. Leave on questions of law is not required for criminal appeals in any other situation. A leave procedure in respect of tax appeals under 82A would therefore significantly prejudice the rights of an appellant as compared to appellants in other criminal contexts, with the consequent concern that the current proposed appeal threshold could be contrary to the Basic Law. In our submission the right of appeal in s.82A cases should not be potentially subjected to miscarriages of justice that might arise from a leave requirement.

The administration has suggested that other tribunals (such as the small claims tribunal or labour tribunal) adopt procedural approaches (ie, a leave requirement) similar to the current proposal. However, for two reasons, it would not be appropriate to regard the Board as the same as these other minor tribunals. Unlike small claims disputes or labour disputes, the nature of claims and persons who hear such disputes in the Board are different.

First, issues that come before the Board can involve very substantial amounts in the range of hundreds of millions of dollars. The cost often spreads over a number of years and involve multiple and subsequent years of assessment with the same facts and legal principles awaiting the outcome of the Board's decision. The other tribunals, by contrast, deal with relatively small matters.

Secondly, unlike the adjudicators of small claims tribunal or the labour tribunal (or the minor employment claims adjudication board), members of the Board are not judicial officers. They are not subject to the supervision and control of the Chief Judge. Their performance is not reviewed nor disciplined. Litigants in Board cases therefore have legitimate concerns about the quality of the decisions rendered by the Board and the performance of the duties by the Board members. Further, members of the Board are not necessarily tax or legal experts. As such, litigants may have legitimate concerns about the quality of the Board's decisions. It follows that litigants should have greater rights to appeal against the Board's decisions (as compared to litigants in other tribunals). And, as mentioned above, there is also the point that the Board may, in relation to s.82A, be in effect imposing a criminal penalty unlike, eg, the small claims tribunal.

In addition, the introduction of the leave requirement would defeat the purpose of the proposed abolition of the case stated procedure. The administration justifies the removal of the case stated procedure on grounds that it would create a more efficient tax appeals system, but the proposed leave requirement would actually create the same delays and expenses that the existing case-stated procedure creates. This is because the proposed leave requirement would effectively require litigants to prepare and present their case in full so as to ensure that leave is granted. The proposal is therefore likely to require two substantive hearings on the same case. This will incur increased costs for the taxpayer and the Inland Revenue Department as well as absorb more resources of the judiciary which, we are advised, are already quite stretched. Consequently, we find it difficult to understand why this procedural amendment has been proposed when the aim of the amendments is to simplify the appeal procedure, hopefully with the aim of saving costs. The proposal does not achieve that objective.

The leave requirement is also unnecessary in the situation where both parties accept that a proper question of law is involved. It would waste the Judiciary's time and costs to hear leave applications in such cases.

In view of the above, we strongly urge that members of the Bills Committee consider removing the leave requirement. For the reasons we have mentioned above, litigants before the Board should be entitled to appeal as of right on questions of law.

Leave threshold

If a leave requirement must be incorporated, we submit that the threshold for the grant of leave is too high.

The threshold of "reasonable prospect of success" would stifle appeals. This is because, even under the existing case stated procedures, the Board only has to find an "arguable point of law". The proposed "reasonable prospect of success" threshold is one step further and raises the existing bar for appeals.

In the context of appeals against *interlocutory* decisions of the Court of First Instance, the test is that there should be a "reasonable prospect of success". However, this is not applicable to Board decisions which are *final* decisions. The purpose of setting a higher threshold for appeals in *interlocutory* appeals is to prevent litigants from delaying the progress of the case. This rationale is not relevant to

appeals against final decisions, including tax appeals from the Board. The function of the leave threshold, if one is adopted (and it should not exist for s.82A appeals for reasons already mentioned) should be to screen out frivolous and unmeritorious cases. Setting the bar too high would only add costs and delay in cases where the taxpayer has an arguable basis on which to proceed.

Even if the appeal procedures of the Board are to be in line with other tribunal procedures, by way of comparison, for appeals from the small claims tribunal and labour tribunal to the Court of First Instance, the threshold for leave is that the appeal involves questions of law or that the claim was outside the jurisdiction of the tribunal. For further appeals from the Court of First Instance to Court of Appeal, the leave threshold is "question of law of general public importance". Neither of these tests requires the appellant to demonstrate a "reasonable prospect of success", as the administration now proposes for appeals against final Board decisions. The proposed leave threshold of "reasonable prospect of success" would therefore unduly restrict the taxpayers' right to appeal.

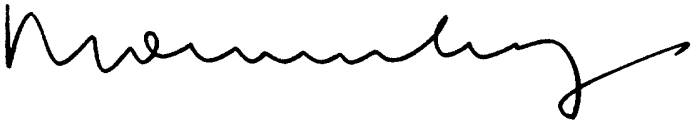
Generally, we note that there is an automatic right of appeal from the Court of First Instance to the Court of Appeal in respect of *final* decisions (s.14AA of the High Court Ordinance, cap 4). This applies to appeals against interlocutory judgments and was enacted to counteract abuse of the court process in relation to interlocutory appeals, because the increased number of such appeals was causing considerable inconvenience in the administration of the judicial system. As far as we are aware, there are usually less than six appeals against Board decisions each year; it is therefore difficult to see how the judicial system is being abused in tax appeals, and no evidence of such has been offered. If so, it seems that there is no abuse of the system or mischief which needs to be addressed or stopped.

We note that the administration suggests that relatively recent case-law imposes a “reasonable prospect of success” criterion in any event, so that the proposed amendments do not change the existing position. In our view, this is not clear. In any case, since what constitutes a proper question of law has been considered in a number of judicial review cases, we consider that there is no need to codify the controversial and unsettled test of ‘reasonable prospect of success” in the proposed legislation. The courts when considering whether there is a proper question of law in a leave application can make the decision by reference to the relevant principles established or being developed by the case-law authorities, without relying on any specific provisions contained in the proposed legislation. On this basis, we propose that the “reasonable prospect of success” test contained in section 69(3)(e) of the proposed legislation be removed, ie, by deleting condition (ii) of section 69(3)(e).

Our final point is that the Board differs from other tribunals in that, in tax matters, the state is seeking to tax the subject and hence take something away from him or her. It does seem just that, in these circumstances, assuming a valid question of law has been asked, such appeals should proceed without hindrance to the High Court.

We welcome the other proposals on the draft Bill, and trust that members of the bills committee will consider our submissions on the leave requirement.

Yours sincerely,



Michael Olesnicky
Chairman
For and on behalf of
The Joint Liaison Committee on Taxation