



Inland Revenue Department

The Government of the Hong Kong Special Administrative Region
of the People's Republic of China

DEPARTMENTAL INTERPRETATION AND PRACTICE NOTES

NO. 6 (REVISED)

INLAND REVENUE ORDINANCE – PROVISIONS AS TO

- (A) OBJECTIONS TO THE COMMISSIONER**
- (B) APPEALS TO THE BOARD OF REVIEW**
- (C) APPEALS TO THE COURTS**

These notes are issued for the information of taxpayers and their tax representatives. They contain the Department's interpretation and practices in relation to the law as it stood at the date of publication. Taxpayers are reminded that their right of objection against the assessment and their right of appeal to the Commissioner, the Board of Review or the Court are not affected by the application of these notes.

These notes replace those issued in November 2006.

WONG Kuen-fai
Commissioner of Inland Revenue

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Our web site : www.ird.gov.hk

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(A) **OBJECTIONS TO THE COMMISSIONER**

Objections by taxpayers

A taxpayer who disputes an assessment must, under section 64 of the Inland Revenue Ordinance (“the Ordinance”), give notice of objection within 1 month after the date of the notice of assessment. In this regard, a computation of loss does not constitute a notice of assessment. A taxpayer who receives a computation of loss cannot make an objection against the computation.

2. Proviso is retained whereby the Commissioner may extend such period where he is satisfied that a person was prevented from giving notice within that period by reason of absence from Hong Kong, sickness or other reasonable cause.

Requirements of a valid objection

3. No objection is valid unless the following requirements are fulfilled:

- (a) The notice of objection is received by the Commissioner within the prescribed period or such extended period as he may consider reasonable in the circumstances mentioned in paragraphs 1 and 2 above. It should be noted that the prescribed period of 1 month runs from the day after the date of the notice of assessment to the receipt of the notice of objection.
- (b) The notice must be in writing and must state precisely the grounds of objection to the assessment. The word “precisely” precludes any vague claim such as “the assessment is not agreed”. The grounds need not be stated in legal form; they can be expressed in ordinary language but they should be sufficiently explicit to direct the attention of the Commissioner to the particular aspects which the taxpayer contends are erroneous.

(c) If the assessment objected to has been made under section 59(3) in the absence of a specified return, less precise grounds of objection would be accepted in the first instance; but in addition to the notice of objection being given within the prescribed period [see sub-paragraph (a) above], the required return, properly completed, must also be lodged within such period, or within such further period as the Commissioner may approve for the making of such return. Before granting any further period for lodging a return, the Commissioner will usually need to be satisfied that definite steps are being taken for the preparation of the return.

4. Where there is a reassessment of tax, either increasing or reducing the liability, the person assessed shall have no further right of objection than he would have had if the reassessment had not been made, except to the extent to which a fresh liability in respect of any particular item is imposed, or an existing liability is increased or reduced.

Acknowledgement of objections and payment of tax in dispute

5. It is, of course, impossible for the Commissioner personally to proceed to deal fully with each and every objection from the moment it is received. The preliminary stages must be delegated to the Assistant Commissioners and through them to the Assessors.

6. Upon receipt of an objection it will firstly be examined to see whether it fulfils the requirements of a valid objection. If not, the taxpayer and his representative will be informed of any defects promptly by an Assistant Commissioner or an officer authorized by the Commissioner and advised of any action which could make it a valid objection.

7. Within the number of working days pledged by the Department of the receipt of a valid objection, it will be acknowledged by an Assistant Commissioner or an officer authorized by the Commissioner who will also advise whether or not any of the tax has been stood over under section 71(2) pending the result of the objection or appeal.

8. The Commissioner is empowered to order the holdover of payment of tax, or any part thereof, conditional upon the person who or on whose behalf the objection or appeal is made providing security for the payment of the tax, or any part thereof, the payment of which is held over either:

- (a) by purchasing a certificate issued under the Tax Reserve Certificates Ordinance (Cap. 289), or
- (b) by furnishing a banker's undertaking,

as the Commissioner may require.

9. The policy with regard to the issue of stand-over orders is as follows:

- (a) Unconditional stand-over - Where, upon receipt of a valid objection and request for holdover, it is immediately apparent to an Assistant Commissioner, or other officer authorized by the Commissioner, that the objection should be allowed forthwith an unconditional stand-over will be ordered pending revision of the assessment. However, interest will be payable if any tax so held-over is finally found payable [see paragraph 14 below].
- (b) No stand-over - Where, upon receipt of a valid objection and request for holdover, it is the opinion of an Assistant Commissioner, or other officer authorized by the Commissioner, that the objection has little chance of success, no stand-over will be ordered and the tax will be payable on the due date(s) contained in the notice of assessment.
- (c) Purchase of tax reserve certificates - Where, upon receipt of a valid objection and request for holdover, it is the opinion of an Assistant Commissioner or other officer authorized by the Commissioner that the objection has some merit but that the balance of probability, based on the facts known to exist at the date of the objection, does not weigh definitely in favour of the taxpayer, a stand-over will be ordered conditional upon the purchase of tax reserve certificates in the amount of the

tax stood-over. It is emphasized that, in the generality of cases falling into this category, the purchase of certificates will be required.

- (d) Banker's undertakings - Consideration will, however, be given to applications received offering to provide a bank undertaking in lieu of the purchase of certificates, where it can be established to the satisfaction of the authorized officer that the purchase of tax reserve certificates would cause undue hardship to the taxpayer, having regard to his present financial resources. It is not possible to lay down hard and fast guidelines and it will be for the taxpayer who is seeking the alternative of a bank undertaking to demonstrate his inability to purchase certificates. Similar to unconditional stand-over, interest will be payable if any tax covered by a bank undertaking is finally found payable [see paragraph 14 below].
- (e) Section 59(3) assessments - Valid objections (i.e. validated by the submission of a full and proper return) against estimated assessments issued pursuant to section 59(3) will be dealt with on their respective merits. In cases where a reduction of the assessment to the quantum of returned profits is envisaged, an unconditional stand-over will normally be ordered. In cases where an Assistant Commissioner or other officer authorized by the Commissioner is of opinion that an adjustment to the returned profits is appropriate, the tax on the difference between the estimated assessment and the returned profits so adjusted will normally be stood-over unconditionally, whilst a purchase of tax reserve certificates in respect of tax on the adjustment will normally be required. The decision whether or not to hold over the tax in these cases will be made having regard to the principles enunciated in sub-paragraphs (a) to (d) above.

10. It is to be noted that where a conditional order is made requiring the purchase of tax reserve certificates, section 71(7) provides that these are to be purchased within a period of 14 days of the date of the order or on or before the

due date for payment of the tax specified in the notice of assessment whichever is the later. Failure to purchase the requisite certificates within the prescribed time will have the effect of nullifying the order, thereby rendering the underlying tax payable in full on the relevant due date(s).

11. Provision is made for the payment of interests on certificates purchased in pursuance of a conditional order, to the extent to which the certificates are not required to meet tax held-over, i.e. to the extent that the Taxpayer's objection or appeal is successful. Interest is payable from the date of issue of the certificate to the date of final determination of the objection or appeal. For those certificates purchased on or before 31 August 1999, interest is calculated at the rate prescribed by the Tax Reserve Certificates (Fourth Series) Rules at the date of purchase of the certificate. For those certificates purchased on or after 1 September 1999, interest is calculated on the prescribed rates in force from time to time over the tenure of the certificate. The holder may surrender the certificate or part to the Commissioner and request him to:

- (a) repay the principal value represented by the certificate or part together with any interest thereon; or
- (b) make an entry in an account in the name of the holder maintained under the Tax Reserve Certificates Ordinance for the principal value represented by the certificate or part together with the interest thereon.

12. Where the objection or appeal is withdrawn or determined against the Taxpayer (wholly or in part), he may tender the certificate or a part of a certificate in payment of so much of the tax held-over as is found payable. No interest is payable upon any certificate or part thereof so tendered. No certificate purchased in pursuance of a conditional order may be used for any other purpose. A certificate so purchased will be inscribed with an identifying mark to such effect.

13. Where a conditional order permits the Taxpayer to furnish a banker's undertaking as security for the tax held-over, the undertaking must be in a form acceptable to the Commissioner and must be given by a bank as defined under the Banking Ordinance (Cap. 155). Except with the consent of the Commissioner, the undertaking must be irrevocable and contain an undertaking

to pay an amount equal to the tax held-over and any interest accrued thereon. Further, the undertaking must be provided within a period of 14 days from the date of the order or on or before the due date for payment of the tax specified in the notice of assessment, whichever is the later; and must provide for payment to the Commissioner upon due written notification to the bank that the objection or appeal has been withdrawn or finally determined and that the amount and interest stated by him is now due.

14. In cases where tax reserve certificates are not purchased i.e. in cases where an unconditional order is made or a conditional order is made requiring the provision of a banker's undertaking, subsections (10) and (11) of section 71 provide that interest shall be payable on so much of the tax held-over which, upon the withdrawal or final determination of the objection or appeal, is found payable. The rate of interest payable is the judgment debt rate fixed from time to time by the Chief Justice by notice in the Gazette under section 50 of the District Court Ordinance (Cap. 336). Interest accrues from the due date for payment of the tax specified in the notice of assessment or the date of the order made under section 71(2), whichever is the later, up to the date of withdrawal or final determination of the objection or appeal. It should be noted that the imposition of this interest is mandatory and there is no provision for waivers or remissions. Furthermore, the judgment debt interest rate, by virtue of its nature, is usually substantially higher than the interest rate applicable to tax reserve certificates. Information about judgement debt interest rate may also be obtained from the Department's website at <http://www.ird.gov.hk/eng/tax/jir.htm>.

15. The Department takes the view that the definition of "tax" in section 2 of the Ordinance which includes provisional tax charged under Parts 10A, 10B and 10C applies to section 71. However, in cases where a hold-over, either unconditional or conditional, of the "basic" tax is ordered an unconditional hold-over of the appropriate portion of the provisional tax will be ordered having regard to the provisions of section 63E, section 63J or section 63O as the case may be and no interest will accrue on such provisional tax held-over.

Processing of objections

16. The Departmental procedure is aimed at avoiding, as far as possible, any delay in dealing with objections. This can only be achieved if there is firstly a proper presentation of the objection by the taxpayer or his

representative, followed by a prompt reply to any further information requested by the Assessor or Assistant Commissioner on behalf of the Commissioner. With cooperation all round it is hoped that objections can be speedily considered with a view to reaching an early agreement, and where that is not possible, preparations will then be made to have the case referred to the Commissioner for his determination as soon as practicable.

17. A proper presentation of the objection will involve not only a statement of the precise grounds of objection [see paragraph 3(b) above] but also the furnishing of evidence and arguments in support of the contention that the assessment is erroneous. As there is no formal hearing of the objection before the Commissioner, any arguments advanced in support of the grounds of objection should quote the reference to any relevant authorities or decided cases.

18. There will be cases where, by reason of the information and evidence given in support of a properly prepared objection, the Commissioner may be able to admit promptly the taxpayer's claim. In that event the taxpayer and his representative will be so informed by an Assessor on behalf of the Commissioner and a revised notice of assessment will then be issued, with an advice of any refund due.

19. In many cases further information or facts may be required before the Commissioner can determine the objection. These will be asked for as soon as possible after receipt of the notice of objection. The prompt submission of this information will enable the objection to be dealt with expeditiously. Undue delay by a taxpayer or his representative may result in the withdrawal of any stand-over of tax or if the delay is prolonged, in the objection having to be determined forthwith.

20. Attempts will be made to see if further explanation of the assessment or of the provisions of the law, can remove misunderstanding and bring about agreement to the original assessment. In other cases, after consideration of the fresh and further information, a revision of the assessment may be proposed by the Assessor in settlement of the objection. If agreement can be reached as to the revised assessment, the objection can be settled and any necessary adjustment of the assessment can be made in accordance with section 64(3).

21. In cases where no agreement is possible (or where there is undue delay in furnishing further facts or particulars which have been sought), the objection will be referred to the Commissioner for his determination in accordance with section 64(4).

22. In the process of attempting to reach agreement or of finally determining the objection, the Commissioner under section 64(2) may by notice in writing require the taxpayer to furnish such particulars as may be deemed necessary in connection with the assessment. He may require the production of all books or other documents, and may summon any person, who in his opinion is able to give evidence respecting the assessment, to attend before him and may examine such person on oath or otherwise.

23. Where the Commissioner proposes to examine any person on oath, he is required to give prior notice in writing so as to afford the taxpayer or his authorized representative a reasonable opportunity to be present at such examination.

24. Where a case has been referred for the Commissioner's determination, a draft "statement of facts" based on the information available to the Department will normally be sent to the taxpayer or his representative for comment. A request will also be made that any further facts, documentary evidence or arguments should now be brought forward. A draft statement of facts will however not be issued (unless requested by the taxpayer or his representative) in simple cases, or cases where there have already been long delays on the part of the taxpayer or his representative or where, for other reasons, an urgent determination is considered desirable. In the absence of any comments within 21 days, the Commissioner will then proceed to determine the objection.

25. Most objections are expected to be settled within 4 months from the date of receipt. In any event, the Assessor would have communicated with the taxpayer within the first 4 months in connection with the processing of his objection, other than the acknowledgement referred to in paragraph 7 above. Cases carrying over 9 months will be kept under constant review by senior management of this Department. There will, of course, be little point for either party to press for the early determination of objections concerning questions of

law which may still be sub-judice and pending clarification in other appeals already before the Board of Review or the Court.

Determination of an objection by the Commissioner

26. There is no formal hearing and the taxpayer or his representative will not appear before the Commissioner unless the Commissioner so requires or they specifically so request and the Commissioner is of the opinion that granting the request could assist in the determination. They will, of course, be given an opportunity to be present if the Commissioner proposes to examine any person on oath.

27. If the Commissioner requires any person to attend before him in connection with the determination of an objection, he may allow any such person, other than the taxpayer or his authorized representative, any reasonable expenses necessarily incurred by him in so attending.

28. The Commissioner may authorize a Deputy Commissioner or an Assistant Commissioner to determine any objection and the Deputy Commissioner or the Assistant Commissioner then has all the powers and functions of the Commissioner.

29. The Commissioner is required to consider every valid objection and within a reasonable time may confirm, reduce, increase or annul the 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. Further, the Commissioner's power to increase an assessment by a determination is not subject to the time limit for making an additional assessment under section 60. Within 1 month after the determination he will transmit his determination in writing to the person objecting to the assessment, together with his reasons for such determination. There will also be given a statement of the facts which the Commissioner has considered in arriving at his determination. A written determination is validly served on a person by post to his last known postal address. In proving service by post it shall be sufficient to prove that the letter containing the written determination was duly addressed and posted. A determination is not necessary where agreement as to the amount of the

assessment is reached between the taxpayer and the Commissioner or an Assessor acting on behalf of the Commissioner.

30. In determining an objection, the Commissioner acts in an administrative, not a judicial, capacity. He is not a tribunal deciding an issue between the Assessor and the objecting taxpayer. His function is purely an administrative one in which he puts himself in the place of the Assessor and determines what according to his view the assessment ought to be, subject to the right of appeal to the Board of Review.

(B) APPEALS TO THE BOARD OF REVIEW

Constitution of the Board of Review

31. As provided under section 66 of the Ordinance, an appeal against the determination of the Commissioner on any valid objection may be made to the Board of Review (“the Board”).

32. The Board is an independent tribunal consisting of persons drawn from various walks of life and activity. Appointments are made by the Chief Executive. The Board consists of a chairman and 10 deputy chairmen, who shall be persons with legal training and experience, and not more than 150 other members. For the purpose of hearing and determining an appeal, a panel with three or more members, including the chairman or a deputy chairman (“the presiding person”), are nominated by the chairman. Decisions are based on a majority vote, and if there is an equality of votes, the presiding person has a casting vote in addition to his original vote. A retired chairman, deputy chairman or member may continue to hear and determine an appeal or to perform any other function as a member of the Board where the Board agrees to rehear a case previously dismissed upon the appellant’s failure to attend the hearing or where a case is remitted to the Board by the Court [see paragraphs 38 and 69 below].

Requirements of a valid appeal

33. For an appeal to be valid, it must:

- (a) be made in writing to the Clerk to the Board within 1 month after the transmission of the Commissioner's written determination, or within such further period as the Board may allow if satisfied that the appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving the notice within 1 month;
- (b) be accompanied by a copy of the Commissioner's written determination, and the reasons therefor and of the statement of facts, with all appendices; and
- (c) contain a statement of the grounds of appeal [see paragraph 43 below].

At the same time as he gives notice of appeal to the Board, the appellant must also serve on the Commissioner a copy of such notice and of the statement of the grounds of appeal.

34. An appeal can also be made under section 82B against assessment to additional tax raised under section 82A. For such an appeal the appellant has to give notice in writing to the Clerk to the Board within 1 month after the notice of assessment to additional tax is given to him or within such further period as the Board may allow if it is satisfied that the appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving the notice within 1 month. The notice of appeal has to be accompanied by:

- (a) a copy of the notice of assessment,
- (b) a statement of the grounds of appeal,
- (c) a copy, if any, of the notice of intention to assess additional tax from the Commissioner or Deputy Commissioner given under section 82A(4), and
- (d) a copy of any written representations made under section 82A(4).

Same as an appeal against the Commissioner's determination [see paragraph 33 above], the appellant shall at the same time as he gives notice of appeal to the

Board serve on the Commissioner a copy of such notice and of the statement of the grounds of appeal.

Hearing and disposal of appeals

35. A time and date for the hearing of an appeal is fixed as soon as possible after the receipt of a notice of appeal. Fourteen days' notice is given to both the appellant and the Commissioner. Appeals will be heard in the office of the Board.

36. At any time before the hearing, the appellant may give notice in writing to the Clerk to the Board withdrawing the appeal. If before the hearing, the appellant and the Commissioner have reached a settlement on the amount at which the appellant is liable to be assessed, the terms of settlement shall be reduced to writing in a form specified by the Board and signed by the parties. The settlement shall then be submitted to the Board for endorsement. If endorsed by the Board, the settlement shall be final and conclusive for purposes of the Ordinance. The Assessor, however, is entitled to make assessment or additional assessment which does not involve re-opening matters covered by the settlement endorsed by the Board. Where a settlement is not endorsed by the Board, the Board shall proceed to hear the appeal.

37. An appellant shall attend each meeting of the Board at which his appeal is heard either in person or by an authorized representative. An "authorized representative" is a person authorized in writing by a person to act on his behalf for the purposes of the Ordinance.

38. If the appellant does not attend on the date fixed for the hearing of an appeal, the Board may either - (a) postpone or adjourn the hearing if satisfied that non-attendance was due to sickness or other reasonable cause, or (b) proceed to hear the appeal [see paragraph 39 below], or (c) dismiss the appeal. If the appeal is dismissed, the appellant is given 30 days in which to ask for a review. Should the Board be satisfied that non-attendance was due to sickness or other reasonable cause, it would set aside the order for dismissal and hear the appeal.

39. The Board may, if satisfied that an appellant is outside Hong Kong and is unlikely to be in Hong Kong within a period considered reasonable by the Board, on the application of the appellant which is received by the Board at

least 7 days before the day fixed for the hearing, hear the appeal in the absence of the appellant or authorized representative, taking into consideration any written representations made to it by the appellant.

40. The Assessor who made the assessment appealed against or some other person authorized by the Commissioner attends each meeting of the Board in support of the assessment.

41. All appeals are heard in camera, but official publication of the hearings may be made in such a manner that the identity of the appellant is not disclosed.

42. The onus of proving that the assessment appealed against is excessive or incorrect is on the appellant. Failure to discharge this onus can be fatal to the appeal.

43. An appellant may not at a hearing rely on any grounds other than the grounds contained in his statement of grounds of appeal unless the Board so consents.

44. Either party may adduce written evidence or cite authorities in support of the appeal during the hearing. If this is done, the Clerk to the Board would require 5 copies of such paginated documents to be sent to the Board for distribution to the members and 1 copy to the other party at a specified date before the hearing. The Board also encourages the parties to prepare a statement of agreed facts as far as possible for purpose of the hearing. The appellant and the Commissioner should lodge all documents or information with the Board before the scheduled hearing date, in compliance with the directions given by the presiding person [see paragraph 54 below].

45. The Board has power to summon any person to attend as a witness at any meeting if it considers such person may be able to give evidence affecting the appeal. A witness may be examined on oath or otherwise and may be allowed any reasonable expenses for so attending. For the purposes of appeals the Board has the powers granted under paragraphs (d), (e), (f) and (g) of section 4(1) of the Commissions of Inquiry Ordinance (Cap. 86).

46. 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 do not apply. This gives the Board greater freedom of action in ascertaining or reaching a conclusion as to the facts on which to base a decision.

47. In so far as the facts are not agreed by the parties, the Board is the fact-finding body. If certain facts are not agreed, the onus of introducing evidence before the Board, in the first instance, lies upon the appellant. If he gives no evidence, the Board will deal with the case on the material before it. If all the facts are agreed, then only points of law are involved in deciding the issue.

48. The Board sits as a judicial tribunal with the duty firstly of ascertaining the primary facts. Where these are agreed by the parties, the Board may accept them without further proof. If they are in issue in any respect, then the Board must resolve this issue judicially. Having ascertained the primary facts, it will then draw inferences therefrom, and finally comes to a conclusion as to the merits of the appeal. It should also be noted that on hearing an appeal under section 68 of the Ordinance, the Board acts *de novo* and makes a general review of the correctness of the assessment (*Shui On Credit Co Ltd v Commissioner of Inland Revenue* (2009) 12 HKCFAR 392).

49. After hearing the appeal, the Board may confirm, reduce, increase or annul the assessment appealed against or may remit the case to the Commissioner with the opinion of the Board thereon. The Commissioner shall then revise the assessment in accordance with the opinion of the Board. If necessary, the Commissioner may go back to the Board for direction as to how to give effect to that opinion. By virtue of section 68A of the Ordinance, the Board may correct any clerical mistake in its decision or any error in its decision arising from any accidental slip or omission.

50. Where the Board does not reduce or annul the assessment, the appellant may be ordered to pay as costs of the Board a sum not exceeding an amount specified in Part I of Schedule 5 to the Ordinance, which shall be added to the tax charged. The specified amount was \$5,000 since 1993 and has been increased to \$25,000 with effect from 1 April 2016.

51. There is no provision for the awarding of costs to either the appellant or the Commissioner on an appeal to the Board.

52. Under section 85(2)(d) of the Ordinance, the Board of Inland Revenue may prescribe any procedure to be followed in relation to an appeal to the Board.

53. A decision of the Board is final, subject to the rights of appeal to the Courts as explained in Part (C).

Directions on provision of documents and information

54. Under section 68AA of the Ordinance, which came into operation on 1 April 2016, the presiding person is empowered to issue directions on the provision of documents and information for the hearing of appeals. Such directions will not prejudice or limit the right to appeal of the appellant, who under section 68(4) of the Ordinance shall have the onus of proving that the assessment appealed against is excessive or incorrect.

55. If a party (“the defaulting party”) does not submit the relevant documents or information in accordance with the directions given by the presiding person, the presiding person may refuse to admit any such document or information as evidence. In such circumstance, the presiding person must notify the defaulting party of the decision by written notice. The defaulting party may apply to the presiding person for relief against the decision within 14 days after the date on which the notice is given or within a longer period that the presiding person allows. The application for relief must provide evidence proving the statements made in the application. The application for relief does not suspend the above decision and may be determined without a hearing. In determining the application for relief, the presiding person will consider all the circumstances and notify the party of the determination by written notice. The circumstances the presiding person needs to consider include—

- (a) the interests of the administration of justice;
- (b) whether the application has been made promptly;
- (c) whether the failure to comply with the directions given was intentional;
- (d) whether there is a good explanation for the failure;

- (e) the extent to which the defaulting party has complied with other directions of the presiding person;
- (f) whether the failure was caused by the defaulting party (or the party's authorized representative);
- (g) where the defaulting party is not legally represented—
 - (i) whether the party was unaware of the directions; or
 - (ii) if the party was aware of the directions, whether the party was able to comply with them without legal assistance;
- (h) whether the hearing date or the likely hearing date can still be met if relief is granted;
- (i) the effect that the failure had on each party; and
- (j) the effect that the granting of relief would have on each party.

Privileges and immunities

56. To ensure that the Board may perform its statutory duty of determining tax appeals impartially without fear or favour and to be fair to parties to the appeal, section 68AAB of the Ordinance, which came into operation on 1 April 2016, provides that—

- (a) the Chairman, a deputy chairman or any other member of the panel of the Board, in performing his or her duties under the Ordinance, has the same privileges and immunities as a judge of the Court of First Instance in civil proceedings in that Court.
- (b) A party to a hearing before the Board, or any witness, counsel, solicitor or person representing a party appearing before the Board has the same privileges and immunities as that person would have in civil proceedings in the Court of First Instance.

(C) APPEALS TO THE COURTS

Transfer of appeals to the Court of First Instance

57. Where a valid notice of appeal is given to the Board and within 21 days after the date that the notice of appeal has been received by the Clerk to the Board, or such further time as the Board may permit upon written application by the appellant or the Commissioner, the appellant or the Commissioner may, by notice in writing to the other party, request the appeal to be transferred to the Court of First Instance for hearing and determination. At the same time a copy of such notice should be sent to the Board.

58. If the other party agrees to the request and gives his consent in writing to the Board within 21 days after the date of such notice, or such further time as the Board may permit upon written application by the appellant or the Commissioner, the Clerk to the Board will transmit the appeal to the Court of First Instance. Appeals so transmitted cannot be withdrawn unless with the permission of the Court.

Appeals to the Court of First Instance before 1 April 2016

59. If either the appellant or the Commissioner is dissatisfied with a decision of the Board, they may make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance under the then section 69 of the Ordinance.

60. Applications requiring the Board to state a case must be made in writing and delivered to the Clerk to the Board within 1 month of the date of the Board's decision, or the date of the communication by which the decision is notified if the decision is notified to the appellant or the Commissioner in writing. A fee of \$770 must accompany the application for a case stated.

61. Guidance on the law and practice of stating a case pursuant to the then section 69(1) of the Ordinance has been provided by the courts. The classic case is that decided by Barnett J. in *Commissioner of Inland Revenue v. Inland Revenue Board of Review and Another* [1989] 2 HKLR 40. The following guidelines laid down in that case are relevant:

- (a) An applicant for a case stated had to identify a question of law which it was proper for the court to consider.
- (b) The Board is under a statutory duty to state a case in respect of that question of law.
- (c) The Board has a power to scrutinize the question of law to ensure that it is one which it is proper for the court to consider.
- (d) If the Board is of the view that the point of law is not proper, it may decline to state a case.
- (e) Unless there is no evidence to support a finding of primary fact, or unless the primary facts cannot support an inference found by the Board, whether the onus of proof is discharged is a question of degree which depends upon the evaluation by the Board as a tribunal of fact. To impugn the Board's evaluation would be to undermine the whole purpose of the Board as a fact-finding tribunal.
- (f) The court would interfere with an inference drawn from primary facts or with a conclusion drawn from a combination of primary facts and inference, if the true and only reasonable inference or conclusion was not the one reached by the Board. Where the primary facts themselves were disputed, it was necessary for the applicant to demonstrate that there was simply no evidence to support such findings.

62. A judge of the Court of First Instance may hear and determine any question of law on a stated case and may confirm, reduce, increase or annul the assessment determined by the Board, or may remit the case to the Board with the opinion of the Court thereon. In that event the Board will revise the assessment in accordance with the opinion of the Court.

Appeals to the Court of First Instance on or after 1 April 2016

63. With effect from 1 April 2016, the above case stated procedure was abolished and an appellant or the Commissioner may apply directly to the

Court of First Instance for leave to appeal against the Board's decision on a ground involving only a question of law. The leave application should be made inter partes. If the Court of First Instance grants leave to appeal, it will hear and determine the substantive issue of the appeal. If the Court of First Instance refuses to grant leave to appeal, the appellant or Commissioner may make a further application to the Court of Appeal for leave to appeal. If the Court of Appeal grants leave to appeal, the case will be heard by the Court of First Instance.

Right to appeal directly to the Court of Appeal

64. Under section 69A, either the appellant or the Commissioner may, with the leave of the Court of Appeal, appeal against the decision of the Board directly to the Court of Appeal instead of the Court of First Instance. Leave to appeal may be granted on the ground that in the opinion of the Court of Appeal it is desirable that, by reason of the amount of tax in dispute or of the general or public importance of the matter or its extraordinary difficulty or for any other reason, the appeal be heard and determined by the Court of Appeal. This arrangement, which is commonly known as the leapfrog arrangement, remains the same as in the past, except that the requirement for case stated has been replaced by that for leave to appeal from 1 April 2016 onwards. Specifically, this is to mean:

- (a) if the Court of First Instance grants leave to appeal, the appellant or the Commissioner may apply for leave from the Court of Appeal for leapfrogging;
- (b) if the Court of First Instance refuses to grant leave to appeal in the first place but the Court of Appeal subsequently grants leave upon application by the appellant or the Commissioner, another leave is still required from the Court of Appeal for leapfrogging; and
- (c) if the Court of Appeal refuses to grant leave for leapfrogging, the appeal will be heard by the Court of First Instance.

Procedures for application for leave to appeal

65. The application to the Court of First Instance or the Court of Appeal for leave to appeal must be made by a summons supported by a statement setting out the grounds of the appeal and the reasons why leave should be granted. For an application to the Court of First Instance for leave to appeal, the application must be lodged with the Registrar of the High Court, and served on the other party (i.e. the appellant or the Commissioner as the case may be) within 1 month after the date on which the Board's decision is made or (if the Board's decision is notified to the appellant or the Commissioner by notice in writing) the date of communication by which the Board's decision is notified. If the Court of First Instance refuses to grant leave to appeal, the applicant may make a further application to the Court of Appeal for leave to appeal against the Board's decision. The time limit for lodging such application with the Registrar of the High Court is 14 days after the date of the Court of First Instance's refusal to grant leave. Reference may be made to Practice Direction 34 issued by the Judiciary (<http://legalref.judiciary.gov.hk/doc/npd/eng/PD34.htm>) for details of its practice in dealing with the leave applications.

66. Pursuant to section 69(3)(e) and (5)(d), leave to appeal must not be granted unless the Court of First Instance or Court of Appeal 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.

67. Section 69(3)(g) of the Ordinance provides that if the Court of First Instance determines the application for leave on the basis of written submissions only, a party aggrieved by the determination may request the Court of First Instance to reconsider the determination at a hearing inter partes.

68. Under section 69(5)(c), the Court of Appeal is provided with the flexibility to determine the application for leave by one or more Justices of Appeal with or without a hearing to cater for cases of different nature and complexity. As provided in section 69(5)(h), after the Court of Appeal (whether or not consisting of a single Justice of Appeal only) has determined

the application for leave (whether or not on the basis of written submissions only), no further application may be made to the Court of Appeal for leave to appeal against the Board's decision.

Hearing of appeals

69. As provided under section 69AA(1) and (2) and section 69A(3), on hearing an appeal with leave granted, the Court of First Instance or Court of Appeal (whether under the leapfrog arrangement or not) may draw any inference of fact; and confirm, reduce, increase or annul the assessment determined by the Board, or remit the matter back to the Board with any directions (including a direction for a new hearing) that the Court thinks fit. Further, the Court, on hearing an appeal against the decision of the Board, must not receive any further evidence, or reverse or vary any conclusion made by the Board on questions of fact unless the Court finds that the conclusion is erroneous in point of law.

70. Subject to the provisions as outlined in paragraph 69 above, the High Court Ordinance (Cap. 4) applies to proceedings before the Court of First Instance and the Court of Appeal for the hearing of appeals.

Costs

71. In any proceedings before the Court, the Court may make such order as to costs as it thinks fit.

Transitional arrangement

72. An application for case stated that had been made and delivered to the Board before 1 April 2016 under section 69 that was then in force will continue to be processed in a manner as mentioned in paragraphs 59 to 62 above. In any other case, the procedures for application for leave to appeal will apply.