Inland Revenue (Amendment) (No 3) Bill 2015

Comments of the Hong Kong Bar Association

Preamble

1. The Hong Kong Bar Association ("**HKBA**") is invited to comment on the Inland Revenue (Amendment) (No 3) Bill 2015 ("**the Draft Bill**") seeking to amend the Inland Revenue Ordinance (Cap 112) ("**IRO**") to enhance the tax appeal mechanism and improve the efficiency and effectiveness of the Board of Review ("**the Board**") in four areas, namely:-

   (1) allow an appeal against the decision of the Board on a question of law to go direct to the Court of First Instance or, if applicable, to the Court of Appeal, by abolishing the case stated procedure;

   (2) empower the Board at the hearing of an appeal to give directions on the provision of documents and information for the hearing;

   (3) provide privileges and immunities to the Chairman, Deputy Chairmen and other members of the Board, and the parties to a hearing as well as other persons appearing before the Board; and

   (4) raise the ceiling of costs to be paid by an appellant as may be ordered by the Board from $5,000 to $25,000, to strengthen the deterrent effect against frivolous appeals.

(1) Abolishing the case stated procedure

2. The HKBA welcomes the proposed abolishment of the case stated procedure under s 69 of IRO and in substitution thereof an appeal on questions of law. Such a reform is in line with the observations of McHugh NPJ (with whom Bokhary, Chan and Ribeiro PPJ and Sir Noel Power NPJ concurred) in *Lee Yee Shing v Commissioner of Inland Revenue* (2008) 11 HKCFAR 6 at para

109 (pp 48-49) who described the case stated procedure as "an anachronism" and "creates delay, takes up the time of tribunals and parties, and increases the expense of conducting litigation".

3. The HKBA agrees with the proposal that leave to appeal (limited to a question of law) must first be sought from the Court of First Instance:-

(1) The requirement for leave to appeal is in line with the threshold under the case stated procedure which does not confer upon an appellant an absolute and unqualified right of appeal, given the Board has the duty to decline to state a case in appropriate circumstances: *Honorcan Ltd v Inland Revenue Board of Review* [2010] 5 HKLRD 378 at paras 50 and 53 (p 392) per Fok J (as he then was).

(2) The restriction that an appeal against a decision of the Board is limited to an appeal on a question of law only is an acceptable limitation on the right of access to the court under Article 35 of the Basic Law: *Lee Yee Shing Jacky v Inland Revenue Board of Review* [2012] 2 HKLRD 981 at paras 50-52 (pp 996-997) per Tang V-P (as he then was).

4. The HKBA notes that Clause 8 of the Draft Bill proposes that leave to appeal be granted only if the proposed appeal has a reasonable prospect of success or there is some other reason in the interests of justice why the proposed appeal should be heard. This marks a higher threshold than an appellant seeking to invoke the case stated procedure, where the Board may only decline to state a case if the point of law is "plainly and obviously unarguable" which is the test applicable in a striking out application: *D26/05* (2005-06) 20 IRLRD 174 at para 3; see also *Honorcan Ltd* (supra) at para 53 ("If the Board did not have a duty to decline to state a case where a party sought to require it to state a case on a **wholly unarguable question of law**, there would inevitably be a risk of frivolous appeals being pursued in the Court of First Instance by way of the case stated procedure") (**emphasis** added). The HKBA queries the basis for tightening the appeal threshold, when the Administration has put forward no evidence to suggest that the current case stated procedure has been abused or

the Court of First Instance has been flooded with frivolous tax appeals. An appeal on a question of law requiring leave from the Court of First Instance does not invariably require a reasonable prospect of success be shown, e.g. an appeal from the Labour Tribunal [1] or the Small Claims Tribunal.[2]

5. The HKBA has the following specific comments on the proposed amendments to the IRO under this head, as set out in Clauses 8 to 10 of the Draft Bill:-

S 69(3)(a)(ii) / S 69(5)(a)(ii)

6. The statement in support of the summons for leave to appeal should also set out "the question of law involved in the proposed appeal".

S 69(3)(e)(ii)

7. The HKBA queries the basis for tightening the appeal threshold to require a reasonable prospect of success be shown or some other reason in the interests of justice why the proposed appeal should be heard: see para 4 above.

S 69(3)(f)(ii)

8. The HKBA queries the basis for such provision for the Court of First Instance to "impose any terms it thinks fit" if it grants leave to appeal, when no similar provision exists in respect of the case stated procedure.

S 69AA(2)

9. A substantive appeal from the Court of First Instance should follow its usual procedures under the Rules of the High Court. The HKBA suggests that the proposed new s 69AA(2) be worded in the following manner (which follows largely s 69(7) of IRO in respect of the case stated procedure):-

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1 Section 32(1) of the Labour Tribunal Ordinance (Cap 25).
2 Section 28(1) of the Small Claims Tribunal Ordinance (Cap 338).

"Appeals from a determination by the Court of First Instance on an appeal for which leave has been granted under section 69 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 from the Court of First Instance."

S 69AA(3)

10. This provision does not appear to serve any particular useful purpose.

S 69A(1), (1A) (the leapfrog arrangement)

11. A time limit should be imposed for seeking leave from the Court of Appeal for the leapfrog arrangement. The following amendment is suggested:-

"No appeal may be made under subsection (1) unless leave to appeal directly to the Court of Appeal has been granted, on the application of the appellant or the Commissioner within 1 month from the date when leave to appeal has been granted under section 69, by the Court of Appeal." (proposed additions underlined)

S 69A(4)

12. This provision does not appear to serve any particular useful purpose.

(2) Empowering the Board to issue directions for the provision of documents or information, and to sanction non-compliance

13. In respect of the 4 SABs named in para 12 of the Legislative Council Brief dated 10 June 2015 for the Draft Bill, none of their empowering statutory provisions [3] sets out the same extensive power proposed by Clause 7 of the

[3] Set out under s 36 of the Clearing and Settlement Systems Ordinance (Cap 584), s 32O of the Telecommunications Ordinance (Cap 106), s 51 of the Unsolicited Electronic Messages Ordinance (Cap 593), and s 36 of the Mandatory Provident Fund Schemes Ordinance (Cap 485).

Draft Bill under the new s 68AA to IRO which, in essence, empowers the presiding person of the hearing to impose a time limit for a party to produce documents or information for the purpose of the appeal, failing which (subject to relief from sanction being granted) no such document or information shall be admitted in evidence for the purpose of the appeal. The HKBA therefore queries the basis of the contention that the proposal in the Draft Bill is "with reference to the approach commonly adopted by other SABs".

14. Whilst the HKBA appreciates the need to strengthen and reinforce the Board's power to control and regulate its proceedings to facilitate and expedite any tax appeal before the Board, it appears that the Board's power to refuse to admit "late" documents or information may be expressly provided under s 68(7) of IRO, which provides: "At the hearing of the appeal **the Board may** ... admit or **reject any evidence adduced, whether oral or documentary**, and the provisions of the Evidence Ordinance (Cap 8), relating to the admissibility of evidence shall not apply." (**emphasis** added).

15. To give clarity to the Board's power to give directions to facilitate the conduct of the proceedings, a new subsection (11) may be added to s 68 (in place of the proposed new s 68AA which is framed in relatively rigid terms):-

> "The chairman or deputy chairman (as the case may be) presiding a hearing before the Board of Review may make such order or direction as may be necessary for or ancillary to the conduct of the hearing or the performance of the Board of Review's function in an appeal." [4]

(3) Providing privileges and immunities

16. The HKBA agrees that privileges and immunities in line with the arrangement of other SABs should be provided as proposed in the Draft Bill. The HKBA suggests the following minor textual amendments to the new s 68AAB:-[5]

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4 Modeled on s 36(1)(m) of Cap 584 (the Clearing and Settlement Systems Appeals Tribunal).
5 Modeled on s 53A of Cap 123 (as regards the Buildings Appeal Tribunal).

"(1) ...

(2) ...

(3) Subsection (4) applies to –

(a) a party to a hearing before the Board of Review; or

(b) a witness, counsel, solicitor or person representing a party appearing before the Board of Review.

(4) A person to whom this subsection applies has the same privileges and immunities ~~as the person~~ such a party, witness, counsel, solicitor or person representing a party respectively would have had in civil proceedings in the Court of First Instance." (proposed changes underlined)

(4) Raising the ceiling of costs to $25,000

17. S 68(9) of IRO provides that where the Board does not reduce or annul the assessment after hearing the appeal, the Board may order the appellant to pay as costs of the Board a sum not exceeding the amount specified in Part 1 of Schedule 5 of IRO. The present ceiling is $5,000. The Draft Bill aims to raise the figure to $25,000 to deter frivolous tax appeals.

18. The HKBA considers that the proposed increased is justified:-

(1) The aim of deterring frivolous appeals is a legitimate one. Anecdotally, it is understood that frivolous appeals do arise from time to time before the Board.

(2) The deterrent effect of a costs order of no more than $5,000 is likely to be limited and in certain cases the current ceiling may be wholly inadequate for the purpose of deterrence. While there can be no mathematical precision in the matter, an increase of the costs ceiling from $5,000 to $25,000 appears to be reasonable. In particular, the higher ceiling will give greater latitude to the Board to award costs in accordance with the particular circumstances of each case, which may widely vary.

19. It is worth emphasising that the figure of $25,000 represents the maximum costs award. It is not an automatic levy against unsuccessful appellants. The HKBA trusts that the Board will exercise due restraint in the ordering of costs and will reserve higher costs awards for clearly unmeritorious, frivolous and/or abusive cases.

HONG KONG BAR ASSOCIATION

Dated: 24th August 2015