UAE Supreme Court acquits warehouse operator in tobacco tax evasion case

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Brief

The Public Prosecution took action against two entities; a tobacco trader (first accused) and a warehouse operator (second accused) on tax evasion charges for possessing cigarette goods that lack the requisite distinctive marks (tax stamps).

On 27 May 2020, the warehouse operated by the second accused was inspected by the Public Prosecution where eighty thousand cartons of cigarettes were found lacking distinctive marks.

The cigarettes were owned by the first accused and sent for storage with the second accused on the basis of being subsequently exported to Pakistan.

The first accused acknowledged knowing that the goods did not have the required tax stamps and that no evidence was provided from the selling party validating the entry of the goods into the UAE. The first accused's defenses relied on whether the provisions of law relied on by the Prosecution were valid at the time of charge by the Public Prosecution.

The second accused, however, argued mainly that the storage service was conducted pursuant to its permitted commercial activities, that it had no interest nor benefit in evading the tax, and that none of the criminal elements were evidenced against it.

The Federal Supreme Court upheld the conviction by the Federal Appeals Court against the first accused.

However, the Supreme Court quashed (set aside / voided) the judgment of the Appeals Court on the finding that the mere presence of the goods in the second accused's warehouse is not sufficient to convict the second accused of participating in tax evasion with the first accused.

Arguments – first accused

The first accused confirmed that:

- They sent the tobacco goods to be stored in the warehouse of the second accused in preparation for shipment to Pakistan.
- They knew that the goods did not have the distinctive marks (tax stamps) as they were intended for export outside the country.
- They did not obtain documents from the party that sold the cigarettes proving their entry into the country through customs.

The first accused argued – however – that the Federal Primary and Appeals Courts applied a repealed law, because the date of arrest was on 27 May 2020, and the provisions in force at that time were that of Law No. 2/2019 on Implementing the Marking Tobacco and Tobacco Products Scheme.

Prior to Law No. 2/2019, the proceeding law was Law No. 3/2018 – also on Implementing the Marking Tobacco and Tobacco Products Scheme.

Article 1 of Law No. 2/2019 set the starting date for certain prohibitions:

- Prohibition on importing designated excise goods without the tax stamps as of 1 March 2020.
- Prohibition on supplying, transferring, storing, or

possessing designated excise goods without the tax stamps as of 1 June 2020.

Article 1 of the canceled Law No. 3/2018 provided similar prohibitions against importing and supplying.

The Federal Courts reasoned that these amendments between the repealed Law No. 3/2018 and the applicable Law No. 2/2019 were nothing but a renewal of this prohibition and do not justify storing excise goods without the requisite marks.

Arguments – second accused

The second accused did not dispute that the goods were seized in its warehouse, but insisted that;

- the criminal elements for conviction were missing;
- its actions were in good faith;
- the goods were being stored for the benefit of others as permitted by its commercial license;
- that it had stored the seized goods belonging to the first accused without knowing that they do not bear the distinguishing marks (tax stamps) that would prevent their possession or storage;
- that the first accused requested to store them to send them outside the country;
- and that the second accused had no interest in evading the tax imposed and due on the goods.

The principal argument of the second accused (the storer) was that it was convicted despite the absence of the elements of the crime and the absence of criminal intent, and that it evidenced the presence of good faith and that it had no knowledge that the cartons stored do not bear the distinctive marks (tax stamps) and that it has no interest in not paying the tax and that it did not violate the company's permitted commercial activity in its license and that the tax law did not provide for the criminalization of storage work for others, and the seized goods were in the possession of its

owner – possession by means.

The second accused focused on arguing that the Primary and Appeals Court judgments did not prove the second accused's contribution to the non-payment of tax and that the first accused admitted that the goods belonged to it and that it deposited them in the second accused's warehouse until they were to be exported outside the country and that the first accused bears the full tax due.

The Federal Primary and Appeals Court relied on the testimony of the second accused during interrogation with the Public Prosecution which was quoted as follows:

"The second accused testified that during interrogation by the Public Prosecution that a quantity of tobacco that was not allowed to be circulated inside the second accused's warehouse was seized from and that it was owned by the first accused, and that the first accused sent it to their warehouse for the purpose of storing it and then shipping it outside the country, but they were unable to export it, so it remained in their (the second accused's) possession. This indicates that the second accused participated with the first accused in evading the tax stipulated in the laws of the State and that he shall be jointly and severally liable before the State with the first accused towards paying the due tax and administrative fines."

On the basis of the interrogation testimony, the Federal Appeals Court upheld the conviction of the second accused as ordered by the Primary Court.

Supreme Court trial

The first accused was represented by the company owner in interrogation and in liability.

The second accused was represented by a corporate representative in interrogation and in liability.

The alleged evaded excise tax was AED 320,000.

The alleged evaded value-added tax was AED 24,000.

The provisions of law in question and review by the Federal Courts were the following:

- Articles 1, 2, 26(1) of the Tax Procedures Law.
- Article 1, 2, 4, 23(1), 23(2), and 23(3) of the Tax Procedures Law Executive Regulations.
- Articles 2 and 4 of the Value Added Tax Law.
- Article 1 of the Excise Tax Law.
- Articles 1 and 2 of Cabinet Decision No. 42/2018 on Marking Tobacco and Tobacco Products.
- Articles 1, 2, and 3 of Cabinet Decision No. 38/2017 on Excise Goods, Excise Tax Rates and the Method of Calculating the Excise Price.
- Article 1 of FTA Decision No. 3/2018 on Implementing the Marking Tobacco and Tobacco Products Scheme.

In February 2021, Federal Primary Court had ordered the confiscation of the goods (amounting to a few million Dirhams), payment of the outstanding excise, and value-added tax amounting to AED 344,000, and a jail sentence of four months to both accused parties.

In June 2021, the ruling was upheld by the Federal Appeals Court.

The first and second accused both petitioned the Supreme Court to quash the Appeals Court judgment.

In October 2021, the Federal Supreme Court ruled on the case.

Supreme Court judgment – first accused

The Supreme Court rejected the arguments of the first accused and upheld the ruling of the Appeals Court convicting the first accused of tax evasion for supply, transfer, storage or possession of cigarettes without the distinctive marks (tax

stamps).

Supreme Court judgment – second accused

The Supreme Court quashed (set aside / voided) the Appeals Court judgment in respect of the second accused reasoning as follows:

“It was proven in the evidence that the second accused did not dispute that the goods were seized in his warehouse, but he held that the elements of the crime were missing and good faith was established, and that the second accused was storing for the benefit of others according to its commercial license and that it had stored the seized goods belonging to the first accused without knowing that they were not carrying distinguished marks prohibiting their possession or storage, and that the first accused requested to store them to be sent outside the country, and that the second accused had no interest in not paying the tax imposed and due on the goods.

The appealed judgment had established its judiciary by convicting the appellant [second accused] of what he mentioned in his testimony during interrogation by the Public Prosecution that a quantity of tobacco that was not allowed to be circulated inside the second accused’s warehouse was seized and that it was owned by the first accused, and that the first accused sent it to their [second accused] warehouse for the purpose of storing it and then shipping it outside the country, but they were unable to export it, so it remained in their [second accused] possession. The Appeals Court found that this indicates that the second accused participated with the first accused in evading the tax stipulated in the laws of the State and that he shall be jointly and severally liable before the State with the first accused towards paying the due tax and administrative fines.

What the appealed judgment concluded is not valid in response to the second accused’s defense and does not convict him.

Additionally, the Appeals Court's finding that the mere presence of the goods in the second accused's warehouse is considered participation with the first accused in evading the tax as stipulated in the laws of the State, without indicating the laws criminalizing the act and validating conviction, stigmatizes the judgment for insufficient causation, and breaches the [second accused's] right of defense, which requires it to be quashed."

(The translation of the judgment is for informational purposes only and is not a substitute for the official judgment. The original version of the judgment, found with the UAE Federal Supreme Court, is the only definitive and official version.)

The Federal Supreme Court found that it was not valid to convict the second accused in complicity with the first accused for the crime of tax evasion for mere storage of the non-compliant tobacco goods where no legal provisions permit such conviction.

The Supreme Court ordered that the Appeals Court judgment be quashed (set aside / voided) in respect of the second accused.

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