UAE Tax Judges: Textualism or Original Intent? (and private clarification disputes)

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In comparison with general dispute practices, tax disputes are subject to a limited number of judges; three judges at the tax dispute resolution committees (TDRCs), one judge at the Tax Disputes Circuit of the Federal Primary Court, one judge at the Tax Disputes Circuit of the Federal Appeals Court, and the Chief Justice at the Federal Supreme Court.

The three judges at the TDRCs are appointed pursuant to Ministerial Decrees and serve a term of one to three years, that may be extended.

Each TDRC has an alternate judge that adjudicates disputes in place of the primary judge in case the latter is unavailable.

Each of the tax disputes circuits of the Federal Primary and Appeals Courts is headed by a judge appointed pursuant to Ministerial Decree – the first appointment having had occurred pursuant to Decisions No. 237 and 238 of 2019.

Finally, tax disputes that reach the Federal Supreme Court would be adjudicated by a panel of five judges; the Chief Justice and four judges.

What does this mean?

Other disputes in the UAE, such as construction, banking and finance, personal affairs, criminal matters, and so on may be adjudicated over by one of a plethora of judges, depending on the Emirate or court system that has jurisdiction over the dispute, the respective circuit, stages of litigation, amongst

other variables.

With such a significant number and variety of judges reasoning and issuing rational over interpretations of the same provisions of law, it is relatively difficult to hone in on a particular stance that the judiciary is taking with respect to a particular law or provision.

On the other hand, because tax disputes have only begun in 2018, and due to tax disputes being heard by a limited number of judges, a tax dispute litigant (or their counsel) can develop better foresight to the persuasions of each of the TDRCs or Federal Court tax dispute circuits.

Textualism or original intent?

Tax judges have taken differing positions on readings of certain tax law provisions. The difference in rationale generally boils down to whether the interpretative approach is an explicit application of the text, or whether the judge expands the reading of the law to grant more weight to the intent of the legislator* at the time the law/provision was drafted and ratified.

*The ‘legislator’ essentially means their Highnesses the seven Rulers of each Emirate who approve Federal law, supported of course by the Ministry of Justice and the technical and legislative lawmaking committees.

A practical example for this discussion would be disputes over decisions by the Federal Tax Authority that do not have an immediate monetary value; such as a dispute over a private or public clarification as opposed to a dispute over an incorrect tax return or a voluntary disclosure.

There is a level of procedural ambiguity with respect to disputes over private or public clarifications. The Tax Procedures Law and the Cabinet Decision forming the TDRCs requires that a tax dispute litigant settle any taxes and/or

penalties in dispute prior to objecting before the competent TDRC. The question becomes; what if a clarification dispute does not have an immediate monetary value (i.e. tax or penalty liability) as is generally the case?

We have seen so far different judicial interpretations amongst judges on this particular issue as to whether a dispute that has no immediate monetary value (such as a private or public clarification dispute) can be adjudicated upon.

Of the various methods of judicial interpretation; two common approaches are textualism and original intent. A textualist would look at the structure and text of the law and apply the explicit reading of a provision. Original intent applies where the judicial interpretation of a law or provision broadens the analysis into what the authors of the text intended to achieve.

Of course, the spectrum of whether an interpretation falls within either approach is extensive, but the example provided with respect to tax disputes that carry no monetary value provides a useful empiricist view within the following cases.

In one private clarification dispute in 2019, a textualist judicial interpretation resulted in a tax judge finding that no immediate monetary value in dispute renders non-fulfillment of the requirement of settling the taxes and penalties prior to objecting and serves as grounds for rejection of a private clarification dispute on a procedural basis.

In another private clarification dispute also in 2019, an original intent judicial interpretation resulted in the finding that dispute procedures in tax laws were intended to grant avenue for adjudication of disputes vis-a-vis the Federal Tax Authority notwithstanding the lack of an immediate tax or penalty liability, also as the subject matter in dispute may ultimately manifest a tax or penalty liability in the future or in retrospect based on the tax treatment in

dispute.

The difference in the method of judicial interpretation applied in these two cases draws a very practical example of how different judicial interpretation approaches could bear significantly different results, and how tax dispute litigants would benefit from understanding the nuances of tax dispute procedures and prior interpretive approaches taken by the UAE tax judiciary.

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