



Hong Kong Tax Controversy Insight

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What happens if a settlement cannot be reached with the Inland Revenue Department (IRD)? - The Appeal Process

What would happen if a taxpayer lodges an objection against an assessment and no agreement can be reached with IRD on the objection? There are various reasons why a settlement cannot be reached with the IRD on a tax dispute. What happens next?

In this issue, we will provide an overview of the appeals process both within and beyond the IRD and share some practical experiences throughout the process.

After a taxpayer lodges an objection against an assessment, in most cases, the IRD would request the taxpayer to provide further information and documentary evidence to substantiate the objection. After consideration of the facts and information provided, and sometimes a negotiation process between the taxpayer and the IRD case officer, the taxpayer and/or the case officer may propose a settlement for the tax issues under dispute. If an agreement can be reached on the proposed settlement, the IRD will issue revised assessments for full and final settlement for the tax matters under dispute.

However, the taxpayer and the IRD may not always be able to agree on a settlement, e.g. the parties are unable to formulate a settlement basis that is acceptable to both parties, or the parties are unable to agree on the quantum of the tax. In these cases, the tax dispute will be referred for the Commissioner's determination.

Appeals team of the IRD

Where a case has been referred for the Commissioner's determination, the case would normally be transferred from the Assessing Units (Unit 1 and Unit 2) or the Field Audit and Investigation Unit (Unit 4) to the Appeals Section within the Commissioner's Unit of the IRD.

The Appeals Section will review the case and prepare a draft "statement of facts" based on available information. The draft "statement of facts" will normally be sent to the taxpayer or his representative for comment, except for cases which the IRD considers to be simple or cases where there have already been long delays on the part of the taxpayer or his representative. Nevertheless, the taxpayer or his representative could request the IRD to issue the draft "statement of facts" for comment in all circumstances.

In addition to the draft "statement of facts", the Appeals Section may make requests for further facts, documentary evidence or arguments to be included in the draft determination prior to the submission of the case to the Commissioner for determination.

For desk review cases handled by the Assessing Units, the draft "statement of facts" may sometimes be prepared by the Assessing Unit case officer and the case may be presented to the Commissioner for determination directly by the case officer.

The Commissioner is required to consider every valid objection and may confirm, reduce, increase or annul an assessment. The determination of an objection is not confined to the matters referred to in the initial assessment. If the Commissioner considers the initial assessment to be inadequate, he is able to increase the assessment.

Once the Commissioner has made his determination, he will transmit his determination in writing to the taxpayer, together with his reasons for such determination and the facts which he has considered in arriving at the determination. The issuance of the written determination signifies the beginning of the appeal process with bodies external to the IRD.

Board of Review (BOR)

The first step of the taxpayer's appeal against the Commissioner's determination is lodging a notice of appeal to the BOR within one month after the transmission of the written determination. The notice of appeal should state clearly the taxpayer's grounds of appeal and include a copy of the Commissioner's written determination.

The BOR is an independent statutory body for hearing and determining tax appeals. Upon receipt of the notice of appeal, the BOR will form a panel with at least three members to hear and determine the tax appeal and fix a date for the hearing.

At this stage, we strongly recommend the taxpayer to engage a barrister to represent himself at the hearing on complicated cases as the IRD would usually involve the Department of Justice at the hearing.

Although the BOR does not form part of the Court system in Hong Kong, the hearing of the BOR follows similar procedures of a hearing of the Courts. The taxpayer is required to submit bundles, documents that the taxpayer intends to present at the hearing to support the case, prior to the hearing within a fixed timeframe. The taxpayer is also able to call witnesses to give evidence at the hearing. Meanwhile, the taxpayer will also be served with the IRD's bundles.

During the hearing, both the appellant (i.e. the taxpayer) and the IRD will give an opening statement, each party then presents their case with evidence and witnesses with cross-examination by the other party. The hearing is concluded by the appellant and the IRD giving a closing statement.

In Hong Kong, saved for a few recognized situations, a practicing barrister may only accept instructions from a solicitor or a member of a recognized professional body if the matter in dispute falls within the professional expertise of the professional. For example, for tax cases, the client may engage a tax professional to instruct a barrister.

After the hearing, the BOR will deliver its decision in writing. The Board may confirm, reduce, increase or annul the assessment appealed against or may remit the case to the Commissioner for re-assessment.

The Courts

The taxpayer or the Commissioner may make an application to the Court of First Instance (CFI) for leave to appeal against the BOR's decision on a ground involving a question of law. As opposed to the BOR, the Courts will only rule on questions of law and not questions of facts.

The application to the CFI must be lodged with the Register of the High Court and served on the other party within 1 month after the date on which the BOR's decision is made or the date of communication by which the BOR's decision is notified, and suggested by a statement setting out the grounds of appeal and the reasons why leave should be granted.

Following the CFI, the taxpayer or the Commissioner may further appeal to the Court of Appeal and ultimately Court of Final Appeal (CFA). The CFA is the highest appellate court in Hong Kong. Dissimilar to the CFI and CA, leave (i.e. permission) to appeal is required for the CFA.

Leave will be granted if in the opinion of the CA or the CFA, the question involved in the appeal is one which, because of its great general or public importance, or otherwise, ought to be submitted to the CFA for decision.

Leapfrog arrangements

The taxpayer and the Commissioner may appeal directly to the CFI after the issuance of the written determination by the IRD under section 67 of the Inland Revenue Ordinance (IRO). In addition, pursuant to section 69A of the IRO, the taxpayer and the Commissioner may also, with the leave of the CA, appeal against the decision of the BOR directly to the CA instead of the CFI. These arrangements are commonly known as the leapfrog arrangements.

In the case of section 67, where a valid notice of appeal is given to the BOR and within 21 days after the date that the notice of appeal has been received by the BOR, the taxpayer or the Commissioner may, by notice in writing to the other party and the BOR, request the appeal to be transferred to the CFI directly for hearing and determination. If the other party agrees to the request and gives his consent in writing to the BOR within 21 days after the date of such notice, the BOR will transmit the appeal to the CFI.

For situations under section 69A, leave to appeal may be granted on the ground that in the opinion of the CA, it is desirable that by the following reasons the appeal be heard and determined by the CA:

- i. the amount of tax in dispute;
- ii. general or public importance of the matter;
- iii. extraordinary difficulty of the matter; or
- iv. any other reason.

Considerations for appealing against an assessment

Although the path for appeal is clear and straightforward, preparation for each level of appeal can be quite complex and requires a lot of resources. As such, the following factors should be considered when taxpayers have to decide whether to settle or appeal against a tax dispute:

1. Time

The appeal process can take up to tens of years to reach final conclusion. Even if the taxpayer appeals successfully at the BOR or one level of the Courts, the IRD may further appeal against the decision and bring the case to the next higher level of the Courts. Therefore, taxpayers should be prepared that the case could be escalated up to the CFA until a final decision can be made.

2. Money

The appeal process often involves engagement of legal and tax professionals. With the potential long time span of the whole appeal process, the professional fees can be substantial. Taxpayers should evaluate the cost and benefits before deciding on whether to make an appeal.

3. Publicity

The taxpayer's confidentiality is protected by the privacy provision of the IRO during the appeal process within the IRD. The taxpayer's identity is also kept anonymous at the BOR level even though the BOR's decision may be published to the public.

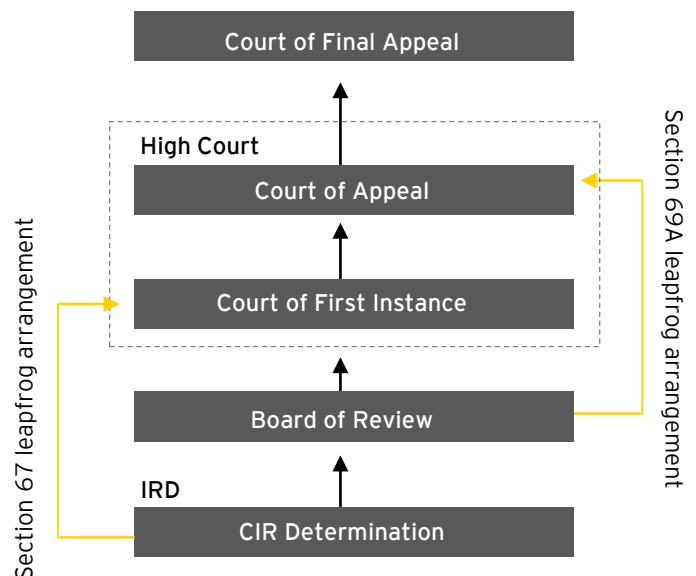
However, once the case is appealed to the Courts, details of the taxpayer and the case will become public. As such, taxpayers should consider whether the publicity will bring any adverse impact to the taxpayer when deciding whether and how far they would go for the appeal route.

4. Certainty

Settling the case now will bring certainty to the past and the taxpayer can plan for the future by restructuring, re-designing its business process / activities, etc. As mentioned above, the appeal process can take up to tens of years and all the years of assessments are open to re-assessment until a final decision is made.

Whether to settle or appeal for a case is not an easy or straightforward decision. There are many factors that should be considered and we strongly recommend that professional advice be sought when making such decision.

Appeal process beyond the IRD



Hong Kong office
Agnes Chan, Managing Partner, Hong Kong & Macau
22/F, CITIC Tower, 1 Tim Mei Avenue, Central, Hong Kong
Tel: +852 2846 9888 / Fax: +852 2868 4432

Ian McNeill Deputy Asia-Pacific Tax Leader +852 2849 9568 ian.mcneill@hk.ey.com			
Non-financial Services		Financial Services	
Ernst & Young Tax Services Limited David Chan Tax Leader for Hong Kong and Macau +852 2629 3228 david.chan@hk.ey.com		Ernst & Young Tax Services Limited Paul Ho Tax Leader for Hong Kong +852 2849 9564 paul.ho@hk.ey.com	
Greater China Tax Controversy Co-Leader Hong Kong Tax Controversy Leader	Greater China Tax Controversy Co-Leader China Tax Controversy Leader	Greater China Tax Policy Leader	
Ernst & Young Tax Services Limited Wilson Cheng +852 2846 9066 wilson.cheng@hk.ey.com	Ernst & Young (China) Advisory Limited Carrie Tang +86 21 2228 2116 carrie.tang@cn.ey.com	Becky Lai +852 2629 3188 becky.lai@hk.ey.com	
Business Tax Services / Global Compliance and Reporting		Business Tax Services / Global Compliance and Reporting	
Hong Kong Tax Services		Hong Kong Tax Services	
Wilson Cheng +852 2846 9066 wilson.cheng@hk.ey.com	Tracy Ho +852 2846 9065 tracy.ho@hk.ey.com	Paul Ho +852 2849 9564 paul.ho@hk.ey.com	
Ada Ma +852 2849 9391 ada.ma@hk.ey.com	Grace Tang +852 2846 9889 grace.tang@hk.ey.com	Sunny Liu +852 2846 9883 sunny.liu@hk.ey.com	
China Tax Services		China Tax Services	
Ivan Chan +852 2629 3828 ivan.chan@hk.ey.com	Lorraine Cheung +852 2849 9356 lorraine.cheung@hk.ey.com	Cindy Li +852 2629 3608 cindy.jy.li@hk.ey.com	
Becky Lai +852 2629 3188 becky.lai@hk.ey.com	Carol Liu +852 2629 3788 carol.liu@hk.ey.com	May Leung +852 2629 3089 may.leung@hk.ey.com	
International Tax and Transaction Services		US Tax Services	
International Tax Services		Michael Stenske +852 2629 3058 michael.stenske@hk.ey.com	
Transfer Pricing Services		International Tax and Transaction Services	
Jo An Yee +852 2846 9710 jo-an.yee@hk.ey.com	Martin Richter +852 2629 3938 martin.richter@hk.ey.com	International Tax Services	
Transaction Tax Services		James Badenach +852 2629 3988 james.badenach@hk.ey.com	
David Chan +852 2629 3228 david.chan@hk.ey.com	Jane Hui +852 2629 3836 jane.hui@hk.ey.com	Jacqueline Bennett +852 2849 9288 jacqueline.bennett@hk.ey.com	
Eric Lam +852 2846 9946 eric-yh.lam@hk.ey.com	Qiannan Lu +852 2675 2922 qiannan.lu@hk.ey.com	Vanessa Chan +852 2629 3708 vanessa-ps.chan@hk.ey.com	
Asia-Pacific Tax Centre		Adam Williams +852 2849 9589 adam-b.williams@hk.ey.com	
Tax Technology and Transformation Services	International Tax and Transaction Services	Indirect Tax	
Albert Lee +852 2629 3318 albert.lee@hk.ey.com Robert Hardesty +852 2629 3291 robert.hardesty@hk.ey.com	US Tax Desk	Tracey Kuuskoski +852 2675 2842 tracey.kuuskoski@hk.ey.com	
	Jeremy Litton +852 3471 2783 jeremy.litton@hk.ey.com		
	Operating Model Effectiveness		
	Edvard Rinck +852 2675 2834 edvard.rinck@hk.ey.com		
		Global Compliance and Reporting	
		Cherry Lam +852 2849 9563 cherry-lw.lam@hk.ey.com	

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