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Paper for the House Committee meeting on 23 October 2015

Report of the Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2015

Purpose

This paper reports on the deliberations of the Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2015 ("the Bills Committee").

Background

2. The Board of Review (Inland Revenue Ordinance) ("the Board") is an independent statutory body constituted under the Inland Revenue Ordinance (Cap. 112) ("IRO") to hear and determine tax appeals lodged by taxpayers. The statutory membership of the Board comprises a chairman, a maximum of 10 deputy chairmen and a maximum of 150 members[1]. The chairman and the deputy chairmen must be persons with legal training and experience. In operation, the Board forms panels to hear individual tax appeals[2]. After completing the hearing of an appeal, the Board may confirm, reduce, increase or annul the assessment appealed against, or remit the case to the Commissioner of Inland Revenue ("CIR") for re-assessment.

3. Under section 69(1) of IRO, either the taxpayer concerned or CIR may make an appeal against the Board's decision on a question of law by requesting the Board to state a case on the question within one month of the date of the Board's decision for the opinion of the Court of First Instance

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[1] According to the information given by the Administration at the meeting of the Bills Committee held at 7 July 2015, at present, the number of deputy chairmen and members appointed to the Board has yet to reach the respective statutory limits.

[2] Each hearing panel must comprise at least three members, including the chairman or a deputy chairman of the Board as chairperson of the panel.

("CFI") ("the case stated procedure"). 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 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 CIR may challenge the Board's refusal to state a case by judicial review.

4. According to the Administration, 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 session) in 2010-2011 to 3 sessions in 2014-2015[3]. The case stated procedure has taken up a lot of the time and resources of the Board at the expense of the efficiency in handling other appeals, particularly those complex ones. Under the case stated procedure, the Board has to review the draft case stated prepared by the applicant and ascertain whether there is a genuine question of law involved. It takes about six months on average for the Board to process a stated case before it could be heard before the court.

5. The Administration has conducted a review on the existing tax appeal mechanism under IRO and identified four key areas for improvement as follows --

(a) (The 1st Area) The statutory requirement for the case stated procedure for dealing with appeals against the decisions of the Board on questions of law is time-consuming and costly, and affects the capacity of the Board to hear other appeals.

(b) (The 2nd Area) The lack of statutory power for the Board to give pre-hearing directions has led to the deferral or unnecessary lengthening of hearings.

(c) (The 3rd Area) The lack of provision of privileges and immunities, as in the case of other statutory appeal boards, for the chairman, deputy chairmen and members of the Board and parties attending hearings may expose them to unnecessary risks of litigation, which is undesirable to the Board in performing its statutory duty of determining tax appeals without fear or favour.

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[3] Source: Legislative Council Brief on the Bill issued by the Financial Services and the Treasury Bureau on 10 June 2015 (File Ref.: TsyB R 183/700-6/3/0 (C))

(d) (The 4th Area) The ceiling of costs which the Board may order the appellants to pay has not been adjusted since 1993. This has reduced the deterrent effect against frivolous appeals.

The Bill

6. The Inland Revenue (Amendment) (No. 3) Bill 2015 ("the Bill"), which was gazetted on 12 June 2015 and first read at the Legislative Council ("LegCo") meeting of 24 June 2015, seeks to amend IRO to --

(a) enable the taxpayer concerned or CIR to appeal directly to CFI against the Board's decision on a question of law in place of the existing case stated procedure;

(b) empower the person presiding at the hearing of an appeal before the Board to give directions on the provision of documents and information;

(c) confer privileges and immunities on members of the Board and parties to a hearing or persons appearing before the Board; and

(d) increase the maximum amount which the Board may order an appellant to pay as costs of the Board from $5,000 to $25,000.

Major provisions of the Bill

The 1st Area (clauses 8 to 10)

7. The existing statutory requirement for the case stated procedure for dealing with appeals against the decisions of the Board on questions of law is proposed to be abolished. Clause 8 of the Bill substitutes the existing section 69, and clause 9 adds a new section 69AA, to provide for the right to appeal directly to CFI against the Board's decision on a question of law.

8. Under the proposed amended section 69, a taxpayer or CIR may apply to CFI for leave to appeal against the Board's decision on a question of law. If CFI refuses to grant leave to appeal, the taxpayer concerned or CIR may make a further application to the Court of Appeal ("CA") for leave to appeal. After CA has determined the application for leave, no further application may be made to CA for leave to appeal against the Board's decision.

9. Under the existing section 69A, an appeal by way of case stated may be brought to CA direct without a hearing before CFI, provided that CA has granted leave on the application by the taxpayer or CIR. Clause 10 of the Bill amends section 69A so that a person who has been granted leave to appeal to CFI may, with the leave of CA, appeal directly to CA ("the leapfrogging arrangement"). If CFI refuses to grant leave to appeal in the first place but CA subsequently grants leave upon an application by the taxpayer or CIR, another leave is still required from CA for leapfrogging. If CA refuses to grant leave for leapfrogging, the appeal will be heard by CFI.

The 2nd Area (clause 7)

10. Clause 7 adds a new section 68AA to IRO to provide for the power of the person presiding at the hearing of an appeal before the Board to give directions on the provision of documents and information, and to refuse to admit in evidence any document or information that is not provided in compliance with the directions.

The 3rd Area (clause 7)

11. Clause 7 also adds a new section 68AAB, which provides that members of the Board including the chairman and deputy chairmen have, in performing their duties under Part 11 (Objections and Appeals) of IRO, the same privileges and immunities as a judge of CFI in civil proceedings in that court and a party to a hearing, and a witness, counsel, solicitor and person representing a party appearing before the Board have the same privileges and immunities as they would have in civil proceedings in CFI.

The 4th Area (clause 13(2))

12. Clause 13(2) amends item 1 of Part 1 of Schedule 5 to increase the maximum amount that the Board may, after hearing an appeal, order the appellant to pay as costs of the Board, if the Board does not reduce or annul the assessment appealed against, from $5,000 to $25,000.

Transitional arrangements (clauses 12 and 14)

13. Clause 12 adds a new section 89(15), and clause 14 adds a new Schedule 35, to provide for transitional arrangements relating to appeals against the Board's decisions such that --

(a) if a person has a right to make an application under the existing section 69 but has not done so before the proposed amended

section 69 comes into operation ("the commencement date"), and the time within which such application may be made has not expired on the commencement date, the person may not make the application on or after the commencement date but may appeal to CFI under the proposed amended section 69; and

(b) applications which have been made and delivered to the Board under the existing section 69 before the commencement date will continue to be processed in accordance with the existing arrangement.

The Bills Committee

14. At the House Committee meeting on 26 June 2015, members agreed to form a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**. Under the chairmanship of Hon Kenneth LEUNG, the Bills Committee has held two meetings. The public, including relevant professional organizations, have been invited to give views on the Bill. The Bills Committee received oral representation from the Joint Liaison Committee on Taxation ("JLCT") at the meeting on 11 September 2015. A list of the organizations which have given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

15. The Bills Committee supports the proposals in the Bill to improve the tax appeal mechanism and improve the efficiency and effectiveness of the Board. The major deliberations of the Bills Committee are set out in the ensuing paragraphs.

<u>Allowing direct appeal to the court on a question of law (clauses 8 to 10)</u>

16. The Bills Committee supports the proposal to abolish the case stated procedure and allow an appeal against a decision of the Board on a question of law to go direct to the court.

The requirement for appellants to apply to the court for leave to appeal against the decisions of the Board of Review

17. Under the proposed amended section 69(1), an appellant or CIR may apply to CFI for leave ("the leave requirement") to appeal against a decision of the Board on a question of law. The Bills Committee has examined the basis and necessity for the leave requirement. Members note the concerns of JLCT on the leave requirement[4] and the support of the Hong Kong Bar Association ("HKBA") for such requirement. JLCT takes the view that while a decision of the Board is final, 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. For example, in Australia, at the federal level, a taxpayer has an automatic right of appeal from the Administrative Appeals Tribunal to the court and no leave is required. JLCT considers that the introduction of the leave requirement would defeat the purpose of the proposed abolition of the case stated procedure. In JLCT's opinion, the leave requirement would create the same delays and expenses that the existing case stated procedure creates, because the leave requirement would require litigants to prepare and present their cases in full so as to ensure that leave is granted. JLCT considers that the leave requirement is likely to require two substantive hearings on the same case, which would incur increased costs for the taxpayer and the Inland Revenue Department and would draw on additional resources of the judiciary. Hon SIN Chung-kai has expressed concern on whether the leave requirement, together with the requirement for the losing party in a tax appeal to pay the costs of court hearings, would constitute a double burden deterring a party aggrieved by a decision of the Board from appealing to the court.

18. The Administration has explained to the Bills Committee that the leave requirement is meant to preserve the sifting function currently performed by the case stated procedure whereby appeals on issues of fact will be screened out. The issue of whether the appeal involves a question of law will first be dealt with by CFI under the proposed enhanced appeal mechanism. The Administration has advised that leave to appeal is also required for appeals to CFI against the decisions of the Labour Tribunal, the Small Claims Tribunal, and the Minor Employment Claims Adjudication Board on questions of law.

19. On the concern about requiring two hearings on the same case, the Administration has advised that whilst CFI may direct that the application be

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[4] According to the submissions from the Hong Kong Institute of Certified Public Accountants (LC Paper No. CB(1)1204/14-15(02)) and The Law Society of Hong Kong (LC Paper No. CB(1)1204/14-15(04)), these two organizations share JLCT's concerns on the leave requirement and the threshold for granting the leave.

considered at a hearing, the proposed amended section 69(3)(c) has allowed for the flexibility for CFI to determine a leave application without a hearing on the basis of written submissions only. Under the proposed amended section 69(5)(c), similar flexibility applies to CA, if CFI refuses to grant leave to the appeal and the applicant makes a further application to CA, for determining a leave application to appeal against the Board's decision.

The threshold for the grant of leave

20. The threshold for the court to grant leave for an appeal against the decision of the Board ("the leave threshold") is set out in the proposed new section 69(3)(e), which provides that leave to appeal must not be granted unless CFI is satisfied that: (a) a question of law is involved in the proposed appeal; and (b) 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.

21. The Chairman has queried, in view of the small number of requests in recent years for the Board to state a case on a question of law arising from the Board's decision[5], which shows no evidence of any abuse of the appeal system, whether it is necessary to codify the leave threshold in the law, given that the court would exercise its judgment on whether there is a proper question of law in a leave application. The Bills Committee also notes the views of JLCT and HKBA that the proposed threshold of "reasonable prospect of success" is higher than that for the existing case stated procedure[6]. JLCT considers that the threshold of "reasonable prospect of success" is not applicable to the Board's decisions, which are final decisions, and setting the bar too high would add costs and delay in cases where the taxpayer has an arguable basis on which to proceed. Both JLCT and HKBA have queried the basis for tightening the leave threshold.

22. The Administration has explained that the leave threshold as included in the Bill was proposed by the Judiciary. The proposed leave threshold aims to enable limited judicial resources to be put to their best use, by filtering out unmeritorious applications for leave (albeit being those on points of law) during the leave process. The Administration has advised that a similar

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[5] According to paragraph 26 of the LegCo Brief on the Bill, the number of requests for the Board to state a case on a question of law arising from the Board's decisions from 2010-2011 to 2014-2015 is on average 3.8 cases per year.

[6] JLCT has expressed that under the existing case stated procedure, the threshold for the Board to agree to state a case is that it finds an "arguable point of law" (LC Paper No. CB(1)1204/14-15(01)). HKBA has expressed that the Board may only decline to state a case if the point of law is "plainly and obviously unarguable" (LC Paper No. CB(1)1204/14-15(03)).

threshold has been introduced for leave to appeal to CA against a decision of the Lands Tribunal on the ground that such decision is erroneous in point of law; and for leave to appeal to CA from any decision of a District Judge in any civil cause or matter. Under the Lands Tribunal Ordinance (Cap. 17), the decision of the Lands Tribunal shall be final and appeal may be made to CA on the ground that such decision is erroneous in point of law. The law has expressly stated that leave shall not be granted unless it is satisfied that "the appeal has a reasonable prospect of success" or "there is some other reason in the interests of justice why the appeal should be heard".

23. The Bills Committee has enquired about the leave requirements and leave thresholds in respect of appeals against the decisions of tax review authorities in other common law jurisdictions. The Administration has advised that in England and Wales, where tax appeals are heard in the Tax Chamber of the First-tier Tribunal, any appeal against its decision on a question of law shall lie to the Tax and Chancery Chamber of the Upper Tribunal. An appeal to the Upper Tribunal may proceed only with "permission" which may be given by the First-tier Tribunal or the Upper Tribunal. As pointed out in JLCT's letter dated 17 September 2015 to the Bills Committee, in *Invicta Foods Ltd v HMRC [2014] UKFTT 456 (TC)*, the First-tier Tribunal looked to Rule 52.3(6) of the Civil Procedure Rules for guidance. The above Rule provides that permission to appeal "may be given only where (a) the court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason why the appeal should be heard". An appeal against the Upper Tribunal's decision on a question of law to the Court of Appeal in England and Wales may proceed only with "permission" which may be given by the Upper Tribunal or the Court of Appeal. It has been expressly provided in the law that such permission shall not be granted unless the Upper Tribunal or the Court of Appeal considers that (a) the proposed appeal would raise some important point of principle or practice; or (b) there is some other compelling reason for the Court of Appeal to hear the appeal. The Administration maintains its position that both the leave requirement and the leave threshold as proposed in clause 8 are reasonable and appropriate to improve the tax appeal system in Hong Kong, striking a balance between the appellants' right to appeal and the Judiciary's prerogative in allowing leave to appeal.

Hearing of appeal against the Board's decision

24. Clause 9 proposes that in relation to appeals against the Board's decisions on questions of law, CFI or CA, when hearing the appeal, must not receive any further evidence (the proposed new section 69AA(1)(b)(i)). The Bills Committee has studied whether this requirement is reasonable.

Hon Dennis KWOK has queried whether the requirement might be unjust to the appellant and contrary to *the Ladd v Marshall principle*, i.e. allowing the court to have the discretion to admit fresh evidence. The Chairman has expressed concern on how the court would handle an appeal where the relevant parties inadvertently failed to submit an important piece of evidence before the Board, if it is provided that the court shall not accept new evidence for the case.

25. The Administration has advised that in an appeal against the decision of the Board, both parties to the appeal, i.e. the taxpayer concerned or CIR, can only challenge the Board's decision on a question of law, but not on grounds of fact. The Board is the ultimate authority for fact finding. The Bill does not seek to change the statutory role of the Board in this aspect. In the Administration's view, the proposed arrangement under clause 9 that any further evidence on a case decided by the Board shall not be received by the court when it handles an appeal against the decision of the Board on a question of law will not only preserve the function and role of the Board in receiving and considering evidence, but will also prevent the proceeding of hearings from being affected by the submission of new evidence by either party during court hearings.

26. The Administration has further explained to the Bills Committee that, in drafting the proposal, reference has been made to the existing practice of other statutory appeal boards. There are similar provisions in the Labour Tribunal Ordinance (Cap. 25), the Small Claims Tribunal Ordinance (Cap. 338) and the Minor Employment Claims Adjudication Board Ordinance (Cap. 453), which provide that the court, when hearing an appeal, may not receive further evidence, or reverse or vary any determination made by the tribunal/adjudication board on questions of fact. The proposed new section 69AA(1)(a)(ii) provides that the court may remit the matter back to the Board with any directions (including a direction for a new hearing) that the court thinks fit, hence the court may do so if the court considers it necessary to obtain further evidence or fact during the course of determining the question of law involved in the appeal.

Leapfrogging

27. Clause 10 provides that a person who has been granted leave to appeal to CFI may, with the leave of CA, appeal directly to CA. The Bills Committee notes HKBA's suggestion that there may be a need for imposing a time limit for seeking leave from CA for the leapfrogging arrangement. In this respect, the Bills Committee does not consider that the imposition of a time limit is necessary. Hon SIN Chung-kai opines that a time restriction

would discourage taxpayers or CIR from appealing against the Board's decisions on questions of law.

Empowering the Board to issue directions and to sanction non-compliance (clause 7)

28. At present, the Board will request the parties to an appeal to submit documents or information to substantiate their positions. However, the existing IRO does not contain any provision empowering the Board to issue directions to the parties to an appeal or sanction non-compliance with such directions. As such, from time to time, there are late submissions of documents and information for the Board's hearings. Clause 7 adds a new section 68AA to IRO to provide for the power of the person presiding at the hearing of an appeal before the Board to give directions on the provision of documents and information (proposed new section 68AA(1)(a)), and to refuse to admit in evidence any document or information that is not provided in compliance with the directions (proposed new section 68AA(1)(b)).

29. The Legal Adviser to the Bills Committee ("the Legal Adviser") has asked the Administration to explain the legislative intent of the proposed new section 68AA(1)(b) as to whether the court would allow only the evidence (document or information) which is provided in compliance with the directions of the presiding person, but not otherwise. Noting that the existing section 68(4) provides that "the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant", the Legal Adviser has also enquired, in a situation where the appellant has certain evidence which is relevant to the appeal but not under any direction of the presiding person to be provided, how the appellant can ensure that such evidence will be considered by the Board in the light of the proposed new section 68AA(1)(b).

30. The Administration has advised that the directions to be made by the person presiding at a hearing of the Board on the provision of documents and information by the parties to the appeal would normally relate to the timing and manner of submission but would not prescribe exhaustively the exact documents and information that are to be submitted; therefore, the situation where certain evidence related to an appeal is precluded from consideration by the Board as it is "not under any direction of the presiding person" would not arise. Whilst noting that the proposed new section 68AA(1)(b) may be wide enough to cover directions not only relating to timing and manner of submission, members have not raised any objection to this proposed new provision.

31. The Bills Committee has enquired whether any penalty would be imposed on the party who has not submitted the documents or information in compliance with the directions given by the Board. The Administration has confirmed that no penalty would be imposed for late submission of documents, but the Board would have a discretion to refuse to admit those documents as evidence.

Strengthening the deterrent effect against frivolous tax appeals (clause 13(2))

32. Clause 13(2) seeks to increase the maximum amount that the Board may, after hearing an appeal, order the appellant to pay as costs of the Board from $5,000 to $25,000, if the Board does not reduce or annul the assessment appealed against. Hon SIN Chung-kai has enquired about the expected effect of raising the cost ceiling in deterring frivolous tax appeals.

33. The Administration has advised that the proposed increase of the cost ceiling is intended to preserve the deterrent effect against frivolous tax appeals, rather than recovering the full cost of a hearing, which is estimated to be about $80,800 on average. The cost ceiling is set out in IRO and can be varied by the Secretary for Financial Services and the Treasury by an order subject to the scrutiny of LegCo under the negative vetting procedure. The Administration intends to review the cost ceiling on a regular basis to preserve its deterrent effect.

Textual and consequential amendments

Clause 3 - constitution of the Board of Review

34. It is proposed in clause 3 that "某宗"/"該宗" (as the quantifier for "上訴" (appeal)) in the Chinese text of certain provisions under the existing section 65 (constitution of the Board of Review) be changed to "某項"/"該項". Members have examined the rationale for the proposed change, and considered whether "宗" or "項" is the proper quantifier.

35. The Administration has explained that the proposed change is to achieve consistency in the quantifier (in the Chinese text) for "上訴" (appeal) among various sections under IRO. The Translation and Interpretation Division of the LegCo Secretariat, which has been requested to provide information about the meaning and usage of the words "宗" and "項", has advised that the two words are used to quantify different nouns according to customary practices but may be used with the same noun, such as "投訴" (complaint). While "宗" usually quantifies things that are complete in

themselves, "項" more frequently refers to items. The Translation and Interpretation Division considers it more appropriate to use the same quantifier for the same noun in a piece of writing, provided that the author has no intention to bring out different meanings by using different quantifiers for the same noun[7]. Members have not raised any objection to the proposed change.

Clause 11 – appeals against assessment to additional tax

36. The existing section 82B(3) of IRO provides that relevant procedures relating to appeals against assessment to additional tax to the Board are the same as those for appeals against assessment to other taxes. The procedures include those set out in the existing sections 66(2), 66(3), 68, 68A, 69 and 70. Clause 11 amends, inter alia, section 82B(3) to cover the proposed new sections 68AA (directions on provision of documents and information) and 68AAB (privileges and immunities). The Legal Adviser has noted that the proposed new section 69AA (appeal against Board of Review's decision: hearing of appeal) and the proposed amended section 69A (right of appeal directly to Court of Appeal against decision of Board of Review) are not included in the proposed amendment to section 82B(3), and enquired whether these two proposed sections would be applicable to appeals against assessments to additional tax.

37. The Administration considers that it is not necessary to cover the proposed sections 69AA and 69A under section 82B(3), and has explained that, same as the existing section 69A (right to appeal directly to the Court of Appeal against decision of Board of Review), which is not covered under the existing section 82B(3), the proposed sections 69AA and 69A are not part of the procedures relating to appeals to the Board, but concern procedures of the court in dealing with an appeal against the Board's decision where leave has been granted. In any event, by virtue of section 69 as currently included in section 82B(3), and given the reference to section 69 in both of the proposed sections 69AA and 69A, the relevant procedures of CFI in hearing of an appeal (69AA) as well as the right to appeal directly to CA with the relevant procedures of CA in hearing of an appeal (69A) will be applicable to an appeal against a decision of the Board (which may be one in relation to an appeal against assessment to additional tax or that in relation to taxes other than additional tax).

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[7] Details are given in LC Paper No. CB(1)1254/14-15(02) (Chinese version only).

Committee Stage amendments

38. The Bills Committee and the Administration will not propose any Committee Stage amendments to the Bill.

Resumption of Second Reading debate on the Bill

39. The Bills Committee supports the resumption of the Second Reading debate on the Bill. The Administration has indicated its intention to give notice for resumption of the Second Reading debate on the Bill at the Council meeting of 4 November 2015.

Advice sought

40. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 1
Legislative Council Secretariat
20 October 2015

Appendix I

Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2015

Membership list

Chairman	Hon Kenneth LEUNG
Members	Hon Cyd HO Sau-lan, JP Hon Starry LEE Wai-king, JP Hon Charles Peter MOK, JP Hon Dennis KWOK Hon SIN Chung-kai, SBS, JP
	(Total：6 members)
Clerk	Ms Sharon CHUNG
Legal Adviser	Miss Winnie LO

Appendix II

Bills Committee on Inland Revenue (Amendment) (No. 3) Bill 2015

List of the organizations which have given views to the Bills Committee

1. Hong Kong Bar Association
2. Hong Kong Institute of Certified Public Accountants
3. Joint Liaison Committee on Taxation
4. The Law Society of Hong Kong