

PRECEDENT: UAE Supreme Court pierces the corporate veil and finds foreign company liable for its UAE subsidiary in USD 1.2 billion energy dispute

March 21, 2021

Summary

The UAE Supreme Court ruled that foreign companies engaging in commercial activities in the UAE are liable for the actions of their UAE subsidiaries even where the UAE subsidiary is the party to the contract in dispute and not the foreign company.

The Supreme Court considered the following arguments:

- The ownership percentage of the UAE subsidiary by the foreign parent company.
- The degree of benefit and responsibility of the foreign parent company in the transaction entered into by its UAE subsidiary in dispute.
- The extent to which the foreign parent company engages in pre-contract activities (such as negotiation) and post-contract activities (such as implementation).
- The extent to which the UAE subsidiary is acting on behalf or for the foreign parent company.

Facts

In 2005, two parties entered into a gas supply agreement for the manufacture of ammonia on the basis that the gas supply would commence on 31 December 2006 (the “Agreement”).

One party to the Agreement was to develop the manufacturing capacities (the “Manufacturer”), and the second party to the Agreement was the UAE subsidiary (“UAE Subsidiary”) of the foreign company (the “Foreign Supplier”).

The Manufacturer completed the development of the facilities, but the UAE Subsidiary did not comply with the supply of the gas by 31 December 2006.

Claim

In 2012, the Manufacturer sued the UAE Subsidiary, the Foreign Supplier and six of the Foreign Supplier’s foreign subsidiaries for the following:

- Almost USD 740,000,000 in lost profits.
- Almost USD 100,000,000 in future lost profits.
- Almost USD 280,000,000 in depreciation of assets.
- Almost USD 40,000,000 in financing costs.
- And other heads of claim regarding leasing and insurance costs, and moral damages.

The Foreign Supplier and its six foreign subsidiaries had no corporate registration in the UAE.

The UAE Subsidiary filed a counterclaim requesting the non-entry into force of the Agreement, and in alternate for the rescindment of the Agreement, and almost USD 30,000,000 in compensation on the basis that:

- the Agreement was subject to a condition precedent for the Manufacturer to secure buyers for the manufactured goods by September 2005 – which the Manufacturer had allegedly failed to conclude.

Primary and Appeals Judgments

The Primary Court rejected the counterclaim by the UAE Subsidiary and ordered compensation by the UAE Subsidiary of almost USD 260,000,000 in favor of the Manufacturer.

The Primary Court did not find the Foreign Supplier or its six foreign subsidiaries liable on the basis that they were not signatories to the Agreement and were not licensed to operate in the UAE.

The Appels Court upheld the Primary Court ruling and increased the compensation quantum in favor of the Manufacturer to almost USD 290,000,000.

Supreme Court Appeal

The Manufacturer challenged the Appeals judgment before the Supreme Court in its part in finding the UAE Subsidiary solely liable – and not finding the Foreign Supplier and its six subsidiaries liable.

The Manufacturer argued that the Foreign Supplier should be held liable for the following reasons:

- the Foreign Supplier is the 100% owner of the UAE Subsidiary;
- the Foreign Supplier is the owner of the gas intended for supply;
- notwithstanding that the UAE Subsidiary was signatory to the Agreement, the Foreign Supplier was the party responsible for negotiating the Agreement; and
- the UAE Subsidiary signed the Agreement on instruction of the Foreign Supplier.

The Manufacturer also argued that the six foreign subsidiaries should be found liable on the basis that:

- the six foreign subsidiaries assisted in the negotiation and conclusion of the Agreement, and hence are jointly liable for any liabilities on the UAE Subsidiary.

Supreme Court Judgment

The Supreme Court overturned the Appeals Court judgment (and in turn the Primary Court judgment) and found that the Foreign Company and its six foreign subsidiaries are to be held jointly and personally liable alongside the UAE Subsidiary for the ordered compensation of USD 290,000,000.

In its reasoning, the Supreme Court applied Articles 313, 314, 315, and 316 of the UAE Commercial Companies Law of 1984 as the governing law at the time of the transaction ("Old CCL") – as opposed to the new UAE Commercial Companies Law of 2015.

The Supreme Court ruled that Articles 313 to 316 of the Old CCL:

"...indicate that the foreign company incorporated abroad may not practice its activity inside the United Arab Emirates unless it obtains a license to do so from the Ministry of Economy after the approval of the competent authority in the Emirate in which it carries out this activity, provided that it is proclaimed by being registered in the commercial register.

If the foreign company or the office or branch to which these procedures are affiliated do not fulfill such requirements before carrying out any activity within the UAE, then they shall not be considered as an independent personality separated from the liabilities of the registered subsidiary, and all that is done in terms of actions by, or arrangements for the account of, the foreign company before the completion of the registration procedures results in personal liability on the foreign company, and joint liability with the persons who performed the act or the disposition on the foreign company's behalf."

The Supreme Court found that the Primary and Appeals Courts' judgments were deficient in excluding the Foreign Supplier from the liabilities of a foreign company active in the UAE.

The Primary and Appeals Courts' judgments relied on Article 2(3) of the Old CCL which excludes the provisions of the Old CCL to petroleum companies working in the field of prospection, extraction, marketing, and transport; companies producing electricity, gas, water desalination and related activities such as transport, and distribution, as well as companies that are exempt by a Cabinet of Ministers decision.

The Supreme Court ordered that Article 2(3) of the Old CCL applies and exempts oil and gas, and electricity and water companies that are registered in the UAE. However, it does not apply to foreign energy companies that do not have any form of registration in the UAE.

Significance

The Supreme Court judgment creates a substantially novel landscape for creditors in the UAE by providing precedent to pursue foreign parent companies for the debts of their UAE subsidiaries – even where the party to the contract in dispute is the UAE subsidiary of the foreign parent company, and not the foreign parent company.

For foreign parent companies, this novelty manifests the need to consider the extent to which a foreign parent company will negotiate and engage in a contract prior to the signing of the contract by its UAE subsidiary, the ownership structure that the foreign parent company will have over its UAE subsidiary, and the level of managerial control the foreign parent company will apply to its UAE subsidiary.

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Arbitration Filing in the UAE Courts: Developments and Technology

March 21, 2021

The United Arab Emirates Arbitration Law (Federal Law No. 6 of 2018) came into effect in June of 2018 after being published in the Federal Official Gazette number 630 on the 15th of May, 2018. Since then, the UAE courts have been implementing internal processes – both administrative and technological – to comply with the Arbitration Law.

In October of 2018, the Dubai Courts website was updated to include an option/button titled (on the English version of the website): “Order on petition, arbitration”. The option can be viewed in the Case Registration webpage. The term seems to be literally translated from (أمر على عريضة، تحكيم); the service is otherwise known generally as a petition/court petition.

The service is listed under the categories of services provided by the Dubai Court of Appeal. This reflects the practical application of Article 55 of the UAE Arbitration Law which states that:

A party looking to enforce an arbitral award shall submit a request for its confirmation and enforcement with the chief justice of the Court [of Appeal].

A court petition in the United Arab Emirates requires the competent judge to issue an order in a procedural sense without the parties having to go through a trial. In issuing such orders the judge acts in an administrative capacity as opposed to a judicial capacity; in Arabic, this capacity is known as “صفة ولائية”.

The order issued is both that of confirmation and enforcement simultaneously. Enforcement measures would then be followed up with the Enforcement Judge to commence enforcement procedures.

A court petition is submitted when a party requires the court to issue an order and is – as a general matter – governed by Article 140 of the Civil Procedures Law requiring a party to submit a petition with a request directed to the authorized judge or the circuit director who examines the request/petition and must issue the order the next day.

Notwithstanding Article 140 of the Civil Procedures Law, Article 56(3) of the Arbitration Law provides the competent judge with a sixty-day limit to issue the order. The UAE judiciary differentiates between what is loosely translated as a procedural time-bar (مدة تنظيمية) and an obligatory time-bar (مدة جزائية). The former can be extended, the latter cannot, which in this case poses the risk that the sixty-day limit could be extended.

To submit the court petition request through the Dubai Court web portal, the applicant must append the requisites outlined in Article 55 of the UAE Arbitration Law which are:

1. The original award or a certified copy thereof.
2. A copy of the Arbitration Agreement.
3. An Arabic translation of the arbitral award, attested by a competent authority, if the award is not issued in Arabic.
4. A copy of the minutes of deposit of the award in Court.

With respect to Article 55(4), in a practical sense, if the arbitrator was appointed by the court the minutes of deposit are obtained from the court but, as we understand, if the arbitrator was appointed by another competent body (e.g. Dubai International Arbitration Center), that body issues the respective minutes of deposit.

As a general matter, the Emirates of Dubai Courts, Abu Dhabi,

and Ras Al Khaimah have independent court systems. The remainder of the Emirates; Ajman, Fujairah, Sharjah and Umm Al Quwain, utilize the Federal Court systems.

The Abu Dhabi Courts have not yet (as of March 2019) updated their electronic systems to provide for direct submission of a petition order for confirmation of arbitral awards. The current electronic e-filing system necessitate that a primary court judgement be present in the system for the user to be able to lodge a request respective of that primary court judgement with the Appeals Court (the competent court for confirmation of arbitral awards).

Currently, the Abu Dhabi Courts require the party to submit the arbitral award manually to the case management office for it to be registered as a primary court judgement in the electronic system. Subsequently, the user can select the registered arbitral award in the electronic filing system (which would have been registered as a primary court judgement) to lodge with the Abu Dhabi Appeals Court for confirmation.

The Federal Courts have recently developed their electronic portal, but its activation is on-going. Until it becomes fully operational, parties must submit the petition order to confirm an arbitral award manually.

It is clear that the new Arbitration Law is being integrated operationally into the electronic court systems. In other words, the past obstacles of re-litigating the merits of a dispute albeit a final arbitral award has been issued are now foregone with the expediency of the various courts' online procedures and seamless process of confirming and enforcing arbitral awards.

Towards Digital Dispute Resolution

With the increase in technological advancement in arbitral proceedings and the court systems, it is not farfetched that

both arbitral and court proceedings would manifest into a completely digital process soon.

For example, the Dutch Foundation for Transport and Maritime Arbitration Rotterdam-Amsterdam (previously TAMARA, now named UNUM) developed e-arbitration facilities early in 2008 and continues to develop those facilities whilst developing rules on e-arbitration;

Provision 4.2 of the UNUM arbitration rules states that:

“Unless the parties explicitly agree otherwise, the arbitration will be settled via an online platform (“e-arbitration”).”

Another example is the Russian Arbitration Association Online Rules issued on 1 October 2015 developed by the RRA which has created an online arbitration system for facilitating the resolution of commercial disputes through means of technology. The RAA administers online arbitrations under its own online arbitration rules of 2015.

On the same date on 1 October 2015, the China Guangzhou Arbitration Commission issued its first Online Arbitration Rules, which was the first set of arbitral rules in Mainland China with specific reference to how an arbitration can be run online.

Moreover, the UAE recently introduced legislation permitting e-trials.

Smart e-Trials were first introduced on 18 September 2017 when His Highness Sheikh Khalifa Bin Zayed Al Nahyan, President of the UAE, issued Federal Decree No. 10 of 2017 (the “e-Trial Law”).

The e-Trial Law made amendments to the Civil Procedures Law issued by Federal Law No. 11 of 1992 (the “Law”).

The e-Trial Law introduced in Title 6 in Book 3 of the Law

under the name of 'Use of Remote Communication Technology in Civil Procedures' Articles 332 to 343 addressing the new e-Trial system.

Article 332 defines the use of Remote Communication Technology in the Civil Procedures as *"the use of audiovisual communication means between two parties or more for the purpose of achieving remote appearance and exchange of documents, including the lawsuit registry, procedures of declaration, trial and execution carried out through this technology"*.

Article 334, regarding 'Appearance and Trial Procedures', states that *"All the provisions concerning the collection of fees, registry, declaration, submission of documents, appearance, publicity, pleading, hearing of witnesses, questioning, deliberation, issuance of judgments, submission of appeals and execution through the procedures thereof set forth under the present Law and its amendments shall be deemed valid if carried out totally or partially through the Remote Communication Technology."*

Additionally, on 27 March 2019, Ministerial Decisions 260 and 259 of 2019 were issued to regulate the e-trial procedures pursuant to e-Trial Law. Decision 260 regulates electronic proceedings in civil procedures, whilst 259 does so for criminal procedures. The Decisions regulate virtual attendance, digital sharing of files and pleadings, virtual hearings, appointment of experts via electronic communication, and digital judgements (with digital signature by the presiding judge or Head of the respective circuit).

Summary

1. The UAE courts are digitizing to the point where most (if not all) submissions pre-trial and during the course of the trial are electronic.
2. Arbitration procedures and centers are also developing

to e-arbitration capacities.

3. Advocacy can now be done via distance communication through e-trial facilities.

Looking at these developments hand-in-hand, the UAE judicial system is on par and in advancement of international judicial innovations, which in turn results in expediency in arbitration matters and procedures.

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UAE Electronic Monitoring Law (No. 53/2019)

March 21, 2021

Electronic monitoring was introduced earlier this year [2019] via Article 355 of Federal Law No. 35/1992 (Criminal Procedures Law) via the amendments to the Criminal Procedures Law implemented by Federal Decree-Law No. 17/2018.

On 4 August 2019, the UAE Cabinet, or more commonly referred to as the Council of Ministers, issued Cabinet Decision No. 53/2019 Regulating Electronic Monitoring (the “Decision”) providing further granular details on the application of electronic monitoring, and permitting collaboration with the private sector in the implementation of electronic monitoring.

Administration of electronic monitoring is overseen by the Ministry of Interior, and all local and federal police forces, with support from the Ministry of Justice in certain respects.

Electronic monitoring is defined as (loosely translated) *“the prevention of an accused or convicted person from absence outside a curfew from their domicile or location designated by the public prosecution or the competent court”*.

Electronic monitoring is defined to account for both time-based and geographical monitoring as designated by the public prosecution or competent court in respective matters.

Circumstances which could subject someone to electronic monitoring are:

1. Temporary surveillance in lieu of temporary confinement (incarceration or otherwise).
2. Temporary surveillance in lieu of half of an incarceration punishment, after half that period has been concluded.

Electronic surveillance can be executed via continuous home signaling devices, geographical tracking devices, or any other method approved by the Cabinet. All tracked data will be archived in central-local and federal archives, respectively.

Specifications of electronic monitoring methods require:

1. Avoidance of health risks to the person under surveillance.
2. Any devices used should be approved by the Emirates Authority for Standardization & Metrology.
3. Avoidance of any hindrance to the person any surveillance with respect to their occupation, education, profession, training, or medical treatment, unless otherwise ordered by the public prosecution or competent court.
4. Guarantee of privacy of the private life of the person under surveillance.
5. Guarantee of privacy of the personal data collected from the surveillance.

Those subject to electronic monitoring must comply with the following:

1. To inform the public prosecution of any changes to their occupation or their domicile.
2. To inform the public prosecution if there is intent to temporary relocate for a period exceeding 15 days.
3. To permit visitations from those in charge of administering the electronic monitoring.
4. Safeguard the monitoring device, and not tamper with it or damage it.
5. To not travel outside the State without obtaining approval from the public prosecution or competent court and inform the public prosecution upon their return.

The Decision permits the Ministry of Interior to cooperate with the private sector, as required, to implement the requirements of the Decision and electronic monitoring in general.

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Qatar Courts and Tax Authority take action amidst COVID-19 pandemic (Coronavirus)

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Qatar Courts Suspend Hearings for Two Weeks

The Supreme Judicial Council of Qatar announced the suspension of hearings of the Appeal Court, the Court of First Instance, labor dispute settlement committees and rental dispute settlement committees as of 15 March 2020, for a period of two weeks.

In a press statement, the Council affirmed the judges' continued work in the consideration of urgent matters and temporary matters, and the setting of new dates for the deferred sessions, bearing in mind that the Cassation Court will continue to consider its hearings at the dates specified in advance.

This action comes within the framework of the preventive efforts and measures taken by the State to limit the spread of the Coronavirus (COVID-19), and in the interest of everyone's safety, and after coordination with the relevant authorities.

Qatar General Tax Authority Extends Tax Filing Date

The General Tax Authority issued Circular of the Chairman of the General Tax Authority No. 5 of 2020 Concerning Extending the Tax Filing Period for the Tax Year ending 31 December 2019.

Due substantial inquiries and requests by taxpayers and audit firms requesting the extension of the deadline for tax filings for the 2019 tax year and taking into considerations the exceptional circumstances amidst the Coronavirus (COVID-19), and in order to promote tax compliance by taxpayers in an adequate manner, the Circular has extended the deadline for the submission of tax returns for the tax year of 2019 for two months as of the final deadline for the submission of tax returns. The new date shall be 30 June 2020.

Please [contact us](#) for more details or assistance in this matter.

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First Inheritance Tax Disputes

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During the Summer of 2020, the first inheritance tax disputes in the UAE made their way to the Federal Primary Court.

As the UAE tax systems develop and tax liabilities and consequences become more commonplace, business owners and high-net-worth persons begin evaluating how any liability to the Federal Tax Authorities may pass on during inheritance to their beneficiaries.

Initially, when a taxpayer passes away, the payable tax owed by them prior to their date of death shall continue to be owed to the Federal Public Treasury, and payment shall be made from the deceased's legacy prior to its distribution among the heirs or legatees.

If it appears following the distribution of the legacy that a payable tax is still outstanding, the Federal Tax Authority may take legal recourse against the heirs and legatees for the payment of such outstanding tax, unless a clearance certificate has been obtained from the Federal Tax Authority for the legacy representative or any of the heirs.

It is also important to recognize that the Federal Tax Authority's right to claim payable taxes and penalties is not

time-barred; there is no time limitation on when the Federal Tax Authority may make its claim against a recorded debt.

In other words, if a person owes taxes (or penalties) and passes away, the debt will continue perpetually against the person's kin (inheritors) until the debt is paid off, or until the Federal Tax Authority enforces the debt via court actions, or waives its right against the debt.

If inheritors disagree with a particular position of the Federal Tax Authority, there are two means to grieve a decision taken by the Authority. Either through waiver and exemption request, or through a reconsideration request.

A waiver and exemption request is based on an excuse that the Authority would be convinced is justifiable. In other words, it is not a discussion over certain interpretation of law or fact, but rather an implicit admission of liability but with a request to waive such liability on the basis of excusability.

For example, if a person subject to value-added tax falls into a coma, and during that period, they cannot submit their tax returns and have no legal representative to do so for them, they may consequently receive tax penalties for non-filing of returns or any other reason arising out of their incapacitation. If the person then passes away whilst in a coma, the tax liabilities and penalties are inherited by the legatees.

In this particular scenario, one could argue that the fact that the person was in a coma with no legal representative registered could not allow them to comply with their tax obligations, and as such – in this hypothetical – these particular sets of facts may be deemed a justified excuse by the Federal Tax Authority to waive penalties.

But the important factor here is the differentiation that the waiver and exemption request is not an argument over interpretation of law and fact, but rather a plea for

exemptive treatment.

On the other hand, if the disagreement between the inheritors and the Federal Tax Authority is over interpretation of law and/or fact, the second option (other than the waiver and exemption request) is a request for reconsideration.

The request for reconsideration triggers the dispute resolution process which is generally a five stage process depending on the value of the dispute, and includes; i) the reconsideration before the Federal Tax Authority, ii) an objection before the competent tax dispute resolution committee, iii) the Federal Primary Court, iv) the Federal Appeals Court, and v) the Federal Supreme Court.

This Summer of 2020, the first tax inheritance cases made their way to the Federal Primary Court.

As tax liabilities increase, and as family wealth is distributed further and further, high-net-worth individuals need to manage generational liabilities with care – and inheritors need to account and prepare for the fact that they will inherit tax liabilities and may be held accountable before the Federal Tax Authority.

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Courts Mandate Valuation of

Claims by Litigants

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On 28 October 2019, the Abu Dhabi Judicial Department (ADJD) ordered the departments of the Abu Dhabi Courts to inspect claims and counterclaims at all levels of the Court to ensure that litigants have quantified their claims/requests in their submissions at the time of filing.

Abu Dhabi Law No. 13/2017 provides that for lawsuits of unknown value, a fixed fee applies of AED 1,500 for summary matters, and AED 4,000 for plenary matters, with the remainder of the fees to be paid once the final judgment is pronounced.

Notwithstanding, the ADJD stated that parties – both plaintiffs and defendants in their claims and counterclaims respectively – may avoid including quantum of their claims in an attempt to avoid court fees.

Hence, litigants with claims that are *prima facie* quantifiable must include the value therein to avoid the risk of claims being rejected by the Abu Dhabi Courts. (See below for types of cases and valuation methods.)

The ADJD also noted that the same requirements apply to claims before the Appeal and Cassation Courts.

Departments that are required to inspect claim values are the Abu Dhabi Court Case Management Office, the outsource services centers (such as Tasheel), the Heads of the Court registration departments, and Heads of Court case preparation departments.

Abu Dhabi Law No. 13/2017 grants the Abu Dhabi Courts authority to dismiss the case in case it is found during the proceedings that the fees paid were not commensurate with the claims or not duly collected.

The Civil Procedures Law No. 11 of 1992 as amended by Cabinet Decision No. 57 of 2018 that came into effect in early 2019 requires the value of the lawsuit to be assessed on the day of its filing and in all cases to be based on the litigants' latest demands. The value of the lawsuit shall include any interests, indemnities, revenues, expenses and other appurtenances of which value is estimated, due on the day of its filing.

With respect to non-cash claims that require valuation per the Civil Procedures Law (as amended), the valuation methods are:

- Where the currency of the claim is other than Emirati Dirhams, a conversion to Emirati Dirhams would take place.
- Real estate ownership matters where valuation would be based on the real estate's value. If the value of the property is not assessed, it shall be considered to exceed one million dirhams.
- Requests for validity, nullification, or rescission of a contract shall be based on the value of the subject matter contract.
- Actions relating to the dissolution or liquidation of a company are valued based on the capital of the company at the time of filing the suit.
- Eviction suits are valued based on the annual rental value.
- Suits between creditors and debtors regarding the seizure or an auxiliary real right are valued based on the debt's value or value of the property/real right seized, whichever is less.

The provided list is non-exhaustive but provides litigants with an idea of the factors in valuating court fees.

The Abu Dhabi Court fees are 5% of the value of civil lawsuits with a minimum of AED 100 and a maximum of AED 40,000. This is applicable to the Primary and Appeal Courts. The Cassation

Court fees are a fixed fee of AED 2,000 for every appeal in cassation, with an AED 3,000 deposit with the court treasury as a guarantee that is refunded if the judgment is in favor of the appellant.

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(COVID-19) 1981 Government opinion on force majeure salary deductions

March 21, 2021

In 1981, the Department of *Fatwa* (Legal Advice) and Legislation, the Department at the UAE Ministry of Justice responsible for advising government agencies on legal issues, issued an opinion on whether an employee who had been out of the country on a work-related trip and could not return due to a force majeure event, was eligible to continue receiving their salary.

The Department established two principles in its opinion:

- The intent of the employee: The provisions on vacation leave do not apply to the case of an employee on a formal work trip abroad when the employee is late in returning to their work for reasons beyond the employee's control because the employee did not consider the delegation of the task entrusted to him as being a

vacation but rather as a work mandate.

- Application of force majeure events: If the employee is on a formal work trip abroad, not to consider their failure to return to the United Arab Emirates (or any other designated work location) due to a force majeure event as a break from work that may be deducted from their salary.

The opinion of the Department was laid out as follows:

If an employee is on an official work trip, they are not considered to be on vacation but rather at work, and if force majeure conditions prevent the employee from returning following the end of their mandate, such cannot be considered a break from work which may be deducted from their vacation days, but rather takes the rule of force majeure that prevents the employee from carrying out their work.

If a force majeure event precludes the possibility of the employee's return following the end of their work mandate, such as the absence of a means of transportation or other reasons that cannot be limited that lead to impeding the return of the employee sent abroad from the workplace, in such a case, this cannot be considered a break from work, which may be deducted from the employee's vacation days, but rather takes the rule of force majeure that prevented the start of work.

What if the employee is in the UAE and not traveling?

In the current state of affairs, a considerable number of employees in the UAE cannot attend their workplace due to the restrictions placed to prevent the spread of COVID-19, whether due to restrictions on accessing the workplace (closure of malls, etc.), or the employee themselves choosing to stay home in adherence with Government instructions, in particular *Cabinet Resolution No. 17/2020 on the Limiting the Spread of the Coronavirus*, and *Federal Public Prosecutor*

Resolution No. 38/2020 on the Regulations of Cabinet Resolution No. 17/2020.

The opinion of the Department is significant in that it addresses an employee's inability to return to the place of work but is nonetheless addressive of a situation where the employee was on a work trip outside the country, as opposed to not being able to return whilst they are within the UAE.

However, employees and employers should account for the first principle established by the Department's opinion; that is the intent of the employee and employer on whether the days affected by the force majeure event were to be vacation days or workdays.

If the restrictions caused by COVID-19 had occurred during days which both the employee and employer had intended on being workdays, but (in reference to the second principle noted above) a force majeure event restricted the employee from attending their place of work, it is precautionary for both employer and employee to refer to and consider the extent to which principles set forth by the Department of *Fatwa* (Legal Advice) and Legislation in its opinion in 1981 would apply in today's circumstances amidst the Coronavirus pandemic.

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As the Dubai tax dispute

committee possibly reforms – does it affect your right to object to tax penalties?

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Brief

The tax dispute resolution committees were formed pursuant to the Tax Procedures Law, its Executive Regulations, and specifically Cabinet Decision No. 23/2018.

The Dubai tax dispute resolution committee (“Dubai TDRC”) was formed pursuant to Ministerial Decision No. 109/2019 which named the primary judge, the two experts, and the alternate judge as the committee members.

The Dubai TDRC has jurisdiction to accept and rule on objections by persons domiciled in, or with a tax registration address, in the Emirate of Dubai.

There are two other committees in the Emirate of Abu Dhabi and the Emirate of Sharjah, but this article focuses on the potential reform of the Dubai TDRC.

Currently, it is believed that the Dubai TDRC may be undergoing reform which could ultimately affect objections that are currently filed or will be filed in the near future until new committee members are appointed by Ministerial Decree.

What happens to objections if the committee is inoperable?

If a person (domiciled in Dubai for tax purposes) disagrees with a decision by the Federal Tax Authority and commences the reconsideration process but does not obtain a favorable outcome, the subsequent procedure would be to object before

the Dubai TDRC.

The objection is lodged with the tax dispute resolution department of the Ministry of Justice that is responsible for lodging the objection with the Dubai TDRC within two weekdays as of the date of the filing.

Once the Dubai TDRC receives the objection, a decision must be rendered within a maximum of forty weekdays which comprises of an initial twenty weekday period, and an additional twenty weekday extension period. The extension can be granted based on the request of the objector or the Federal Tax Authority, or if the Dubai TDRC deems it necessary.

After the procedure before the Dubai TDRC is concluded, either the objector or the Federal Tax Authority can challenge the committee's decision before the Federal Primary Court.

Here the question becomes; what if a committee is undergoing reform and does not issue a decision?

Does the objector have to wait, or can they continue their dispute before the Federal Primary Court?

To briefly address these questions, we draw reference to a case where a similar committee was yet to be formed, and the litigant proceeded to file their claim before the Courts directly, which was found to be a valid procedure by the Federal Supreme Court.

Federal Supreme Court case where an administrative committee was not formed

In 2001, conciliation and arbitration committees ("CAC") were established within the Federal Courts to decide on certain disputes before those disputes were to be filed before the Federal Primary Court.

By 2008, one of the Federal Courts had not yet set up a CAC, and a litigant bypassed the CAC and filed their case directly

before the Federal Primary Court on the basis that the CAC was not formed.

The Federal Primary and Federal Appeals Court rejected the claim based on the grounds that the litigant had not registered their dispute before the CAC prior to filing the claim with the Federal Primary Court, and that such procedure was mandated by law.

However, the Federal Supreme Court overturned the lower courts' judgments and ordered that if the Minister of Justice does not issue a decree forming the CAC for it to be competently operable, litigants may plead their case before the Federal Primary Court directly.

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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.

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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.

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