



Hong Kong Tax Controversy Insight

24 August 2020

2020 Issue No. 4

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.

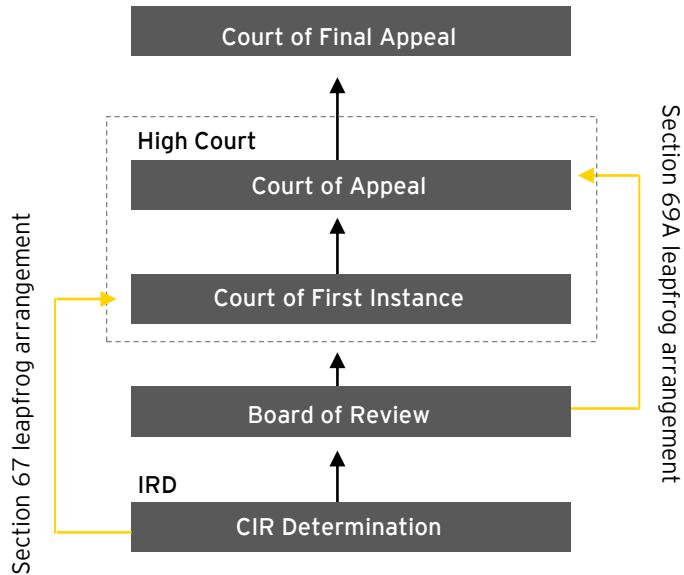
However, once the case is appealed to the Courts, details of the taxpayer and the case will become public. As such, taxpayers should consider whether the publicity will bring any adverse impact to the taxpayer when deciding whether and how far they would go for the appeal route.

4. Certainty

Settling the case now will bring certainty to the past and the taxpayer can plan for the future by restructuring, redesigning 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

Ernst & Young Tax Services Limited
 David Chan
 Tax Leader for Hong Kong and Macau
 +852 2629 3228
 david.chan@hk.ey.com

Greater China Tax Controversy
Co-Leader
Hong Kong Tax Controversy Leader

Ernst & Young Tax Services Limited
 Wilson Cheng
 +852 2846 9066
 wilson.cheng@hk.ey.com

Greater China Tax Controversy
Co-Leader
China Tax Controversy Leader

Ernst & Young (China) Advisory Limited
 Carrie Tang
 +86 21 2228 2116
 carrie.tang@cn.ey.com

Greater China Tax Policy
Leader

Becky Lai
 +852 2629 3188
 becky.lai@hk.ey.com

Financial Services

Ernst & Young Tax Services Limited
 Paul Ho
 Tax Leader for Hong Kong
 +852 2849 9564
 paul.ho@hk.ey.com

Business Tax Services / Global Compliance and Reporting**Hong Kong Tax Services**

Paul Ho
 +852 2849 9564
 paul.ho@hk.ey.com

Sunny Liu
 +852 2846 9883
 sunny.liu@hk.ey.com

China Tax Services

Cindy Li
 +852 2629 3608
 cindy.jy.li@hk.ey.com

US Tax Services

Michael Stenske
 +852 2629 3058
 michael.stenske@hk.ey.com

International Tax and Transaction Services**International Tax Services**

James Badenach
 +852 2629 3988
 james.badenach@hk.ey.com

Jacqueline Bennett
 +852 2849 9288
 jacqueline.bennett@hk.ey.com

Vanessa Chan
 +852 2629 3708
 vanessa-ps.chan@hk.ey.com

Adam Williams
 +852 2849 9589
 adam-b.williams@hk.ey.com

Transfer Pricing Services

Justin Kyte
 +852 2629 3880
 justin.kyte@hk.ey.com

Transaction Tax Services

Rohit Narula
 +852 2629 3549
 rohit.narula@hk.ey.com

Asia-Pacific Tax Centre**Tax Technology and Transformation Services****International Tax and Transaction Services****Indirect Tax****Global Compliance and Reporting**

Albert Lee
 +852 2629 3318
 albert.lee@hk.ey.com

Robert Hardesty
 +852 2629 3291
 robert.hardesty@hk.ey.com

US Tax Desk

Jeremy Litton
 +852 3471 2783
 jeremy.litton@hk.ey.com

Operating Model Effectiveness

Edvard Rinck
 +852 2675 2834
 edvard.rinck@hk.ey.com

Tracey Kuuskoski
 +852 2675 2842
 tracey.kuuskoski@hk.ey.com

Cherry Lam
 +852 2849 9563
 cherry-lw.lam@hk.ey.com

EY | Assurance | Tax | Strategy and Transactions | Consulting

About EY

EY is a global leader in assurance, tax, strategy, transaction and consulting services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. Information about how EY collects and uses personal data and a description of the rights individuals have under data protection legislation are available via ey.com/privacy. For more information about our organization, please visit ey.com.

© 2020 Ernst & Young Tax Services Limited.
 All Rights Reserved.

APAC no. 03010847
 ED None

ey.com/china

About EY's Tax services

Your business will only succeed if you build it on a strong foundation and grow it in a sustainable way. At EY, we believe that managing your tax obligations responsibly and proactively can make a critical difference. Our 50,000 talented tax professionals, in more than 150 countries, give you technical knowledge, business experience, consistency and an unwavering commitment to quality service – wherever you are and whatever tax services you need.

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax, legal or other professional advice. Please refer to your advisors for specific advice.

Follow us on WeChat

Scan the QR code and stay up to date with the latest EY news.

