

Ruling Sets Precedent on Applicable Penalties for Voluntary Tax Disclosures (UAE)

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In the extremity; when faced with errors in tax filings, taxable persons may be subject to fines amounting to the equivalent of up to 350% of any unpaid taxes.

Comparatively, with appropriate record-keeping and diligent filing of a voluntary disclosure(s), the penalty that could apply to errors would only be 5%, as supported by a recent ruling of one of the three Tax Dispute Resolution Committees (TDRC) in the United Arab Emirates.

Taxable persons wishing to notify the Federal Tax Authority (FTA) of an error or omission in their tax return, tax assessment, or tax refund application may submit a voluntary disclosure pursuant to Article 8 of the Executive Regulations to the Tax Procedures Law.

There have been cases of voluntary disclosures that have resulted in penalties specific to voluntary disclosures being applied to the taxable person amounting to 50%, 30%, or 5% of the unpaid tax.

There have also been cases where voluntary disclosures have resulted in the taxpayer being subjected to retroactive penalties that would amount to a maximum of 300% of the unpaid tax in addition to the 50%/30%/5% voluntary disclosure penalties.

A recent landmark ruling by the Tax Dispute Resolution

Committee (TDRC) clarified that where the taxpayer can clearly evidence that they have acted in good faith and made the voluntary disclosure within the timeframe of twenty business days as of the date their awareness of the error, only the voluntary disclosure penalties apply – and not the retroactive penalties that could amount to an additional penalty of 300% of the unpaid tax.

As opposed to merely stating the necessity to remedy a mistake without noting the taxable person's consciousness of the error; both the Executive Regulations and the Tax Procedures Law emphasize the element of a taxable person's awareness of a mistake when making a voluntary disclosure filing:

- Article 8 of the Executive Regulations: *"...the taxable person shall make a voluntary disclosure to the Authority within twenty business days from the date when the taxable person became aware of the error."*
- Article 10 of the Tax Procedures Law in each of the four sub-articles: *"If a taxable person becomes aware..."*

The TDRC's ruling is in line with UAE court precedent such as the Federal Supreme Court's rulings in appeals 555/2012 and 1/1991 where the Court clearly indicated that unintentional error is not punishable especially if the subject person acted in good faith [when becoming aware of a mistake] within the parameters of the law.

The significant takeaway of this ruling for taxable persons is that evidence of how the error and/or omission came about, and how the taxable person became aware should be clearly recorded and transmitted to the FTA when a voluntary disclosure is made. That evidence should indicate that the taxpayer had discovered the error (and made the voluntary disclosure) within the twenty-business day period.

When reconsideration requests to the FTA are made, challenges before the TDRC are submitted, or an appeal is raised before

the Federal Courts on voluntary disclosure, it is paramount that the taxable person can clearly evidence how it is they came about becoming aware of the error that required a voluntary disclosure.

Such evidence can be in the form of internal communication between personnel, private clarifications (a response to a clarification request issued to the FTA), issuance of an FTA guide or public clarifications, adjustment of systems and processes (especially in light of the novelty of the tax reforms in the UAE), deployment to production systems, internal audits, and so on.

The Penalties in Detail

Cabinet Resolution No. 40/2017 on Administrative Penalties for Violations of Tax Laws in the UAE explicitly provides for the application of two penalties in cases of voluntary disclosure by the taxable person. The first is a fixed penalty of AED 3,000 for the first occurrence of voluntary disclosure and an AED 5,000 penalty in case of repetition.

If the taxable person makes a voluntary disclosure after being notified of the tax audit and the FTA starts the tax audit, or after being asked for information relating to the tax audit, whichever takes place first, a 50% penalty of the unpaid tax shall apply.

If the taxable person makes the voluntary disclosure after being notified of the tax audit but before the start of the tax audit, a 30% penalty of the unpaid tax shall apply.

If the taxable person makes a voluntary disclosure before being notified of the tax audit by the FTA, a 5% penalty of the unpaid tax shall apply.

Nonetheless, there are also additional penalties that have been imposed on taxable person retroactively when voluntary disclosures are submitted to the FTA. These penalties have

been those that fall under the category of failure to settle the tax within the timeframe (i.e. late payment penalties). These penalties are:

- 2% of the unpaid tax is due immediately once the payment of payable tax is late.
- 4% is due on the seventh day following the deadline for payment, on the amount of tax which is still unpaid.
- 1% daily penalty charged on any amount that is still unpaid one calendar month following the deadline for payment with a maximum of 300%.

The calculation of the above late penalty percentages commences as of the date of when the disclosure should have been made initially (i.e. when the error occurred).

Knowledge of Tax Legislation

In a short period of time, the UAE witnessed several federal legislations (laws, legislative decrees, cabinet decisions, ministerial decrees, all of which comprise new tax legislation). This legislation is new to the community and the Emirati judiciary and came in succession rapidly. Moreover, there have been more than 20 guidelines and 10 public clarifications issued by the FTA.

Albeit the general principle is that ignorance of the law is not an excuse; it is in UAE jurisprudence that it is necessary for those subject to the law to understand the content and application of the law as an additional condition after its publication and entry into force. This is pursuant to the principles of justice that a person is required to respect legislation only after he or she has become aware of its requirements.

This axiom is significant for taxable persons who see a voluntary disclosure triggered due to new guidelines or public clarifications issued by the FTA, private clarifications provided, or errors that stem from the organizational

compliance efforts that a taxable person puts in place to comply with the tax reforms.

In 2008, the Federal Supreme Court ruled that the general constitutional requirements and the legal system are based on the principle that laws and the like are not enforced once they are enacted, but must be sufficiently communicated to all and brought to their knowledge. Otherwise, the adverse would be contrary to the principles of justice and the obligation to protect acquired rights, and the stability required by the public interest in the transactions of individuals and maintenance of public confidence.

The Federal Supreme Court ruled in the same manner in 2002 that in accordance with the principles of the Shari'a law, the general constitutional principles and the foundations of the legal system, it decided laws and the like (regulations, etc.) shall not be effective once issued, but shall be communicated to all and brought to their knowledge in order for those subject to the law to conform to.

The principles of knowledge of the law – particularly in tax legislation – have also been grounded by the Egyptian Court of Cassation in a recent ruling in 2016 where the Court found that late payment penalties due to the introduction of new tax legislation should be reconsidered by the respective authorities, and in certain cases, not be applied due to the time period necessary for a taxable person to become aware of the new tax requirements.

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UAE employment disputes amidst COVID-19: force majeure, class actions, unionization, and procedures

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As the Coronavirus pandemic takes its toll on businesses, many employment relationships are facing disruption, and employers are taking action on a mass-scale, with issues relating to unpaid leave, undue termination, or other actions that may be seen as a breach of contractual or lawful employment rights.

Comparatively, employees who deem themselves victimized in the current circumstances look to avenues to protect their interests individually or collectively.

In this article, we look at updates to unionization and class action lawsuits in the United Arab Emirates, the risks of employers arguing force majeure circumstances, and procedures for a collective claim by employees.

Example of past cases on collective employment disputes

In 1991, the Federal Supreme Court ruled in favor of the employees in a collective employment claim lodged by three employees (and referred to the Federal courts by the deputy minister at the time).

In 2002, the Federal Supreme Court rejected a claim by 18 employees on the basis that it was a joinder of 18 independent claims and did not fulfill the requirements under Article 154 of the UAE Labor Law (Employment Law) governing collective employment disputes.

In 2006, the Federal Supreme Court rejected defense by an employer that the claim should have been lodged as a collective employment dispute and ruled in favor of the employee.

2018 updates; thresholds, class actions, and unionization

In 2018, the regulatory procedures for collective employment disputes were amended by the Minister of Human Resources and Emiratization. Amongst which three crucial amendments were introduced.

The first of the crucial amendments made in 2018 was establishing a minimum threshold of one-hundred employees to fulfill the conditions of a collective employment dispute.

Secondly, the employees making the claim do not necessarily have to be employed by the same employing entity. Even if the employees are employed by different entities, but share a common denominator, they may form a class on the condition that all their employers share the same owner.

Finally, the employees must be represented by three to five employees designated by the collective employees; essentially a mechanism akin to unionization in other jurisdictions.

Force majeure and the dangers of making the argument

Employers looking to legitimize actions against employees based on an argument of a force majeure event occurring may face inquiry (by the conciliation committee, the supreme arbitration committee for employment disputes, a court, or opposing counsel) as to whether the employer's financial condition justified such action against the employees.

A critical example would be large enterprises (such as banks, airlines, or real estate developers) who publicly announce annual revenues in billions of Dirhams, in which case an overseeing conciliator, arbitrator or judge would question

whether adequate human resource provisions were made against potential business disruption in light of the magnitude of revenues generated.

Provisioning for human resource liabilities is of particular importance as Emirati law requires that employment debts are prioritized in the payment of debts during liquidation or bankruptcy, and are also prioritized over government or third-party debts, which essentially reflects the significance the Emirati legislator has given in terms of preferring employment debts against any others.

Moreover, limited liability companies (and other forms of commercial companies) must maintain a certain cash reserve. Administration and liabilities of corporate cash reserves are complex and vary, but as a general matter, the reserve must amount to half of the paid-up share capital amount. For example, a corporate with a paid-up share capital of AED 100,000,000 must maintain a statutory reserve of AED 50,000,000.

Read collectively, companies must provision funds out of annual profits into cash reserves and employment debts arguably have priority over government or third-party debts. The formulation of these two elements dilutes an argument of force majeure as the employer is – by law – required to establish a cash reserve to cover unexpected expenses of which employees are prioritized over third parties (such as suppliers, landlords, etc.).

Even in the odd circumstance that an employer has an insignificant shareholding capital, such as AED 10,000 for example which would require a reserve of only AED 5,000 – but the employer operates with annual figures amounting to millions or more, an employee may argue factual contradiction to the requirements of the commercial companies law which necessitates that a company must have sufficient capital to achieve the purpose of its incorporation.

Importantly; employers face creating a liability over the personal assets of the shareholders and managers if arguing that the Coronavirus is a force majeure event that hindered the employer from paying salaries (or any other employee debt).

The risks arise if the employer is found to have not maintain the required cash reserves (which are meant to cover unexpected circumstances) due to excess distribution of profits to shareholders, in which case the owners and managers of the employer may become liable in their personal capacity (i.e. with their personal assets) for breach of the commercial companies law.

Procedure for collective employment disputes

Commencing collective employment dispute procedures (whether as employees of the same employer, or a class of employees of different employers who share the same owner) requires the employees to notify the employer in writing of any collective dispute to commence a preconditional amicable settlement period.

The employees and the employer must also notify the Customer Happiness Center of Ministry of Human Resources and Emiratization located in the Emirate that has jurisdiction over the dispute, on the day the dispute occurs, or directly on the following business day, that a collective employment dispute has commenced.

The employees must continue to adhere to their employment obligations, and the employer must keep the entity valid and operational until the dispute has been resolved.

If direct negotiations do not resolve the dispute within seven business days, either of the employer or employees may request the Center to mediate the dispute.

If mediation efforts by the Center are not accepted by the

parties within ten days from the date the Center is notified of the request to mediate, the Center must then refer the dispute to the respective conciliation committee.

The conciliation committee has the authority to set hearings and obtain evidence to adjudicate the dispute, and question any of the employees or persons concerned with the dispute, as it deems fit.

The conciliation committee must issue its ruling within two weeks of the dispute being referred to it or otherwise refer the matter to the supreme arbitration committee for employment disputes.

If the conciliation committee issues its ruling, and either of the parties disagrees with the ruling, they may object before the supreme arbitration committee for employment disputes.

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National Media Council Issues Circular Regarding Social Media Advertising

March 21, 2021

On 9 September 2020, the National Media Council issued a circular regarding social media advertisements which will impact companies, brands, influencers, and anyone who carries out social media advertising activities on a commercial basis;

emphasizing the need to obtain prior approval from the Media Licensing Department.

As the influencer wave maintains its consistent growth, the circular addresses this by putting an emphasis on the manner in which products are to be advertised via social media. A recent study found that 84% of influencers in the UAE do not disclose paid partnerships on their social media posts and this has led to a mass confusion amongst their followers, as people are failing to grasp the authenticity of the influencer's posts – the circular aims to rid this issue. The circular states:

"The advertisement must conform to conditions of advertisement, must be authentic and not exaggerated, must not lead to confusion with other names, products or activities, and must not include or contain any false or misleading claims and anything involving fraud and deceit."

Furthermore, the circular goes on to state:

"The identity of the advertisement must be clearly defined and must incorporate the use of a clear and non-confusing language that is distinct from the other materials posted on the account. The advertisement must appear distinctive and independent from other materials, with time intervals in cases of broadcast."

The advertising material that is used on the social media post must be referred to and referenced in the following fashion:

- The use of a phrase or hashtag "advertising material", "advertisement" or "paid advertisement" clearly, without other hashtags that make it challenging for the advertisement to stand out;
- The use of "thanks to... [advertising entity]" or "in collaboration with..." has been deemed, by the National Media Council, not sufficient enough to disclose whether the advertisement is commercial

or not.

- The use of a clear and legible font and the avoidance of the small and illegible font or a font with a color similar to the advertisement background;
- The disclosure (the advertisement) must be placed where it is clearly visible to readers;
 - Generally, the disclosure has to be placed at the beginning of the content or description.
 - The disclosure cannot be placed where users are required to move to another page or content in order to see it.
- If the content is a video, the disclosure must be stated orally (in addition to being placed in the writing);
 - If the advertising is used in a Snapchat/Instagram/Facebook story or video posted on the account, the disclosure must be featured in the first or second story/video or at the beginning of a live broadcast.

The circular reiterates the much-needed restrictions on the advertising of health-related products, drugs, and other pharmaceuticals with prior approval for advertising required by the Ministry of Health.

Influencers should be diligent in the manner in which they advertise and ensure that they obtain their license immediately. For example, paid influencers who are advertising without a license could potentially face a AED 5,000 fine from the National Media Council.

With the perpetual rise of social media marketing that has redefined how businesses can engage in the public's day-to-day life, the UAE is taking steps to ensure that this form of marketing is nurtured and moderated.

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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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Piercing the Corporate Veil in the UAE: Suing and Enforcing against LLC Shareholders, Directors and Managers

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The volatile mass number of persons establishing, liquidating, or not renewing limited liability companies (LLCs) in the United Arab Emirates causes a plethora of claims being met with enforceability issues – particularly due to lack of assets.

Creditors take action against debtor LLCs to find that the latter have expired licenses, transferred assets to a new LLC, or distributed dividends leaving no assets in the creditor LLC.

The frustration that debtors face in these circumstances is agonizing – resulting from years of litigating before the courts or arbitral tribunals, only to find enforcement is to no avail.

However, the court systems are not without resolve in these circumstances.

Here we provide a brief palatable overview of when liability may not be limited, and the evidence and procedure required to trigger the courts into action.

When is liability not limited?

Most of the legislative provisions have been discussed in various articles issued by firms in the UAE over time, but for clarity's sake, this article is segmented into a palatable breakdown of circumstances where personal liability can arise, and at the end of this article, relevant cases and provisions of the law have been provided.

Shareholders (whom one of, if not all, are usually managers or board members) are protected by the limitation of liability, i.e. the corporate veil of an LLC.

In brief; the shareholders, board members, or managers who operate the LLC, benefit from it, but as a general matter an LLC's creditor is limited to action against the LLC itself, not those operating and benefiting (unless there is a financial instrument triggering criminal liability).

There are, however, certain actions that if taken by the shareholder(s), board member(s), or manager(s) would hold them liable in their personal capacity, either jointly or severally.

Following is a brief summary of when such circumstances could be.

Shareholders can be held personally liable if they had:

- Not contributed the disclosed share capital in cash.
- Overvalued contributions of shares in-kind.
- Increased number of shareholders without notifying the authorities.

- Identified the LLC as another legal form.

Board members and/or managers can be held personally liable if they had:

- Not registered the Articles of Association or any amendments thereto with the authorities.
- Distributed fictitious profits to shareholders.
- Distributed to the shareholders or other profits or interests in contravention with the law.
- In case the company is in bankruptcy and it was found that the company's assets are not sufficient to meet at least (20%) twenty percent of its debts.

Managers can be held personally liable if they fail to clearly disclose that the company is an LLC by name, i.e. by explicitly stating after the name of the company the expression "Limited Liability Company" or in short "LLC". In the event of a sole proprietorship, the name of the company shall be accompanied by the name of its owner and followed by the expression "sole proprietorship with limited liability".

Evidence

The more important, follow-up question, to the above analysis is to do with evidence.

Most, if not all, of the circumstances mentioned above, are either undisclosed to the public and/or require an uphill battle to prove without tangible evidence.

The UAE courts have powers to issue subpoena orders against defendants or third parties to provide witness statements and/or disclose documents that would assist in the plaintiffs' claims.

A court may issue a subpoena order for the disclosure of the documents such as general assembly minutes of the meeting, bank deposits at the time of establishment (to evidence share

capital deposits), official documents (such as trade licenses, articles of association, etc.).

Bearing in mind that the evidential threshold for the court to issue a subpoena order, and such requests are usually to no avail.

Alternatively, plaintiffs may rely on experts to act as mediums in obtaining documentary evidence.

There is no explicit provision in the law that identifies an expert's permissible actions, but the courts have the authority to state the expert's duties and the urgent measures he is allowed to take.

In practice, expert duties may include investigation of documents and devices at the plaintiff's, or any other third party's location, in addition to valuation, obtaining witness statements, etc.

Moreover, the plaintiff and their counsel may accompany the expert during his investigation of the defendant's (or any other third party's) premises, documents, or devices.

Conclusively

The reality is; it is not farfetched that LLCs have issues with miscalculated profit distribution or paid-up capital, or merely not maintaining enough assets to meet at least 20% of their debts.

Any of these missteps could trigger personal liability on the shareholder, board member, or manager, piercing the corporate veil and allowing plaintiffs to find recourse for their claims/judgments/awards.

Sample Cases

Dubai Cassation Court 239/2008: It was decided that the non-availability of the substantive elements of the company would

lead to its nullity – and any interested party may claim this nullity and the court would automatically consider it.

Federal Supreme Court 669/2014: Shareholders in an LLC are not personally liable for any of the debts of the company, other than for the amount already invested in the company; creditors cannot seize the shareholders' personal assets as long as the shareholder(s) was acting on behalf of the company within the limits of their authority.

Federal Supreme Court 811/2004: Creditors have the right to pursue a shareholder's personal assets and hold him personally accountable for an LLC's debts once it was proven that he has exploited the financial independence of the LLC's patrimony, limited from its shareholders' patrimony, as a mean and cover to his apparent fraudulent acts against the LLC's creditors.

Federal Supreme Court 167/2001: Non-publication of the registration documents of a limited liability company has, in terms of the corporate veil and its standing towards the shareholders, the same effect as non-registration.

Commercial Companies Law No. 2 of 2015 ("CCL")

Articles 8 and 9 of the CCL: A company is a contract under which two or more persons are committed to participating in an economic enterprise with the objective of profit realization by contributing a share in capital or work and dividing between themselves the profit or loss resulting from the enterprise. Any company which does not adopt one of the legal forms shall be considered null and void, and the persons concluding contracts in its name shall be individually and jointly liable for the obligations arising from such contracts.

Article 15 of the CCL: The managers, or directors of the company, as the case may be, shall be jointly liable to indemnify the damage suffered by the company, the shareholders or third parties due to the non-registration of the Articles

of Association or any amendments thereto with the competent authority.

Article 16 of the CCL: If the invalidity of the company is ruled based on a third-party request, the company shall be deemed void ab initio as against such third party. Persons who have contracted with such third party in the name of the company shall be personally and jointly liable for the obligations arising from such Contract.

Article 30 of the CCL: No fictitious profits may be distributed to the partners or shareholders. The board of directors or any similar body shall be liable towards the partners or shareholders and the creditors of the company for such procedure.

Article 72: A Limited Liability Company shall have a name derived from its objective or from the name (s) of one or more partners, provided that name of the company shall be followed by the expression "Limited Liability Company" or in short "LLC". In the event of a sole proprietorship, the name of the company shall be accompanied with the name of its owner and followed by the expression "sole proprietorship with limited liability". If the manager (or managers) contravene the provision of this article, such manager (managers) shall be jointly liable, in their own assets, for the obligations of the company and, as applicable, for the compensations.

Article 75 of the CCL: If at any time upon the incorporation of the company, the number of the partners exceeds the maximum limit of 50, the manager or managers, as the case may be, shall notify the competent authority within thirty (30) days from the date of such increase. Other than in the event of transfer of title to the share of a partner by way of inheritance or court judgment, the company shall adjust its position within three months from the date of the notice, and the competent authority may extend such period to another period of three months, otherwise the company shall be deemed

terminated. The partners shall be personally and jointly liable from their assets for the debts and obligations of the company from the date of increase of the number of the partners.

Articles 76 and 78 of the CCL: Shares may be in cash and/ or in-kind and shall be paid in full at the time of incorporation. The shares in cash shall be deposited in a bank operating in the State. The bank may not pay such shares other than to the managers of the company after providing such evidence that the company has been registered with the competent authority and as provided by the contract appointing such managers. The partners may agree on the value of shares in kind. In such event, such value shall be approved by the competent authority. The partner providing such contribution shall be liable to third parties for the evaluation of its value in the Articles of Association.

Article 363 of the CCL: Any manager or board member who distributes to the shareholders or others profits or interests in contravention of the provisions of the CCL or the Memorandum of Association or Articles of Association of the company and any auditor who approves such distribution while being aware of such contravention shall be punished by imprisonment for a period between six months and three years and/ or a fine between AED 50,000 (fifty thousand) and AED 500,000 (five hundred thousand).

Insolvency Law No. 9 of 2016 ("IL")

Article 144 of the IL: If it was found that the company's assets are not sufficient to meet at least (20%) twenty percent of its debts, the court that adjudicated bankruptcy may compel some or all the members of the board or the managers, jointly or severally, to pay all or some of the company's debts, in the cases where they are proved to be liable for the company's losses according to the provisions of the Commercial Companies Law.

Evidence in Civil and Commercial Transactions Law No. 10 of 1992 ("ECCL")

Article 18 of the ECCL: A party to the litigation may request the court to compel his opponent to submit any useful written document or paper detained by him...

Article 20 of the ECCL: The court may, during the examination of the case, even before the court of appeal, give permission to force the intervention of a third party compelling him to submit a document in his possession, in the instances and without prejudice to the provisions and the circumstances provided for in the preceding articles. It may also order – even if by itself – to involve any administrative party to give all information and documents necessary for the flow of the case.

Article 54 of the ECCL: Parties to the litigation may not be heard as witnesses in a case but the court may, however, interrogate those present in court, and each one of them may request the interrogation of his attending opponent. The court may also, on its own or upon request of his opponent order summoning a party to the case to interrogate him. The party summoned for interrogation has to attend the hearing fixed in the order.

Article 71 of the ECCL: Should the court decide to delegate an expert or more, its decision must include the following...an accurate statement of the expert's duties and the urgent measures he is allowed to take.

Translations of law and case decisions provided by LexisNexis Middle East.

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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 (Coronavirus) pandemic

March 21, 2021

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

March 21, 2021

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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Affect of Recent UAE Bankruptcy Legislation on Businesses Facing Cash Flow Difficulties

March 21, 2021

In March of 2019, an Emirati limited liability company (the “LLC”) had restructured its debts under the Bankruptcy Law; Federal Decree-Law No. 9 of 2016 which was first published in

the Official Gazette on 29 September 2016 and came into force on 29 December 2016.

Under Chapter 4 of the Bankruptcy Law the Bankruptcy Circuit of the Abu Dhabi Primary Court oversaw the restructuring of the LLC under which had been operating in the contracting industry since 2008 and had debts exceeding eighteen times its paid-up capital.

This new judgment reflects the utility of the options available under the Bankruptcy Law and provides a real case example on how it could assist businesses facing difficulties because of cash flow issues without prejudice to the rights of creditors, or business owners.

The Bankruptcy Law provides businesses with cash flow issues an opportunity to safeguard their business from creditors until they can get back on their feet through various avenues, explained below, which at the same time do not prejudice the rights of creditors.

As opposed to liquidation – the procedure more commonly applied in the United Arab Emirates – bankruptcy is not aimed at concluding or expiring a business, on the contrary, it is aimed at providing an opportunity for the business to be restored as a productive member of the economy and to reutilize assets for continued production; notwithstanding that bankruptcy can be treated as a double-edged sword to penalize fraudulent activity of debtors.

Moreover, businesses can utilize the bankruptcy procedures to assist with other potential financial rescue methods. For example, with the rise of litigation funding in the region, distressed businesses can also augment their revitalization process by obtaining financial assistance in pursuing their own outstanding debts whilst in the period of restructuring or preventive composition.

Overview

The Bankruptcy Law aims at financially troubled companies and protecting the assets of creditors and shareholders, thus protecting economic activity and the investment environment in general.

In the first successful bankruptcy restructuring case, the Court referenced Article 67(1) of the Bankruptcy Law which states that:

“The procedures stated shall regulate the restructuring of the debtor, if possible, by helping the latter to implement the plan of restructuring of his business.”

A bankruptcy suit may be filed by:

1. A debtor if they cease to pay their debts on maturities of more than 30 days consecutive business days as a result of his difficult financial position or in case of insolvency;
2. A creditor or a group of creditors with ordinary debt of not less than AED (100,000) one hundred thousand may apply to the Court to commence bankruptcy procedures against the debtor, if the creditor(s) had already warned the debtor in writing to settle the due debt and the latter did not settle within (30) thirty consecutive working days from the date of notification thereof; or
3. The Public Prosecution may, for public interest requirements, request the Court to commence bankruptcy procedures, provided that it proves that the debtor is insolvent.

These procedures governed by the Bankruptcy Law regulate two possible outcomes based on the financial health of the company (1) restructuring of the debtor, if possible, by assisting implementation of the restructuring plan, or (2) declaring the debtor insolvent, by assisting in the commencement of a fair

liquidation of assets to fulfill creditor obligations.

There are four methods of insolvency assistance under the Bankruptcy Law; preventive composition which permits the Court to oversee the rescue of a business; restructuring with Court oversight due to insolvency; liquidation due to insolvency; and obtaining new financing (with or without guarantee) in preventive composition or restructuring procedures.

The Bankruptcy law comprises of 231 Articles and is quite elaborate on the processes and procedures, penalties and obligations, and tasks of those that may be involved. However, business owners and managers must act with caution as Chapter 6 of the Bankruptcy Law provides for a set of scenarios in which the board of directors, managers, liquidators, guardians or experts may be imprisoned and fined if their actions cause damage creditors' rights. For example, Article 198 of the Bankruptcy Law states that a company's board members, managers, and liquidators shall be punished by imprisonment for a period not exceeding five years and a fine not exceeding AED (1,000,000) one million, if they are committed of – amongst other things – hiding, destroying, or changing the company's books with intent to prejudice creditors, or if they embezzle part of the company's assets.

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Courts Mandate Valuation of

Claims by Litigants

March 21, 2021

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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