

Landmark Ruling Cancels Tax Audit Penalties

March 21, 2021

In a recent landmark ruling issued by one of the three Tax Dispute Resolution Committees ("TDRC"), the TDRC ordered the cancellation of not only the late payment penalties – but also the tax audit penalties resulting from a tax audit.

Generally, the penalties arising from a tax audit are 50% of the tax liability, and there is usually a late payment penalty of up to 300% of the tax liability.

Wasel & Wasel counseled a taxpayer before the TDRC who had been subject to a tax audit and the TDRC ruling obtained ordered the cancellation of nearly all penalties including both the late payment penalties and, additionally, the tax audit penalties.

Although in the past the TDRCs and Federal Courts have ruled on cancellation of late payment penalties (of which Wasel & Wasel counseled on), this recent ruling by the TDRC cancelling the tax audit penalties was the result of significant efforts in arguing that the lawful elements that give rise to the tax audit penalties were not completely fulfilled.

Audit Penalties Process

Once a taxpayer is audited, the taxpayer generally receives (i) notification of the audit results; (ii) notification of the tax assessment; and (iii) notification of the tax penalties levied.

The tax penalties levied as a result of a tax audit are generally based on §10 or §11 of Cabinet Decision 40/2017 which applies penalties as follows:

- Fixed penalty of AED 3,000 or AED 5,000 depending on whether a violation is a first-time or repeat violation.
- Percentage based penalty of the amount unpaid to the FTA due to the error and resulting in a tax benefit as follows:
 - o 50% if the taxpayer / registrant does not make a voluntary disclosure or a voluntary disclosure is made after being notified of the tax audit and the FTA has started the tax audit process, or after being asked for information relating to the tax audit, whichever takes place first.
 - 30% if the taxpayer / registrant makes the voluntary disclosure after being notified of the tax audit and before the FTA starts the tax audit.
 - 5% if the taxpayer / registrant makes a voluntary disclosure before being notified of the tax audit by the FTA.

The second penalty generally applied from tax audits is pursuant to §9 of Cabinet Decision 40/2017 which is the late payment penalty calculated as follows:

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

Wasel & Wasel has counseled taxpayers before the TDRCs and the Federal Courts (up to the Federal Appeals Court) where late payment penalties and other penalties (such as audit penalties) were canceled.

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First UAE Supreme Court COVID-19 Judgement (Trade Secrets)

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In late 2020, the UAE Federal Supreme Court ruled on the first COVID-19 related dispute which involved trade secrets. For employers and employees, this case provides a long-awaited answer as to the importance of how and when to treat COVID-19 issues with secrecy in the workplace.

Facts

The case in question revolved around a police officer who was to guard a house containing individuals that had contracted COVID-19. The officer was tasked with ensuring none of the infected residents leave the house, nor for anyone to enter.

Whilst guarding the house, the officer took a video of himself – with the house in the background – and sent the video via WhatsApp to his family group chat, warning them to stay away from the house/area to avoid contracting the virus.

The Public Prosecution filed a criminal case against the officer, claiming he had breached trade secrecy by sharing the video with his family.

Issues

The Public Prosecution brought the claim against the officer in the Federal Primary Court, pursuant to Article 379 of the UAE Penal Code which stipulates:

“Shall be subject to a jail sentence for a minimum period of one year and/or to a minimum fine of twenty thousand Dirhams, whoever by virtue of his profession, craft, position or art is entrusted with a secret and divulge it in cases other than those allowed by law or if used for his own personal interest or for the interest of another person, unless authorized by the confiding person to disclose or use it.

The penalty shall be imprisonment for a term not exceeding five years in case the perpetrator is a public servant or a person in charge of a public service who was confided the secret because or on the occasion of discharging his duties or performing his service.”

There are two elements that are required to satisfy Article 379 of the UAE Penal Code:

- (1) obtainment of the confidential information/secret through one's profession, craft, or possession, and;
- (2) divulging such information for their own personal interest or the interest of others.

Rule

The Federal Primary Court ruled in favor of the officer and acquitted him of the accusation brought against him. The officer presented his argument to the Federal Primary Court detailing the two degrees of the accusation: (1) the information of the house containing individuals that had contracted the virus was not characterized by secrecy, and (2) the purpose of him sharing a video was not to divulge a secret. As a result, the Public Prosecution appealed the

ruling before the Federal Court of Appeals, seeking to overturn the acquittal and requesting a sentence of three months' imprisonment as punishment for the officer.

The Federal Court of Appeals determined that the officer sending a video of the house he was guarding to his family, was a breach of the confidentiality of the information defined within Article 379 of the UAE Penal Code. The Federal Court of Appeals found that although the purpose of the officer sharing such information had no criminal intent as he was merely alerting his family to be wary of the house in order to avoid contracting the virus, he had divulged such information for the benefit of others – as described within the Article.

Furthermore, in accordance with Article 379 of the UAE Penal Code, for the crime stipulated in the Article to exist, the accused must *"by virtue of his profession, craft, position [...] is entrusted with a secret and divulge it [...] for his own personal interest or for the interest of another person"*.

The Federal Court of Appeals determined that the officer had obtained the confidential information of the house containing the individuals that had contracted the virus from his Captain, and that such information would not have been made available to him unless it were for his profession.

The ruling of the Federal Court of Appeals was challenged by the officer before the Federal Supreme Court.

The Federal Supreme Court found that the first element of Article 379 of the UAE Penal Code was not satisfied, even though the information was confidential, there was no criminal intent behind the actions of the officer. Additionally, the Federal Supreme Court found – similarly to the Federal Primary Court – that the purpose of the officer sharing the information with his family was no more than a warning and was not an act of divulging a secret. Therefore, the elements of Article 379 of the UAE Penal Code had not been satisfied.

Decision

The Federal Supreme Court overturned the judgment of the Federal Court of Appeals and acquitted the officer of the accusations, ruling that he was not guilty of criminal activity in his actions.

Why This Case Matters?

This is the first case that involved COVID-19 to be adjudicated by the Federal Supreme Court and in concurrence the first dispute involving breach of secrecy regarding COVID-19.

For employers and employees, this case provides a long-awaited answer as to the importance of how and when to treat COVID-19 issues with secrecy in the workplace and provides a judicial test that could be applied in employment policies and procedures.

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