Dispute Resolution Analysis in First Double Tax Treaty Between GCC Countries

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The Double Tax Treaty ("DTT") between the UAE and the KSA provides a significant tax incentive for businesses operating in the two contracting states. A positive impact on investment and trade between the two contracting States is expected in the aftermath of its entry into force. Both contracting countries are members of the BEPS inclusive framework and signed the Multilateral Instrument ("MLI").

The treaty provides for a Mutual Agreement Procedure ("MAP") which can be requested to the competent authority in any of the contracting states within 3 years from the first notification of the action resulting in taxation, not in accordance with the provisions of the Convention.

The dispute resolution provision requires the "Competent Authority" of each respective State to communicate with each other directly (not through diplomatic channels) to resolve complaints filed by persons.

Albeit each State's respective courts may have a domestic perception to certain issues, Articles 31 and 32 of the Vienna Convention have generally permitted domestic courts to account for such the provisions of treaties and analyze them from a domestic perception.

Unlike dispute resolution provisions under domestic law, as general practice on an international level, Article 25 of the DTT can be triggered by a taxable person before a taxation that the taxable person believes is unjust is charged against him, but as a general matter, that complaint must present that

the unjust measure of taxation expected is probable – not just possible.

The question arises with respect to each State's administrative and constitutional litigation avenues; if a competent authority of either state takes a decision that is deemed unconstitutional, can it be challenged before the constitutional circuits of either State? If a person disagrees with a decision, can they challenge it before the administrative circuits of either State? Which ruling would take precedent?

Another item to consider is Article 25(1) which requires notification by the person to occur within three years of the "first notification of the action resulting in taxation not in accordance with the provisions of the Convention". This raises questions as to whether the three-period continues to apply if a domestic litigation process is in play, or whether the period would commence after a final and binding judgment occurs. The effect of a taxable person challenging a matter through domestic proceedings and in parallel triggering the DTT is to be seen.

It has also been noted in general commentaries on the OECD Model Tax Convention of 2014 that criminal penalties imposed by domestic courts or prosecution authorities would not be subject to the procedures of a DTT. As a general practice, the "Competent Authority" would not have jurisdiction to decrease or annul such penalties.

As a solution to these uncertainties between challenges and court proceedings, on 21 November 2017, the OECD approved amendments to the OECD Model which the inclusion of arbitral proceedings into Article 25. Article 25(5) of the 2017 version provides that, in the cases where the competent authorities are unable to reach an agreement under a Mutual Agreement Procedure within two years, the unresolved issues will, at the request of the person who presented the case, be solved

through an arbitration process. Whether this mechanism will be adopted is a potential given that these novel regulations are in their early stages.

For the time being, the general consensus is that given the lack of no overarching international tax specific court to provide guidance for the interpretation of DTTs, there is no certain unification of interpretations and courts in each of KSA and the UAE may interpret the DTT in a particular manner if issues under the DTT are brought forth in domestic proceedings.

The MLI is meant to improve the dispute resolution mechanisms when the treaties are covered treaties by the contracting parties. Lastly, as GCC investors become more attuned to intra-GCC treaty applications, and given the rise of investment arbitration in the MENA region, Emirati or Saudi investors could potentially look into challenging unfavorable double taxation decision by triggering investment protection treaties; which usually have more flexible dispute resolution provisions. Moreover, investors may choose to directly resort to investment protection treaty protections as direct access to arbitral proceedings without waiting for a competent authority to issue a decision.

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