How the New FTA Public Clarifications Guide Affects Tax Disputes

March 21, 2021

In October – November 2019, the Federal Tax Authority issued an updated Clarifications User Guide (USEG001) replacing its predecessor version from June 2018.

Item '6′, pg. 10, of the previous version of the Clarification stated that:

"Once a response is issued by the FTA, you may decide whether to follow the Clarification provided by the FTA or not at your own risk".

In the updated version of the Clarification that was issued recently, this provision has been omitted, subsequently creating more mandatory application of public clarifications on taxpayers in the UAE.

How does this affect litigation procedures and the judicial interpretation of public clarifications?

As far as the black letter of the law goes; Federal Decree-Law No. 13/2016 On the Establishment of the Federal Tax Authority does not grant the FTA powers to issue laws – only to propose them in coordination with the Ministry of Finance.

As a general matter, Federal legislation may only be issued by the 'Legislator', i.e. the consensus of the seven Rulers of the seven respective Emirates. This was the issue with the DIFC Law in the past and is currently a matter of discussion on the Bylaws to the Civil Procedures Law.

Public clarifications – as far as matters stand today – are

administrative decisions that may be challenged as any other administrative decision is, originally pursuant to Article 84 of the Civil Procedures Law on actions for canceling administrative decisions; taking into consideration the special provisions of the Tax Procedures Law.

In March 2019, Minister of Justice Decisions Nos. 237 and 238 of 2019 established Tax Dispute Circuits in the Federal Courts. Prior to the Tax Dispute Circuits, tax cases were referred to the Administrative Circuits of the Federal Courts, i.e. the Circuits that hear disputes where one (or all) of the parties are public / government entities.

This reinforces the stance that a public clarification is an administrative decision. Consequently, meaning that if a taxpayer was existing in the State when the clarification was issued, they should challenge the clarification itself as an administrative decision within the time limit of its issuance, or otherwise be deemed to have conceded to it.

The complexity arises if the taxpayer is established in the UAE after that time limit on challenging a public clarification has passed, in which case the taxpayer may request the Tax Dispute Resolution Committees or Federal Courts to adjudicate on the contents of the clarification if there are substantive, arguable grounds to do so.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile:
https://waselandwasel.com/about/mahmoud-abuwasel/

UAE Tax Courts Anniversary: 41 cases, 6 favoring taxpayers (so far)

March 21, 2021

The Tax Disputes Circuits of the Federal Primary Court and Federal Appeals Court were signed into law on 18 March 2019 pursuant to Minister of Justice Decisions No. 237 of 2019 and No. 238 of 2019, respectively.

The Tax Disputes Circuit of the Federal Primary Court is responsible to hear challenges against rulings of a Tax Disputes Resolution Committee ("TDRC"). Both the taxpayer and the Federal Tax Authority ("FTA") may challenge a ruling of the TDRC before the Federal Primary Court, Federal Appeals Court, and finally the Federal Supreme Court.

As the Tax Disputes Circuits pass their first anniversaries, we look at how many cases have been lodged since March 2019 till *circa* April 2020, and how many have been in favor of the taxpayers. Taking into consideration that many cases are still pending and that there have not been any final and binding judgments by the Federal Supreme Court so far.

Cases filed at the Federal Primary Court:

- 13 cases have been filed by the FTA challenging TDRC rulings that were in favor of the taxpayer.
- 15 cases have been filed by taxpayers challenging TDRC rulings that were in favor of the FTA.

The Federal Primary Court has so far ruled in favor of taxpayers in 5 cases, reversing penalties applied by the FTA in 4 cases. Other cases have either been in favor of the FTA

or are pending.

Wasel & Wasel is counsel to various taxpayers in cases before the Federal Primary Court. In early 2020, Wasel & Wasel obtained two judgments at the Federal Primary Court reversing penalties applied by the FTA, in addition to various other rulings obtained by Wasel & Wasel at the TDRC stage reversing penalties.

Cases filed at the Federal Appeals Court:

- 4 cases filed by the Federal Tax Authority appealing a Federal Primary Court judgment in favor of the taxpayer.
- 5 cases filed by taxpayers appealing a Federal Primary Court judgment in favor of the FTA.

Cases filed at the Federal Supreme Court challenging a judgment of the Federal Appeals Court:

- 1 case filed by the Federal Tax Authority appealing a Federal Appeals Court judgment in favor of the taxpayer.
- 2 cases filed by the taxpayers appealing a Federal Appeals Court judgment in favor of the FTA.
- 1 case filed at the Constitutional Circuit of the Federal Supreme Court challenging the ‘pay now, argue later’ rule.

The Execution Circuit of the Federal Primary Court is responsible for enforcing payment against taxpayers. So far, there have been 9 execution applications against taxpayers.

The industries of taxpayers involved in litigation before the Federal Courts have included tobacco, construction, manufacturing, e-commerce, banking and insurance, exhibitions, education, and trading.

The values in dispute before the Federal Courts have ranged from six-figures to nine-figures. Rulings by the TDRCs under

six-figures (i.e. AED 100,000) are final and cannot be challenged before the Federal Primary Court.

A substantial number of the cases that were ruled in favor of the FTA by the Federal Courts were due to the taxpayers having failed to adhere to procedural requirements; such as failing to pay the taxes and penalties in dispute prior to objecting before the TDRCS, or objecting before the TDRCs after twenty working days of receiving the FTA's decision on a reconsideration request.

Statistics are approximate figures as of mid-April 2020.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
Tier-1 services since 1799.
www.waselandwasel.com
business@waselandwasel.com

UAE Federal Court Restricts Time Limit on Tax Reconsideration Requests

March 21, 2021

Brief

One of the most common questions asked regarding tax reconsideration requests is the consequence of not receiving a response from the Federal Tax Authority ("FTA") within the statutory timeframe of twenty-five weekdays.

The UAE Federal Courts have recently addressed this issue in opining that – if no decision is taken on the reconsideration request – the time limit to object before the tax dispute resolution committees commences at the expiry of the twenty-five weekdays.

This essentially means that once a person submits a reconsideration request, if no decision is received within twenty-five weekdays, the twenty-weekday time limit to object before the tax dispute resolution committee commences at that point.

Recap on Time Limits

Briefly recapping the tax dispute resolution procedure; if a person disagrees with a decision made by the FTA, the first step to trigger the dispute resolution procedure is to submit a reconsideration request to the FTA against that decision.

Subsequent to the reconsideration procedure, there are four stages that the dispute would be subject to; the tax dispute resolution committees, the tax dispute circuits of the Federal Primary Court and the Federal Appeals Court, and finally the Federal Supreme Court.

There are time limits between each stage and non-compliance with the time limits results in rejection of the dispute on a procedural basis.

The time limit to submit a reconsideration request is twenty weekdays as of the date of the decision subject of the reconsideration.

Upon submission of the reconsideration request, the FTA has twenty weekdays to decide and five days thereafter to communicate the decision to the requestor; twenty-five weekdays in total.

If the requestor does not agree with the reconsideration

decision, they must object before the competent tax dispute resolution committee within twenty weekdays as of the date of the reconsideration decision.

The Federal Courts have now clarified that if no decision is received from the FTA on the reconsideration request within twenty-five weekdays, the time limit of twenty weekdays to object before the tax dispute resolution committee commences.

Was this expected?

As a general matter, grievances against a government agency require explicit statute on the consequences of a lack of response to such grievance.

The general rule for decisions on government grievances is legislated under Article 84 of the Civil Procedures Law which states that "…if 60 days lapse from the date of submission of the grievance without a reply from the competent authorities, the grievance shall be deemed rejected."

The general rule, such as that under the Civil Procedures Law, can notwithstanding be altered by subject matter legislation.

For example, the Country-by-Country Reporting Law states that where a person submits an appeal against CbCR penalties to the Ministry of Finance and does not receive a response within 60 weekdays "…then the appeal will be deemed to have been successful and any penalty imposed shall be canceled."

So, we see the original position under the Civil Procedures Law is that a non-response is deemed a rejection, whilst in the CbCR subject matter legislation a non-response is deemed an acceptance.

The Tax Procedures Law, on the other hand, is silent on whether no response from the FTA on reconsideration requests is to be deemed a rejection or acceptance of the application.

Where a subject matter legislation, such as the Tax Procedures

Law, does not provide for an explicit variation to the original rule – then the original rule applies.

Moreover, the Tax Procedures Law and the Cabinet Decision forming the tax dispute resolution committees grants the committees jurisdiction to decide on reconsideration requests that were submitted to the FTA to which the FTA has not decided upon.

The Federal Courts have now confirmed this and have taken the position that if a person wishes to object against a reconsideration request that has not been decided upon, they must do so within twenty weekdays as of the expiry of twenty-five weekdays since the submission of the reconsideration request.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

Supreme Court Ruling: Agreeing to Arbitration by E-mail and Instant Messaging?

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In the last quarter of 2019, the United Arab Emirates Federal Supreme Court issued a judgment stating that agreeing to arbitration between parties could occur by electronic means and digital messaging. The judgment confirms Article 7(2)(a) of the Federal Arbitration Law which states that an

arbitration agreement is deemed to be in writing if it is in the form of an electronic message.

This is an unprecedented development as the general consensus had been that an arbitration agreement must be signed in manuscript (by hand) by the parties to the agreement.

Moreover, the Federal Supreme Court added that the agreement to arbitration could occur before the respective subject matter contract is concluded, during its lifetime, post its termination or nullity, or even during litigation procedures at which point a court hearing the dispute would be mandated to stay proceedings for the parties to commence arbitration.

Case Facts

In 2017, an arbitration award was issued by Tahkeem (the Sharjah International Commercial Arbitration Centre) in relation to a real estate dispute. The arbitration agreement between the parties had been entered into as a separate agreement after the conclusion of the subject matter contract.

In 2018, after the issuance of the 2018 Federal Arbitration Law, the net winner of the arbitration submitted the award for confirmation before the Primary Court. The Primary Court deferred the matter to the Appeals Court as the competent court for confirmation pursuant to the Federal Arbitration Law. The Appeals Court rejected confirmation of the award reasoning that a separate arbitration agreement is void and should instead had been a provision within the subject matter agreement itself.

The net winner of the arbitration challenged the judgment of the Appeals Court before the Federal Supreme Court, requesting that the Appeals Court judgment be overturned, and requesting confirmation of the validity of the arbitration agreement and the arbitration award.

Judgement

The Federal Supreme Court ruled that a separate arbitration agreement is valid and upheld the validity of the arbitration award; ordering the Appeals Court to confirm the award.

The Federal Supreme Court ruled that an arbitration agreement that is subject to the laws of the United Arab Emirates is valid even if the subject matter agreement is terminated or found void, or if the subject matter agreement is being litigated before the courts.

The Federal Supreme Court also confirmed the requirement for the arbitration agreement to be in writing, however, it also explicitly found that such agreement can be done through written electronic communication or through instant messaging, so long as such are compliant with the statutory requirements of electronic transactions.

Electronic Signing of an Arbitration Agreement

The Federal Electronic Transactions Law governs agreements between parties concluded through electronic devices and permits agreements (in whole or in part) to be conducted via electronic means, and the Federal Law on Evidence in Civil and Commercial Transactions governs the admissibility of digital/electronic evidence before the courts.

The Dubai Cassation Court has ruled in (in separate trials) that the rules on evidence do not prevent the admission of a data message or electronic signature as evidence to substantiate a litigant’s arguments.

A widespread point of concern in arbitration proceedings in the United Arab Emirates is the requirement of persons with specific authority to bind the parties to an arbitration agreement pursuant to Article 4(1) of the Federal Arbitration Law and Article 203(4) of the Federal Civil Procedures Law.

However, the Dubai Cassation Court has also ruled that authority may be express, implicit or apparent, particularly

if the signatory is the registered manager (authorized representative) of the party. The exception to the manager's authority would generally be if the Articles of Association of the company explicitly restrict the manager from agreeing to an arbitration agreement.

The Electronic Transactions Law permits electronic signatures even if the law requires the existence of a specific form of a signature on a document; such as the specific authority to bind a party to an arbitration agreement.

To determine whether it is possible for a person to rely on an electronic signature, the party relying on the electronic signature must, amongst other elements, adopt appropriate steps to verify that the electronic signature is enhanced by an electronic authentication certificate, and if relying on an electronic signature is impossible, the party relying on the electronic signature shall be responsible for all the risks resulting from the non-validity of that signature unless otherwise established.

E-mails have a variety of tools that can create secure authentication of e-mail messages creating secured digital signatures to comply with the Electronic Transactions Law. Generally, reliance on e-mails as evidence would be conditional on the parties' ability to evidence the authenticity or lack thereof of the e-mail exchange.

It is also prudent to address instant messaging technologies considering the Federal Supreme Court ruling in this article. The most popular instant messaging means of which in today's modern commercial landscape is the use of WhatsApp as a platform for agreements to be negotiated and concluded (at times mere heads of agreement, sometimes addendums, or even severable provisions).

In 2019, the Dubai Cassation Court ruled – in respect of a gold trade deal dispute – that an agreement concluded between

parties via WhatsApp (and partly via e-mail) is binding.

Moreover, WhatsApp Inc. (the developer of the WhatsApp service) does not provide expert testimony but holds that WhatsApp records are self-authenticating pursuant to law and do not necessarily require the testimony of a records custodian.

In essence, and in reading the relevant UAE laws and reliance on UAE higher court rulings, those authorized on behalf of the parties can conclude an arbitration agreement via WhatsApp if the WhatsApp message exchanges between the parties have evidence of receipt (often indicated by the 'blue ticks') before or during the lifetime of the respective subject matter agreement, or post its termination or nullity, or even during a court trial on a dispute regarding the subject matter agreement.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

UAE Remote Notarization / Attestation amidst COVID-19

March 21, 2021

The COVID-19 pandemic has left many businesses unable to go about performing their normal day-to-day operations. With people stuck at home, offices locked down, and restrictions on global travel in place, many have found difficulties in ensuring that their work makes it through the pandemic.

Notarization is necessary for any business in order to avoid fraud and to ensure proper execution. The UAE continues to thrive in maintaining an ascendant economic ecosystem by doing all that it can to ensure that businesses do not face the challenges that come about with situations such as these.

In April 2020, the Dubai Courts announced that public notary services would be available to be conducted remotely, as to abide by the health and safety measures put in place due to the pandemic, whilst also ensuring that business operations remain steadfast. The circular states that the following Notary Services can be conducted remotely:

i) Power of Attorney notarization;

ii) Notarization of legal notices;

iii) Acknowledgments;

iv) Notarization of Local Service Agent Agreements;

v) Notarization of Memorandums/Articles of Association and addendums thereto with respect to civil companies (i.e. companies not subject to the Commercial Companies Law).

Companies that are subject to the Commercial Companies Law that wish to incorporate or amend constitutional documents must do so with the Dubai Economic Department.

This remote notary service requires a subscription to BOTIM, a video/voice calling application that can be found on the App Store for Apple users and the Play Store for Samsung users. The process entails the Dubai Courts' notary office contacting the attestor to the document through this video connection to establish the identity of the principal and full knowledge of the contents of the document.

This document must be sent to the dedicated email address in PDF format with an approved declaration to the remote signing on the bottom of each page.

When sending the email, it must contain all the information and documentation that is relevant, including (1) applicant's name, mobile number, address, Emirates ID or passport and confirmation of capacity; (2) documentation proving the applicant's authority to appoint powers; and (3) the company's commercial registration details (e.g. trade license), if applicable.

For these remotely notarized documents to be permissible under this service, they must include the following language:

"I, the undersigned, declare with my full capacity, and through video communication, using BOTIM, my consent on all that is stated in this application and I sign accordingly."

After the Dubai Public Notary has reviewed the documents, the applicant will be contacted via BOTIM either for: (a) further documents to be presented, (b) amendments to be made, or (c) to confirm approval of the notarization request and verify the relevant details with the applicant.

The applicant will then receive an SMS and an email containing the amount due and the link for payment. Once the payment has been made online, the original document will be sent to the applicant's address. The fees for this procedure will be payable by credit card and the courier will deliver the document at a cost of AED 21 to your address.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

Getting The Deal Through 2021: Tax Controversy – UAE Chapter

March 21, 2021

The #1 global guide on tax disputes and procedures.

A guide to disputes and controversy arising from complex and multi-layered modern tax laws, with international experts providing overviews and in-depth analysis of relevant legislation and regulation, including jurisdiction-specific tax authorities and third parties, taxpayer rights, enforcement and penalties, dispute resolution methods, and court and trial procedures.

For the second year in a row, firm Managing Partner, Mahmoud Abuwasel has been selected to author the United Arab Emirates chapter.

Click Here to Download: Getting The Deal Through 2021 – Tax Controversy (UAE Chapter)

Please contact us for more details or assistance in this matter.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

38 Tax Disputes Filed in Dubai in 2019: Lessons Learned

March 21, 2021

The tax dispute resolution committees began operation in 2019. There are three tax dispute resolution committees in the United Arab Emirates:

- one in Abu Dhabi dedicated to taxpayers with a registered address in Abu Dhabi;
- one in Dubai dedicated to taxpayers with a registered address in Dubai; and
- one in Sharjah dedicated to taxpayers with a registered address in the other five emirates – namely, Ajman, Fujairah, Sharjah, Ras Al Khaimah and Fujairah.

The tax dispute resolution committees are the second step in a grievance process that a taxpayer takes. The first step being submission of a reconsideration request to the Federal Tax Authority, subsequent to which, if the taxpayer disagrees with the FTA's decision to the reconsideration request, they may object to the tax dispute resolution committee competent to their registered tax address.

The tax dispute resolution committees were formed by law in 2017, and although the first objections were submitted in 2018 to the Dubai tax dispute resolution committee, the committee came into formation and operation in March 2019, with its first rulings being issued in April 2019.

All objections registered in 2018 and early 2019 before the Dubai tax dispute resolution committee commenced operation were docketed in March 2019.

In 2019, there have been 38 registered objections with the Dubai tax dispute resolution committee, and in this article, we look at developments and lessons learned.

Nature of the Tax Dispute Resolution Committees

So far, the tax dispute resolution committees are considered to be administrative bodies with the authority to issue judicial decisions. Each is comprised of a judge and two technical experts. Memorandums of objection submitted by taxpayers should not only argue the technicality of their position but should also provide for the legal arguments and references to the appropriate case precedents to advocate their position and provide the legal grounds for the judge to fully rationalize his decision. The tax dispute resolution committees have ruled on matters which are more legally intricate than they are technical; such as UAE precedent on acting in good faith, perfection of notification and summons, or the Legislator's intent in the drafting of certain provisions in the tax law. Lack of legally apt arguments would deter the issuance of a ruling favorable to the taxpayer – particularly as various objections before the tax dispute resolution committees have been due to different interpretations of the law by the taxpayer and the FTA.

Official Form Issued

In mid-2019, the Ministry of Justice which oversees all tax dispute resolution committees issued an official form to be used when submitting an objection against a decision by the FTA. The form requires the inclusion of the value of taxes and penalties objected to, dates of the underlying reconsideration request, shareholders and branches, etc., and importantly, the following information necessary to protect procedural sanctity of the dispute:

- The capacity of the person submitting the challenge.
- Evidence of empowerment (POA) of the legal

representative.

- Memorandum explaining the reasoning of the objection.
- The decision of the FTA being objected to.
- Proof of payment of the tax and penalties, as applicable.

Notification

Once the ruling of a tax dispute resolution committee is communicated to the taxpayer, the taxpayer has twenty working days to challenge the ruling before the tax disputes circuit of the federal primary court. The ruling of a tax disputes resolution committee will be communicated via the email address provided in the official objection form submitted to the tax disputes resolution committee. Albeit overseen by the Ministry of Justice, notification of rulings of the Dubai tax disputes resolution committee is conducted via the Dubai Courts automated smart notification system. Taxpayers should ensure the email address submitted is diligently reviewed and managed to avoid the ruling being diverted to junk or spam, etc. Article 8 of Civil Procedures Law Regulations states that a notification of a judgement/ruling by email is considered perfected on date of being sent – not on the date/proof of receipt. As far as current judgements have established, if a taxpayer falls outside the time limitation to challenge a ruling before the federal courts due to the email containing the ruling being unseen by the taxpayer, the federal courts would reject such challenge. For the Dubai tax dispute resolution committee, taxpayers can continuously check the public online case inquiry service for an update on their dispute.

‘Pay Now, Argue Later‘

UAE laws and by-laws making up the tax legislation have an explicit requirement for the taxpayer to pay all taxes and penalties due before being able to resort to a tax dispute resolution committee, and subsequently, the federal courts.

The rule is generally known as ‘pay now, argue later’. This rule has been respected by the tax dispute resolution committees and the higher levels of the federal courts to be a mandatory requirement, not subject to any leeway.

Incorporation of Civil Procedural Law Provisions

The Tax Procedures Law does not reference other legislation to fill vacuums. This raised a question as to whether litigants or the tax dispute resolution committees (or federal courts) could refer to other laws such as the Civil Procedures Law to answer procedural questions not addressed in the Tax Procedures Law. For example, the Tax Procedures Law does not explicitly state the consequence of the FTA not responding to a request for reconsideration with twenty working days of receiving such request from a taxpayer. However, the Civil Procedures Law states that any grievance request to an administrative body is considered rejected if no response is provided within the time limit. Whether the two laws could be read in conjunction was unclear.

Usually, a subject matter law would have a complementary relationship with similar laws and legislations respective of its subject matter, so that some of the provisions of the similar law can be borrowed to supplement a vacuum in the subject matter law. For example, Article 4 of the Personal Status Law states that: *“In the absence of any text in this Law regulating the procedures of any matter, the provisions of the Civil Procedures Law and the Law of Evidence in Civil and Commercial Transactions shall apply.”*

Article 4 of the Law on International Judicial Cooperation in Criminal Matters states that: *“The provisions of the Criminal Procedures Law and any relevant laws shall apply to any matter not governed by a text in this law.”*

Article 67 of the Law for the Regulation and Protection of Industrial Property states that: “*The decisions of the*

committee may be appealed before the competent court in accordance with the Civil Procedures Law…"

However, the Dubai tax dispute resolution committee relied on provisions of the Civil Procedures Law in its ruling. Unless otherwise ruled inapplicable by the Federal Supreme Court, this provides litigants; taxpayers and the FTA, an avenue to incorporate provisions of the Civil Procedures Law, and the Civil Procedures Law Regulations into their arguments in case a matter is not explicitly addressed in the Tax Procedures Law.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
Tier-1 services since 1799.
www.waselandwasel.com
business@waselandwasel.com

Tax Dispute Time Bars – Weekdays, not business days

March 21, 2021

Time bars

UAE tax legislation provides taxpayers with relatively short time bars to act against decisions by the Federal Tax Authority (FTA) that a taxpayer disagrees with (including penalty assessments). In failing to do so, a taxpayer loses their right to challenge depending on the respective stage of the challenge.

With the Eid public holidays around the corner, we address a wide misconception in the reading of the Tax Procedures Law that had caused taxpayers substantial losses or missing the opportunity to challenge decisions.

The issue is that public holidays are not discounted from the time bars.

Generally, to dispute a decision by the FTA, a taxpayer can submit a reconsideration request and/or a reduction and waiver application to the FTA.

A taxpayer may then resort to the tax dispute resolution committee of Abu Dhabi, Dubai, or Sharjah, depending on the taxpayer's registered tax address or if they are an out-of-state registrant.

Subsequently, the taxpayer can challenge a committee decision before the Tax Disputes Circuit of the Federal Primary Court in Khalifa City.

All these steps share a common time bar between them.

(With the exception of reduction and waiver applications which have different time bars and procedural requirements.)

The time bars are set as per (أيام عمل) in the Tax Procedures Law in Article 27 for reconsideration requests, Article 30 for objections before the competent tax dispute resolution committee, Article 33 for challenging before the Federal Primary Court, and in Article 26 of the Tax Procedures Law Executive Regulations with respect to reduction or exemption applications.

The time limit is 20 (أيام عمل). *

We use the Arabic terminology (أيـــــام عمـــــل) because the misconception has arisen out of the translation of this term to English.

The term (أيـــام عمـــل) is a descriptive term meaning ‘days of work’ and can be translated as business days.

But importantly, can also be translated as weekdays.

This elaboration is quite elementary, but significant for the purposes of this article and for taxpayers in pursuing reconsiderations of an FTA decision.

Lost in translation

In the English language, business days are generally accepted and understood to mean days other than weekends and holidays.

Weekdays are generally understood as meaning the working days of the week other than Saturday and Sunday (or the equivalent days of the weekend depending on the jurisdiction).

In the UAE, the weekend is Friday and Saturday.

Comparatively, in Arabic, there is no formal or colloquial direct translation for ‘weekend’.

Instead, weekend is referred to in Arabic as a descriptive sentence being ‘the end of the week’ or as the ‘holiday at the end of the week’.

Likewise, there is no common Arabic translation of the term ‘weekdays’ as is the case in the English language.

So, the use of the term (أيـــام عمـــل) in the Tax Procedures Law could mean business days or weekdays.

In the law

Of course, not only is language analysis important but more so the legislative backing for this deduction.

Here we refer to Article 45(2) of the Tax Procedures Law which states the following:

“If the last day of the time limit coincides with a public holiday, the time limit shall be extended to the first weekday thereafter.”

With this explicit provision, it is clear that the wording of the law in using the term (ايـــام عمـــل) is intended to mean weekdays, not business days.

Otherwise, if the term (أيـام عمـل) was to mean business days, Article 45(2) would serve no purpose.

Weekdays in the UAE are Sunday – Thursday.

Counting time bars for purposes of submitting a reconsideration request, a reduction or wavier application, an objection, or a challenge before the Federal Primary Court* should be on the basis of weekdays, irrespective of whether a public holiday occurs during the time bar. Unless the public holiday is on the last day of the time bar, at which point the last day to make a submission would be the first weekday after the public holiday (or weekend).

* Time bars for appealing a Federal Primary Court or Federal Appeals Court judgement are subject to the Civil Procedures Law and are counted in calendar days and are 30 and 60 calendar days respectively.

This manner of reference to ‘weekdays’ in legislation very rarely occurs. Emirati legislation almost uniformly refers to calendar days for the purposes of time bars. Hence, the reason this novel confusion that has arisen in the reading of the Tax Procedures Law (and its Executive Regulations).

Origin of the ‘business days’ English translation

The Ministry of Finance provides an unofficial translation of tax laws; which is the version that has been commonly circulated between non-Arabic speakers in the market.

The Ministry of Finance makes an explicit caveat in its

English translations that it is an unofficial translation. In other words, it has no legal bearing.

Because of the nomenclature between business days and weekdays, it would have been expected that the reader would either refer to Article 45(2) or refer to the Arabic text.

Ultimately, a person subject to a specific law is expected to rely on the official language text as is published in the Official Gazette – or to be diligent, request counsel to advise.

For purposes of an example, another explicit discrepancy between an English translation of a law available on the Ministry of Finance website and the official Arabic text is seen in is Article 37(2)(c) of the VAT Law Executive Regulations.

The unofficial English translation states '*a service apartment…*'.

The official Arabic text states '*a hotel apartment…*'.

Nonetheless, reiterating, it is the general expectation that persons to whom a law applies will rely on the original text in the Official Gazette as opposed to unofficial translations, and seek counsel to advise on interpretation.

In the courts and counting time bars in general

Since 2018, during the first tax cases before the Federal Courts, and repeatedly thereafter at the reconsideration, objection, and Federal Court stages, positions have been taken that the public holidays are not to be discounted from the time periods.

In calculating time bars in general, Article 11 of the Civil Procedures Law administers the calculation of time bars as follows:

Article 11(1): If the law has set, for attendance or for the occurrence of procedures, a duration counted by days, months or years, the day on which the notice is served or the matter considered by the law as giving effect to the duration shall not be counted. The duration shall expire by the end of the office hours of the last day thereof.

Article 11(5): In all cases, if the end of the duration falls on a public holiday, the duration shall be extended to the following weekday.

Significance

Because a taxpayer generally has a relatively short period of 20 weekdays to act between every stage of a tax dispute up to the Federal Primary Court, we have seen most decisions being taken, or most applications being submitted, on the last day or last few days of the time bar.

This is generally because – in a practical sense – upon receipt of a decision not agreed to, the taxpayer engages in internal discussions (possibly amongst management in different jurisdictions), then obtains input from tax advisors and tax counsel, and must prepare the application and confirm the application. A process which generally takes a few weeks.

Moreover, a substantial number of tax disputes since 2018 have been rejected due to being submitted late and falling outside the time bar.

As the Eid holidays close in, taxpayers with current applications or disputes will be taking the Eid holidays into account whilst counting time bars.

It is necessary to consider that the Eid holidays will not be discounted from the time bar, but only need to be accounted for if the last day of the time bar falls during the public holiday, at which point the last day of the time bar would be extended to the first weekday after the public holiday.

Tax dispute time bars

Reconsideration request to the FTA against a decision by the FTA: 20 weekdays as of the following weekday from the date of notification of the decision.

Objection to the competent tax dispute resolution committee against a reconsideration decision: 20 weekdays as of the following weekday from the date of notification of the decision.

Challenge to the Federal Primary Court against a tax dispute resolution committee ruling: 20 weekdays as of the following weekday from the date of notification of the ruling.

Appealing a Federal Primary Court judgement before the Federal Appeals Court: 30 calendar days as of the following calendar day from the date of notification of the judgement.

Appealing a Federal Appeals Court ruling before the Federal Supreme Court: 60 calendar days as of the following calendar day from the date of notification of the judgement.

Note: Notifications of reconsideration decisions and tax disputes resolution committee rulings are conducted via email. A person being notified by email is deemed notified upon the date the email is sent. * Not when the email is received. Taxpayers are generally advised to create dedicated email addresses for tax procedure purposes and whitelist the FTA, Ministry of Justice, and tax dispute resolution committee email addresses respective of the tax dispute procedures to ensure awareness of any notifications during the tax disputes procedure. Currently, the Federal Court is also notifying taxpayers of tax disputes via email in certain instances and taxpayers should follow-up diligently with the Federal Courts to ensure whether a case has been filed, and what email address the Federal Courts used to communicate the trial details to the taxpayer.

* According to Ministerial Decision No. 33 of 2020 amending certain provisions of Ministerial Decision No. 57 of 2018 promulgating the Executive Regulations of Law No. 11 of 1992 on Civil Procedures.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

UAE Federal Primary Court applies Supreme Court ruling on late tax payment penalties

March 21, 2021

Since early 2019, the tax dispute resolution committees, and Federal Primary and Federal Appeals Courts have ordered the invalidity of applying late payment tax penalties capped at 300% retroactively to voluntary disclosures.

On 14 October 2020, the Federal Supreme Court overturned the position taken by the committee and Court judges, and ordered that voluntary disclosures are to be considered a branch of the original tax return – hence that both are one and the same, meaning that submission of a voluntary disclosure is akin to a late submission of a tax return.

The subsequent question circulating was whether the tax dispute resolution committees, and the Federal Appeals and

Federal Primary Courts would echo the judgment by the Supreme Court.

In the week of 25 October, several judgements were passed by the Federal Primary Court applying the judgment of the Federal Supreme Court verbatim – in both content and principles – applying late payment penalties to voluntary disclosures retroactively calculated as of the date of the original tax return.

This confirms the expectation that the judges of the committees, and the Primary and Appeals Courts will echo and mirror the findings of the Supreme Court on this matter.

Does this close all avenues to litigate?

This does not necessarily prevent taxpayers from challenging late payment penalties on voluntary disclosures.

The right to resort to the judiciary is a constitutional right, and the procedure itself is granted as a subject matter right in the tax procedures legislation.

There are certain conditions, however, that must be respected when litigating a matter that is similar to one that has been previously litigated and adjudicated on by the Federal Supreme Court.

The Constitutional Circuit of the UAE Federal Supreme Court ruled in 2019 that:

"…the Federal Supreme Court's ruling has an absolute authority that is binding on all and all state authorities, including courts of different degrees and types, and it is not permissible to disband it, debate it, override its content, or reconsider the same case from a newcomer to this court…"

Hence, for taxpayers arguing the same basis that voluntary disclosures are to be considered a separate procedure than that of tax returns and hence subject to independent penalties

– the Federal Supreme Court judgment will likely dismantle and trump this argument before any committee of Federal Court judge.

However, alternative procedures and arguments not heard by the Federal Supreme Court, that do not contradict the findings of the Federal Supreme Court judgment issued on 14 October, may provide an avenue for taxpayers to dispute the application of late payment penalties on voluntary disclosures.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

UAE Supreme Court Rules No Privacy Invasion via WhatsApp

March 21, 2021

The case involved a husband (the defendant) who took a video of his wife (the complainant) and sent the video recording to the complainant's mother instantaneously through the instant messaging application; WhatsApp.

The complainant/wife filed a criminal complaint against the defendant/husband for breach of Federal Decree-Law No. 5/2012 on Combating Cybercrimes (the "Cybercrime Law") which prohibits the use of a computer network or electronic information system or any information technology means for the purpose of the invasion of privacy.

The complainant/wife requested that the defendant/husband be penalized under Article 374/1 of the Penal Code and Article 21

of the Cybercrime Law. (Citations provided below.)

Amongst the requests by the complainant for the judiciary to order a fine against, and the imprisonment of the defendant, the complainant also requested an order for the prohibition of the defendant to access WhatsApp and the telecommunication network used by the defendant in the purported crime.

The complaint was first filed in mid-2017, with the final and binding ruling being issued by the Federal Supreme Court in mid-2019.

It is was decided by the Federal Supreme Court that invasion of privacy crimes committed through WhatsApp are not covered by the Cybercrime Law if the crime involves two or more persons in a closed room with the subject matter and media not privy to others outside that room.

The court did not rule on whether there were breaches under the Penal Code as the limitation period of three months on insult and slander accusations had expired by the time the complaint was filed.

In this ruling the Federal Supreme Court sets two elements to the test of whether the privacy of another person has not been invaded via electronic/digital means:

- Outside of cyberspace, if the accused, the suggested victim, and the recipient(s) of the media purported to have invaded the privacy of another, are physically located in a place closed-off to others; and
- If the media purported to have invaded the privacy of another is distributed only to persons in the same closed-off venue, who are also privy to the subject matter of the distributed media.

In the Workplace

The ruling raises questions towards the applicability of the

Cybercrime Law in a workplace environment.

Comparatively, if this ruling were to be used as reference in managing workplace privacy policies, then it is arguable that a recording/image of one employee shared amongst other employees may not necessarily fall under the Cybercrime Law's invasion of privacy provisions if said employees are all within a closed-off area (a closed office space for example) at the time, and the media is not distributed to persons outside that closed office space.

Provisions

- Article 21 of the Cybercrime Law:

Shall be punished by imprisonment of a period of at least six months and a fine not less than one hundred and fifty thousand dirhams and not in excess of five hundred thousand dirhams or either of these two penalties whoever uses a computer network or and electronic information system or any information technology means for the invasion of privacy of another person in other than the cases allowed by the law and by any of the following ways:

1- Eavesdropping, interception, recording, transferring, transmitting or disclosure of conversations or communications, or audio or visual materials.

2- Photographing others or creating, transferring, disclosing, copying or saving electronic photos.

3- Publishing news, electronic photos or photographs, scenes, comments, statements or information even if true and correct.

Shall also be punished by imprisonment for a period of at least one year and a fine not less than two hundred and fifty thousand dirhams and not in excess of five hundred thousand dirhams or either of these two penalties whoever uses an electronic information system or any information technology

means for amending or processing a record, photo or scene for the purpose of defamation of or offending another person or for attacking or invading his privacy.

- Article 374/1 of the Penal Code:

Shall be sentenced to detention for a maximum period of six months or to a fine not exceeding five thousand dirhams in case the libel or insult takes place through the telephone or facing the victim in the presence of others.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile:
https://waselandwasel.com/about/mahmoud-abuwasel/