



24 August 2015

By email < bc_09_14@legco.gov.hk > and by post

Your Ref.: CB1/BC/9/14

Our Ref.: C/TXP54, M101714

Hon Kenneth Leung,
Chairman, Bills Committee on Inland Revenue (Amendment)(No.3) Bill 2015,
Legislative Council Complex,
1 Legislative Council Road,
Hong Kong.

Dear Mr. Leung,

Inland Revenue (Amendment)(No.3) Bill 2015

Thank you for inviting the views of the Hong Kong Institute of Certified Public Accountants ("the Institute") on the Inland Revenue (Amendment)(No.3) Bill 2015. The Institute's Taxation Faculty Executive Committee has considered the bill and its observations are set out below.

We have no objection, in principle, to most of the changes to the powers, privileges and procedures of the Board of Review (Inland Revenue Ordinance)("BOR") contained in the bill, which are reasonable and desirable changes. However, we are aware of concerns raised by the Joint Liaison Committee on Taxation (JLCT) regarding the right to appeal decisions of the BOR to the Court of First Instance, in particular, the need for a requirement for leave to appeal and also the high threshold for the grant of leave to appeal. We support the views of JLCT that there should be an automatic right of appeal, without having to seek leave, and that, should the requirement for leave be retained, the threshold should be lowered from a "reasonable prospect of success" to, e.g., an "arguable point of law", which is the test for the BOR under the current case stated procedure. Furthermore, given also our concerns, explained below, regarding the capacity of the current BOR structure to handle complex cases, we consider that it is all the more important that undue barriers to the right to appeal to the Court of First Instance should not be introduced.

While, subject to the above qualifications, we support most of the proposed changes in the bill, we believe that, in the long run, they do not go far enough in enhancing the operation and efficiency of the BOR.

In 2008, the Financial Services and the Treasury Bureau ("FSTB") sought views on the future of the BOR and its role in the appeal procedures for tax cases. This followed the decision of the Court of Final Appeal ("CFA") in the case of *ING Baring Securities Ltd. vs Commissioner of Inland Revenue* (FACV19/2006), in which the CFA provided a detailed analysis of the decision of the BOR in that case and questioned, generally, whether the BOR was appropriately constituted and staffed to handle complex tax appeals. In this regard, we note that, at paragraph 26 of the Legislative Council Brief, the Administration states: "While the Board processes an average of around 50 tax appeals per year, the appeal cases have become more and more complex and the average hearing time per case has increased from 1.3 sessions (half-day for each) in 2010-11 to 3 sessions in 2014-15."

Mr. Justice Bokhary, then a permanent judge of the CFA, stated, at paragraph 4 of the judgment in the *ING Baring* case: "Before parting with this case, I would observe that it is but one illustration of the extent to which the work to be performed by the Board of Review has, over the years, grown more complex and time-consuming. So much so that there appears much to be said for urgent consideration being given, in the appropriate quarters, to the question of whether the public interest in present-day Hong Kong calls for, if not a new body composed of full-time personnel to take over some or all of the Board's work, then at least an overhaul of the way in which the Board is constituted and resourced. This involves no criticism of those willing to take time out of their busy schedules to serve on the Board. What it does perhaps involve is whether it is fair to expect them to do so under present conditions." His views were endorsed by other judges.

In the Institute's response to FSTB's consultation, at that time, we made several recommendations in relation to constitution of the BOR. The main recommendations and observations were:

1. Appointment of a full-time panel of specialist members to be supported by a legally-qualified clerk to the BOR. The chairman of the BOR would be a member of this specialist panel.

2. The specialist panel should comprise four to five members and handle all complex tax cases. When members of the specialist panel were not engaged in hearings or writing decisions on complex cases, they should sit as the chairmen of BOR hearings on non-complex cases.
3. A full-time specialist panel would avoid the perception of conflicts of interest whilst at the same time providing the BOR with a significant body of tax expertise for dealing with complex tax cases, which, at present, is not available to the BOR, or at least not on a full-time basis.
4. For non-complex cases, a part-time general panel of members, comprising a number of deputy chairmen and members (although a smaller pool than at present) should be retained, thus ensuring that a simple, inexpensive and informal procedure can be maintained for straightforward cases.

We consider that these recommendations remain valid. We would suggest that the Administration revisit the issues raised by the CFA, and in the Institute's previous submission, and, at the earliest opportunity, consider the need to take further steps to enhance the capacity of the BOR to handle complex tax appeals.

Should you have any questions on this submission, please contact me at the Institute, on 2287 7228, or by email at: peter@hkicpa.org.hk

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Peter Tisman', is written over a light blue horizontal line.

Peter Tisman

Director, Advocacy and Practice Development

Encl.