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Summer 2023

FEATURE FIRM FOUNDATION ON TAX?
Foundations and the UAE Corporate Tax regime

PROFILE CONSULTING
Mourad Chatar of Value Square

ANY QUESTIONS
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A ROUND UP OF TAX DEVELOPMENTS ACROSS THE MIDDLE EAST

IN COMES TRANSFER PRICING

New UAE Transfer Pricing Regime

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When Federal Decree-Law No. 47/2022 Concerning Corporate and Business Tax was first issued in 2022, a common theme for many commentators was the range of areas where further clarification was needed. Perhaps not surprisingly, in the run up to this law taking effect on 1 June 2023, we have seen a host of additional tax laws being issued in quick succession, clarifying points including the position of freezone qualifying entities; who is required to prepare and maintain audited financial statements for corporate income tax purposes; and when the presence of a natural person in the state will not create a Permanent Establishment for a non-resident person for corporate Income tax purposes. In this issue, we look at two issues where there have been open questions surrounding Federal Decree-Law No. 47/2022 - the introduction of the new transfer pricing regime and how Foundations are to be dealt with under the Corporate Income Tax Law. Ministerial Decision No. 97/2023 Requirements for Maintaining Transfer Pricing Documentation for the Purposes of Federal Decree-Law No. 47/2022 on the Taxation of Corporations and Businesses has provided some additional information on the thresholds for providing this documentation, but questions still remain. Some may be surprised that Foundations whose main aim is to receive, hold, invest, disburse, or manage funds or assets associated with savings or investments for the interest of beneficiaries or in order to achieve a charitable purpose, were not automatically exempt from corporate income tax. However, there is a provision in Federal Decree-Law No. 47/2022 which enables family foundations registered in the UAE to be treated as an Unincorporated Partnership for corporate income tax purposes, and there have been recent clarifications on this point. However, there are still open questions on these, and other issues, and I suspect even though the 1 June 2023 deadline has now passed we will continue to see more legislation and additional guidance on this area for some time.

Claire Melvin - Editor

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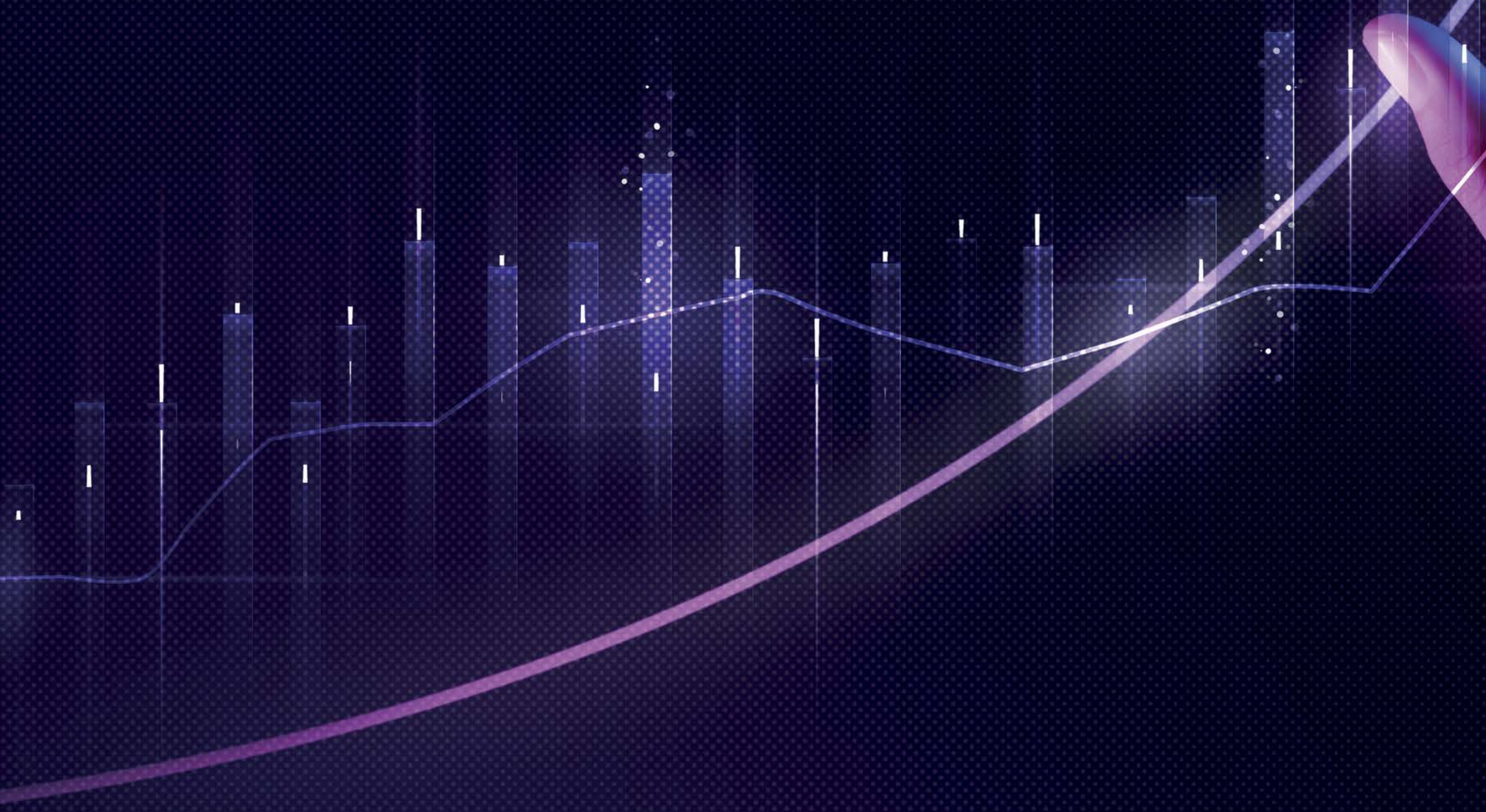
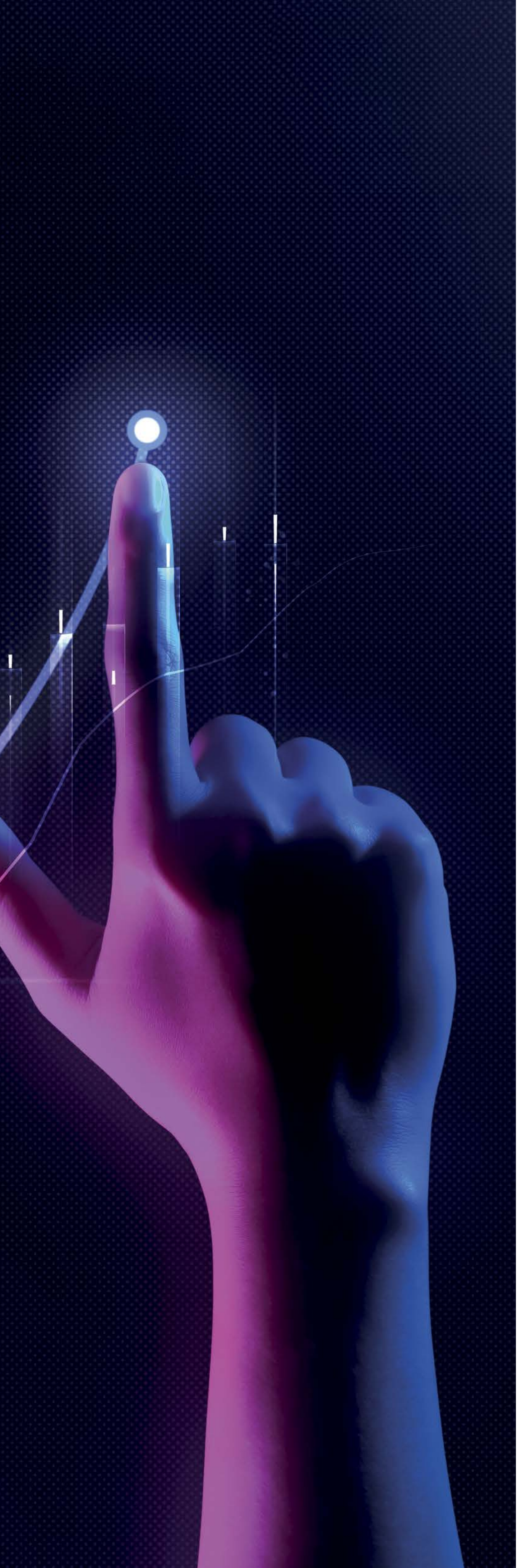
IN COMES TRANSFER PRICING

Transfer pricing will be introduced into the UAE starting from 1 June 2023. Alessandro Valente of Crowe explains how it will operate.





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As part of the UAE Corporate Tax law (Federal Decree-Law No. 47/2022 Concerning Corporate and Business Tax), a thorough Transfer Pricing regime has been introduced in the UAE starting from 1 June 2023. This regime will be largely in line with the revised OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations which were issued in 2022.

Saudi Arabia and Qatar have already implemented Transfer Pricing regimes which follow the OECD guidelines. At present Oman, Kuwait and Bahrain have not yet introduced Transfer Pricing although Oman and Bahrain have Country by Country Reporting, and Oman is expected to introduce formal Transfer Pricing shortly.

UAE APPROACH

The UAE Transfer Pricing regulations apply to transactions made between related parties and connected persons. A related party is defined in Article 1 of Federal Decree-Law No. 47/2022 as any Person associated with a Taxable Person as determined in Article 35(1) of Federal Decree-Law No. 47/2022 and a connected person is defined as any Person affiliated with a Taxable Person as determined in Article 36(2) of Federal Decree-Law No. 47/2022. This means for example, a legal entity with more than 50% of the direct or indirect ownership or control over a taxable person would fall within the definition of a related party. In addition, with related parties and connected persons control is defined as the ability to influence another person.

All taxpayers, including corporations, partnerships, and trusts will be subject to these regulations. They will apply equally to foreign owned and domestically owned enterprises, regardless of whether they are based in the UAE mainland or a freezone. However, transactions between members of a Tax Group are not within the scope of the UAE Transfer Pricing Regulations, unless a member of the Tax Group needs to compute their stand-alone Taxable Income in order to use Tax Losses incurred before joining the Tax Group or when leaving the Tax Group.

When the outcomes of a transaction between related parties and unrelated parties are comparable, the transaction is said to comply with the arm's length principle (which means it has taken place at market value). However, under Article 34 of Federal Decree-Law No. 47/2022 which covers the arm's length principle, the UAE Federal Tax Authority (FTA) has the power to adjust income or expenses among related parties and connected persons to avoid the preferential relationships which naturally exist between such parties ultimately affecting the price or rate of a transaction (and therefore, resulting in a transaction that is not considered to have been made at market value). As such, the Transfer Pricing Regulations have been enacted to ensure that deals between related parties are made with the same conditions thaty would have been with between unrelated parties. In order to determine whether agreements between related parties follow the arm's length principle, taxpayers can use a variety of Transfer Pricing methods.

DIFFERENT TRANSFER PRICING METHODS

Although five methods are provided in Federal Decree-Law No. 47/2022 which are the comparable uncontrolled price method, resale price method, cost plus method, transactional net margin method and transactional profit split method, there is no express

recommendation that a preferred method should be used to produce an arm's-length result. It is also possible under Article 34(3) of Federal Decree-Law No. 47/2022 to use one or a combination of the listed methods. In addition, if the Taxable Person can show that none of the methods listed in Article 34(3) of Federal Decree-Law No. 47/2022 can be reasonably applied an alternative method can be used as long as it meets requirements in Article 34(2) of Federal Decree-Law No. 47/2022.

As a result, the method which a particular tax payer chooses to adopt will be based on specific facts and circumstances. However, prior to adopting any of the methods, all variables that could affect comparability should be assessed, particularly, as comparability is often measured in light of functions, contractual clauses, risks, prevailing economic conditions, corporate business plans, and the goods or services which are being sold.

When choosing a particular method it is also important to consider the information which is available, including the availability, coverage and reliability of data which will be used to determine the arm's length principle, financial and other data available on company activities, the nature of the assumptions which will be used and the degree of comparability between controlled and uncontrolled enterprises' transactions.

Alessandro Valente

International Tax & Transfer Pricing Director at Crowe UAE

TRANSFER PRICING DOCUMENTATION

Article 55 of Federal Decree-Law No. 47/2022 covers transfer pricing documentation requirements. If transfer pricing applies to a judicial person - three separate forms of documentation have to be maintained.

The first is the related party disclosure form which is a document containing details of all transactions and agreements with their related parties and connected persons. This has to be submitted to the FTA along with their corporate tax return. Taxable persons must file a corporate tax return for each tax period within nine months of the end of the relevant period. The same deadline will generally apply for payment of any corporate tax due in respect of the tax period for which a return is filed. For most businesses, whose financial year runs from January to December, the first reportable year will be 2024, which means they have to file their corporate tax return and related party disclosure form by September 2025. However, companies incorporated on or after 1 June 2023, will be subject to Federal Decree-Law No. 47/2022, regardless of their financial year starting on 1 January.

In addition to this, the taxable person has to maintain a master file and a local file for any transactions which involve connected parties or related entities. Ministerial Decision No. 97/2023 Requirements for Maintaining Transfer Pricing Documentation for the Purposes of Federal Decree-Law No. 47/2022 on the Taxation of Corporations and Businesses has also now been issued and specifies the conditions for maintaining transfer pricing documentation as per Federal Decree-Law No. 47/2022.

Article 2 of Ministerial Decision No. 97/2023 details the requirements for maintaining a Master File and a Local File. These conditions include being a constituent company of a multinational enterprises group with a total consolidated group revenue of 3.15 billion AED or more during the relevant tax period, or having a revenue of 200 million AED or more in the relevant tax period. A Master File provides a global overview of an enterprise's transfer pricing and includes high level information about their global operations and transfer pricing policy. The OECD has an outline of the information which should be included in a Master File which most countries follow.

The local file is far more detailed. It is documentation of functional asset and risk (FAR) analysis and Comparability Analysis. A Taxable Person required to maintain a Local File must include transactions or arrangements with all Related Parties and Connected Persons who are non-resident persons, exempt persons, a resident person who has made and qualifies for a small business relief election under Article 21 of Federal Decree-Law No. 47/2022 and a Resident Person whose income is subject to a different Corporate Tax rate from the one which applies to the Taxable Person's income.

However, there are also a number of situations where transactions or arrangements with Related Parties and Connected Persons do not need to be included in the Local File.

These include transactions and arrangements with Resident Persons who are not within the specific list of those where the requirement exists under Article 2(2)(b)-(d) of Ministerial Decision No. 97/2023.

There is also an exemption if the transaction or arrangement is with a Related Party or Connected Person is a natural person or a juridicial party who is only considered as related or connected because they are a partner in an Unincorporated Partnership and both parties have acted as if they were independent of each other.

Although in such cases the transaction or arrangement must also be undertaken in the ordinary course of business and the parties cannot be exclusively or almost exclusively transacting with each other.

In addition, there is a further exemption from inclusion of a transaction or arrangement in the local file if it involves a Permanent Establishment of a Non-Resident Person in the State who is subject to the same Corporate Tax rate as the Taxable Person.

In Saudi Arabia a Transfer Pricing documentation requirements apply to a threshold where the value of controlled transactions is 6m Riyals for master and local file provision. While, in Qatar the threshold is an annual tax-free turnover or gross assets on the balance sheet which are equal to or more than 50 Qatari Riyals. In Qatar the deadline for submitting master file and local file documentation is within 60 days after submission of the corporate tax return.

However, in the UAE and Saudi the deadline for submission is 30 days from the date of the FTA's request. With such a short window to submit such detailed documentation to the FTA in the UAE it makes sense for businesses to draft and maintain both local file and master file ahead of 2024 to avoid hefty penalties.

TRANSFER PRICING ADJUSTMENTS

Where the result of the transaction or arrangement between Related parties does not fall within the arm's length range, the Tax Authority adjust the Taxable Income to achieve the arm's length result.

Where they or the Taxable Person adjusts the Taxable Income for a transaction or arrangement to meet the Arm's Length Standard, the Tax Authority will also make a Corresponding Adjustment to the Taxable Income of the Related Party involved in that transaction or arrangement.

Due to these Adjustments prices realised by a Related Party in a controlled transaction with the Taxpayer can be revised upwards or downwards.

For example, if the price of goods sold by the Taxpayer to a Related Party is adjusted upwards by the Tax Authority then the corresponding purchase price of the Related Party would also be adjusted upwards.

WHAT IS NEXT

The introduction of transfer pricing in the UAE may require some tax payers to make changes to their legal structures, business models, contracts, accounting systems and data collection.

Therefore, it is vital that work analysing potential impact, possible calculation methods and reporting requirements begins as soon as possible.

FIRM FOUNDATION ON TAX?

Foundations are often used for succession planning and charitable purposes, but it would be wrong to automatically assume they will be exempt from the UAE's new corporate income tax law, as Alejandra Esmoris, Head of Private Clients, CVML explains.

In the UAE, we currently have three foundation regimes which are governed respectively by DIFC Law No. 3/2018 (the DIFC Foundations Law), the AGDM Foundations Regulations 2017 and the Ras Al Khaimah Foundations Regulations 2019. UAE Foundations are usually established for succession planning and philanthropic purposes. Their main aim is to receive, hold, invest, disburse, or manage funds or assets associated with savings or investments in the interest of beneficiaries or in order to achieve a charitable purpose. In this context, business activities are not their primary focus. However, this does not mean that UAE foundations are therefore excluded from the scope of Federal Decree-Law No. 47/2022 on the Taxation of Corporations and Businesses.

POTENTIAL APPROACH

When the UAE implemented economic substance (ES) regulations, initially in Cabinet Decision No. 31/2019 which was repealed and replaced by Cabinet Decision No. 57/2020 foundations and trusts were initially excluded from the scope of ES Regulations. However, it was later clarified by the authorities if a foundation or trust undertakes any 'Relevant Activity' as defined by the law, that vehicles would fall within the scope of the ES Regulations and would be expected to demonstrate it had sufficient and adequate presence in the UAE (see the ES Regulations: Frequently Asked Questions). Therefore, it is likely UAE authorities could adopt a similar approach with Federal Decree-Law No. 47/2022 when it comes to foundations and trusts.

RESIDENCY

Under Federal Decree-Law No. 47/2022, any company and other juridical persons incorporated, formed or recognised under UAE laws will automatically be considered a resident person for UAE corporate tax purposes. This includes any juridical person incorporated under either mainland or free zone regulations.

Therefore, any UAE foundation registered under any free zone regulations will have their own legal personality and by default will be treated as a resident person for corporate tax purposes in the UAE.

EXEMPTIONS

The next question to consider is whether a UAE foundation could potentially claim to be exempt under Federal Decree-Law No. 47/2022 or a Cabinet decision. Currently, there are nine exemption categories mentioned in the law. These include government entities and government controlled entities; a Person engaged in an Extractive Business; a Person engaged in a Non-Extractive Natural Resource Business; a Qualifying Public Benefit Entity; a Qualifying Investment Fund; a public pension or social security fund; or a private pension or social security fund that is subject to regulatory oversight of the competent authority in the UAE and meets any other conditions that may be prescribed by the Minister. An exemption also applies to a juridical person incorporated in the UAE that is wholly owned and controlled by the first, second, fifth or sixth type of Exempt Person mentioned above which undertakes part or the whole of the activity of the Exempt Person, is engaged exclusively in holding assets or investing funds for the benefit of the Exempt Person, or only carries out activities that are ancillary to those carried out by the Exempt Person. Any other person determined in a decision issued by the Cabinet at the Minister of Finance's suggestion can also be exempt. The Ministry of Finance has also published an exemption table on its website which explains the types of entity which are automatically exempt, which types can become exempt if they have notified the Ministry of Finance and meet certain conditions, or are exempt because they have been listed in a Cabinet Decision or are exempt as they have applied to and received the approval of the Federal Tax Authority and meet certain conditions. However, at present Foundations are not included in this table.

> "ANY UAE FOUNDATION REGISTERED UNDER ANY FREE ZONE REGULATIONS WILL HAVE THEIR OWN LEGAL PERSONALITY AND BY DEFAULT WILL BE TREATED AS A RESIDENT PERSON FOR CORPORATE TAX PURPOSES IN THE UAE.

There is no specific exemption related to UAE Foundations, among them except for those ones which have a public interest and could benefit from the Qualifying Public Benefit Entity status, subject to meeting certain criteria and being listed as exempt in a Cabinet decision.

Apart for this exception, UAE Foundations are unlikely to fall within any other exemption category listed in the law. However, they may still be able under certain circumstances to benefit from a special tax treatment.

TAX TREATMENT OF FAMILY FOUNDATIONS

Article 17 of Federal Decree-Law No. 47/2022 contains specific provisions on the tax treatment of family foundations. Federal Decree-Law No. 47/2022 defines a 'Family Foundation' as any foundation, trust or similar

Alejandra Esmoris
Head of Private Clients, CVML Limited

RELEVANT LEGISLATION

Article 10(1) of DIFC Law No. 3/2018 DIFC Foundation Law

A Foundation is a body corporate with a legal personality separate from that of its Founder(s) and any other person.

(Source: Lexis Middle East Law)

RELEVANT LEGISLATION

Article 17(3) of Federal Decree-Law No. 47/2022 On the Taxation of Corporations and Business

For the purposes of monitoring the continued compliance by a Family Foundation with the conditions of Clause 1 of this Article, the Authority may request any relevant information or records from the Family Foundation within the timeline specified by the Authority.

(Source: Lexis Middle East Law)

entity that meets the following cumulative conditions: (i) the entity has been established for the benefit of identified or identifiable natural persons, or for the benefit of a public benefit entity, or both; (ii) its main activity is to receive, hold, invest, disburse, or otherwise manage assets or funds associated with savings or investment; (iii) it does not conduct any activity that constitutes a business or business activity under Article 11(6) of Federal Decree-Law No. 47/2022, had such an activity been undertaken, or its assets been held, directly by its founder, settlor, or any of its beneficiaries; (iv) the main purpose of this entity is not corporate tax avoidance; and (v) any further conditions that may be prescribed by the Ministry of Finance have been met.

> ARTICLE 17(2) OF FEDERAL DECREE-LAW NO. 47/2022 ALLOWS ANY FAMILY FOUNDATION REGISTERED IN THE UAE WHICH MEETS THESE CRITERIA TO APPLY TO THE FTA TO BE TREATED AS AN UNINCORPORATED PARTNERSHIP FOR CORPORATE TAX PURPOSES.

Article 17(2) of Federal Decree-Law No. 47/2022 allows any Family Foundation registered in the UAE which meets these criteria to apply to the Federal Tax Authority (FTA) to be treated as an unincorporated partnership for corporate tax purpose. Under Federal Decree-Law No. 47/2022 Law, an 'Unincorporated Partnership' is defined as a relationship established by contract between two (natural or juridical) persons or more, such as a partnership or trust or any other similar organisation, in accordance with the applicable legislation of the UAE. From a UAE corporate tax perspective, an Unincorporated Partnership is tax transparent and is not considered as a taxable person on its own under this regulation.

Instead, the revenue generated by the Unincorporated Partnership is taxed in the hands of the partners according to their corresponding distributive shares in the partnership. As a result, each partner within an Unincorporate Partnership should assess whether or not they need to register for corporate tax purpose in the UAE, declare their revenues and profits according to their distributive share in the Unincorporated Partnership and then eventually be taxed at 9% in the case of any taxable income or 0% in the case of any qualifying income.

Therefore, if a Family Foundation applies to the FTA to be treated as an Unincorporated Partnership and the request is approved, the UAE Foundation itself will no longer be considered as a taxable person but the entity will be treated as tax transparent from a UAE corporate tax perspective. While Federal Decree-Law No. 47/2022 is silent on who in the Family Foundation would be understood to be the partners of an Unincorporated Partnership, the Explanatory Guide on Federal Decree-Law No. 47/2022 which was recently released provides further guidance on this.

According to the Guide, if such an approval is granted, the beneficiary or beneficiaries of the corresponding Family Foundation will be seen as directly owning or benefiting from the Family Foundation's activities and assets. The possibility that this approach might also trigger some cross-border tax issues for beneficiaries according to their nationality/nationalities) or their countries of domicile cannot be excluded. Therefore, further assessment from local tax advisors in those jurisdictions might be necessary.

Last but not least, it is currently unclear whether a Family Foundation which has opted in to be treated as an Unincorporated Partnership would be able to revoke its election at a later date should it wish to do so. As a result, every Family Foundation should carefully assess the opportunity to be treated as tax transparent under Federal Decree-Law No. 47/2022 before submitting an application to FTA. In a case, where a Family Foundation does not apply to be treated as tax transparent it will likely be treated as any other juridical person registered in the UAE. As UAE Foundations are established in free zones, the application of the Qualifying Free Zone Person regime under Federal Decree-Law No. 47/2022 if the conditions are met, remains to be seen.

EXPECTED TAX TREATMENT

Currently, UAE foundations should expect to be treated as a taxable person under Federal Decree-Law No. 47/2022 and should consider registering on the Emara Tax Platform in order to file annual tax returns with the FTA in due course. This does not mean any revenue or profit generated by a UAE Foundation (that would not be treated as tax transparent) will necessarily be taxed at 9%, but each foundation will need to assess whether or not their revenue or profit could be treated as a taxable income and/or qualifying income under the applicable law. UAE Foundations may also request to be treated as tax transparent, after assessing their current situation in order to determine whether they meet the criteria to benefit from the Family Foundation regime under the Corporate Income Tax Law and the potential tax implications, notably for beneficiaries. At this stage, we are still waiting for further clarifications and guidance from UAE authorities on a number of subjects, including the tax treatment of Family Foundations, which may be provided in the coming weeks.

WHAT'S CHANGED
ELECTRONIC COMMERCE

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KEY TAKEAWAYS
Businesses engaged in e-commerce activities in the UAE must ensure they are compliant with these new VAT reporting and record keeping requirements which take effect on 1 July 2023.

CHANGE

On 22 February 2023, Ministerial Decision No. 26/2023 was issued setting out criteria and conditions for electronic commerce supply record keeping in the UAE.

The Federal Tax Authority (FTA) has issued Public Clarification VATP033 on the changes to Emirates-wise reporting for e-commerce supplies.

The publications follow Article 72 of the VAT Executive Regulations' amendment which requires businesses with E-Commerce supplies over 100 million AED to keep records to prove in which Emirate the supply is received from 1 July 2023.

RELEVANCY

The Decision and Public Clarification set out conditions for e-commerce supplies which are subject to specific Emirate-wise reporting for VAT. The following conditions should be met.

- The goods and services must be listed or advertised on an Electronic Commerce Medium – This means the customer is provided with sufficient information to make an informed purchase of the goods or services. The condition is not met if there is a simply listing or an advertisement of general categories of goods or services on the Electronic Commerce Medium without individually listing or advertising specific goods or services or without a price or cost. The conditions are also not met if the Electronic Commerce Medium just provides a link to another website where the goods or services are listed or only displays a QR code.
- The goods and services are ordered through the Electronic Commerce Medium, regardless of whether payment is made online or not - The order must be fully executed, using the Electronic Commerce Medium. The manner or form of payment is not a determining factor for meeting the condition. The conditions is not met if customers must sign a contract in person (offline) or separately agree to terms and conditions on another electronic medium or via email.
- With a supply of goods, the goods are delivered to a customer specified location not owned or operated by the supplier - The delivery must be to a customer specified location. This location determines the Emirate in which the supply is received. This condition is not met if the customer specifies any location owned or operated by the supplier (e.g. stores or warehouses) as the delivery address. In order to determine the Emirate where goods are received, the location specified by the customer takes precedence over a place of residence, billing address, or IP address.
- With a supply of services, the services are provided, or the right to receive the services is granted to the customer with minimal or no human intervention - The determination of the Emirate for services depends on various factors, and the customer's place of residence takes priority over other factors, e.g. the billing or IP address. This condition is not met when providing live-stream services, e.g. a human lecture via a live-stream or providing services through chat bot operated by a human being in a call centre.

REMEMBER

- Undisclosed Agent Arrangements – This is a clarification on the VAT treatment when an Electronic Commerce Medium acts as an undisclosed agent. The supplier is considered to have supplied goods or services to the Electronic Commerce Medium, and the Electronic Commerce Medium is considered to have supplied the same goods or services to the customer, so the Electronic Commerce Medium must consider the supply to the end customer when determining the value of taxable supplies made through e-commerce.
- Incidental supplies to the e-commerce supplier - If the same supplier provides ancillary services such as payment systems and logistics for delivering goods in support of online transactions, these activities are considered to be part of the electronic commerce supply of goods. Provisions for composite supplies may be applicable in these situations.

TAX NEWS ROUND-UP

COVERING RECENT KEY DEVELOPMENTS – REGION-WIDE

UAE

FREEZONE APPROACH

Cabinet Decision No. 55/2023 On Determining Qualifying Income and Ministerial Decision No. 139/2023 On Qualifying Activities and Excluded Activities have been issued and provide further information on the taxation of a Free Zone Person's income. UAE Free Zone Persons may be eligible for a 0% rate on their income streams rather than a 9% rate. The Free Zone regime is intended to apply to income from activities that are performed exclusively in or from within a Free Zone. Qualifying Income will be derived from transactions with other Freezone persons, domestic and foreign-sourced income which is derived from any of the Qualifying Activities and any other income (i.e. from Excluded Activity) provided it is below a De Minimis threshold. Article 2(1)(a) of Ministerial Decision No. 139/2023 defines Qualifying Income as covering 13 areas which include manufacturing and processing of goods and materials, and headquarter, treasury and financial services to related parties. Excluded Activities which are covered in Article 3 of Ministerial Decision No. 139/2023 will not be treated as Qualifying Income (irrespective of where the income comes from). They include any transaction with natural persons except transactions in Article 2(1)(d), (f), (g) and (j) of Ministerial Decision No. 139/2023; banking activities; insurance activities, finance and leasing activities subject to regulatory oversight in the UAE (although in these cases there are some specific exceptions found in Article 2(1)(e), (i) and (j) of Ministerial Decision No. 139/2023); ownership or exploitation of immovable property, other than commercial property located in a Free Zone where the transaction is with other Free Zone Persons; ownership or exploitation of intellectual property assets; and any activities that are ancillary to the activities in Article 3(1)(a)-(f) of Ministerial Decision No. 139/2023. A Qualifying Freezone Person can earn income from excluded Activities or non-Qualifying Activities where the other party is a Non-Free Zone Person if this does not exceed the De Minimis threshold. This is the lower of either 5% of total revenue or 5 million AED.

For the purposes of determining this, income attributable to a domestic permanent establishment, e.g. a UAE mainland branch or a foreign permanent establishment is not included in the calculation. If the De Minimis threshold is breached or the Qualifying Freezone Person does not satisfy the eligibility conditions of Article 18 of Federal Decree-Law No. 47/2022, they will not be eligible to be treated as a Qualifying Freezone Person for the current tax year and the subsequent four tax years.

RELIEFS AND EXEMPTIONS

Ministerial Decision No. 73/2023 On Small Business Relief for the purposes of Federal Decree-Law No. 47/2022 has been issued in line with Article 21 of Federal Law No. 47/2022 (which treats a taxable person as not deriving any taxable income in a given tax period if their revenue does not exceed a specific threshold). Taxable persons who are resident persons can claim Small Business Relief if their revenue in the relevant tax period and previous tax periods is below 3 million AED for each tax period. Once they exceed this threshold in any tax period, Small Business Relief is no longer available. The 3 million AED threshold applies to tax periods starting on or after 1 June 2023 and will only continue to apply to subsequent tax periods that end before or on 31 December 2026. Small Business Relief is not available to Qualifying Free Zone Persons or members of Multinational Enterprises Groups (MNE Groups) as defined in Cabinet Decision No. 44/2020 on Organising Reports Submitted by Multinational Companies. In tax periods defined in the decision if businesses do not elect to apply for Small Business Relief, they can carry forward any incurred Tax Losses and any disallowed Net Interest Expenditure from such tax periods, for use in future tax periods in which the Small Business Relief is not elected. If the FTA establishes a business or business activity has been artificially separated, and the total revenue of the entire business or business activity exceeds 3 million AED in any tax period and those persons have elected to apply for Small Business Relief, this would be considered an arrangement to obtain a Corporate Tax advantage under the anti-abuse rules in Article 50(1) of Federal Decree-Law No. 47/2022.

In addition, Cabinet Decision No. 49/2023 On the Determination of the Business Categories or Business Activities Subject to the Corporate Tax and Exercised By Resident or Non-Resident Physical Persons states for Article 11(6) of Federal Decree-Law No. 47/2022, Businesses or Business Activities conducted by a resident or non-resident natural person will only be subject to Corporate Income Tax where the total turnover exceeds 1,000,000 AED for a calendar year. Activities of resident or non-resident natural persons which lead to turnover from wage, personal investment income or real estate investment income will also not be considered Businesses or Business Activities subject to the Corporate Income Tax Law.

SAUDI ARABIA

KEY QUESTIONS

The Zakat, Tax and Customs Authority (ZATCA) has issued guidelines highlighting their Policies and Procedures on what they class as the most debatable Zakat, Tax and VAT matters. The content of the new guidelines is not considered to be an amendment to any laws and regulations in force in Saudi Arabia. Issues covered include the Transitional Grandfathering rule on applying zero rate VAT on supplies related to long term contracts before VAT introduction and input VAT recovery for meal expenses for workers in remote locations. There are also clarifications on deductible expenses for zakat and tax purposes on a range of areas

TAX TREATY UPDATE

UAE: The UAE-Israel CEPA agreement which has removed or reduced over 96% of relevant tariffs for trade in goods came into force on 1 April 2023.
Oman: A double tax avoidance agreement has been signed between Oman and Egypt.
Qatar: Qatar signed a Double Tax Treaty (DTT) with Egypt.
Kuwait: Kuwait and San Marino have 'initialled' a Double Tax Treaty (DTT).

including bad debts, vacation and air ticket allowances, and salaries which are above what was reported in the GOSI certificate. Further information has also been provided on rights to reassessment.

NON-RESIDENT REFUNDS

The Zakat, Tax and Customs Authority (ZATCA) has issued a circular on VAT refunds to taxable persons who are not residents of GCC countries. Eligible persons who carry out an economic activity outside the GCC may apply for registration to recover tax incurred on goods or services supplied to them by a taxable person in Saudi Arabia. Under the two-stage process they register as an eligible person for a tax refund and file a refund claim. The non-resident must be eligible for a 100% deduction in their own country.

QATAR

INCOME TAX CHANGES

Qatar Law No. 24/2018 Promulgating the Income Tax Law has been amended. Income tax has been extended to include some income generated outside Qatar. Profits resulting from the disposal of property of any Qatari Project abroad are subject to tax. Income subject to tax also includes income derived from abroad from providing rights to distributing products or services, payments for provision of marketing, procurement, financial intermediation, agency and other mediation services, fees paid for guarantees or similar financial support, and providing communication and broadcasting services. The scope of tax exemptions provided in Article 4 of Qatar Law No. 24/2018 have also been expanded to include the income of private associations and institutions, private charitable associations and institutions, and private institutions of public interest.

KUWAIT

RETURN FOR K-ENTITIES

The Kuwait Ministry of Finance (MoF) has issued Kuwait Circular No. 8/2023, which provides relief for companies enjoying tax incentives as per the Kuwait Direct Investment Promotion Authority (KDIPA)'s regulations (K-Entities). K-Entities are now eligible to reclaim 80% of the 5% tax retention their customers have withheld by submitting the required documentation to the Department of Inspection and Tax Claims (DIT). They can reclaim the remaining 20% (i.e. the remaining 1% out of the 5%) of retained amounts through regular means.

TURKEY

DEBT PUSHDOWN

Turkey Law No. 7440/2023 on Restructuring of Certain Receivables and Amendments to Certain Laws has been issued. It allows financing costs incurred for a share purchase to be deducted from the corporate income tax base at the acquired company if the loan is transferred to that company through a merger. Prior to this amendment, Article 5(3) of the Turkish Corporate Income Tax Law allowed financing costs incurred in a share purchase at the Special Purchase vehicle (SPV) level to be deducted. However, it was not possible to deduct these financing costs from a new company's business profits in the case of a merger of the SPV and the acquired company.

EARTHQUAKE TAX

Turkey Law No. 7440/2023 on Restructuring of Certain Receivables and Amendments to Certain laws has also introduced a one-time additional tax for around 22,000 corporate taxpayers who benefit from certain exemptions and deductions when calculating their corporate income tax base. The tax is being called the Earthquake tax as it is being used to generate extra funds for Turkish earthquake victims. Those in cities and districts in the disaster area are exempt from it. Based on corporate income tax calculations for 2022, 10% will be levied on exemption and deduction amounts applied on business income under the Corporate Income Tax Law and other laws, and on the tax base within the reduced corporate tax rate under Article 32/A of the Corporate Income Tax Law, without being associated with the business income of the period. In addition, 5% will be levied on income subject to the participation income exemption under Article 5/1-a of the Corporate Income Tax Law and on exempt income obtained from abroad and certified to bear a tax burden of at least 15%.

IN BRIEF

UAE: Based on Cabinet Decision No. 7/2023 taxpayers requesting Private Clarifications will be charged 1,500 AED for inquiries about one tax and 2,250 AED for those on more than one tax...

UAE: An updated Public Clarification EXTP010 (Public Clarification) covering registration of Warehouse Keepers; and registration and renewal of registration of Designated Zones has been published...

UAE: An updated VAT Guide on Input Tax Apportionment (VATGIT1) with better examples of standard and special apportionment methods has been published...

Saudi Arabia: The Zakat, Tax, and Customs Authority (ZATCA) has approved amendments to the Selective Tax Regulations which enable companies that own goods subject to that tax to claim a refund if the goods are destroyed...

Kuwait: Kuwait Ministerial Decision No 24/2023 On the Examination of Sample Tax enables the tax authorities to use a sample examination method to assess tax returns...

Qatar: The deadline for tax returns for 2022 was extended to 31 May 2023 but companies in the petrol processing and petrochemical industry, and those with different accounting periods to those in Article 1 of Qatar Law No. 24/2018 were excluded from the extension...

Qatar: A clarification on requirements for submitting a simplified tax return for companies owned by Qatari citizens or GCC nationals has been issued....

Bahrain: The Parliamentary Financial and Economic Affairs Committee has recommended the approval of a bill to levy income tax on foreign investments...

EGYPT

VAT AND MACHINERY

Egypt Ministerial Decision No. 115/2023 has changed the VAT rate on machines, equipment, and production lines purchased from the local market or imported from abroad and used in the production of goods or the provision of services to 5%. The producer of the goods or service provider must provide the local seller or customs authority with documents including an approved document from the relevant technical entity of the goods' producer or service provider confirming the machines, equipment, or production lines are used in the production of goods or services and the producer or provider's registration certificate with the Egyptian Tax Authority (Value Added Tax) or the tax card.

FOCUS ON CUSTOMS VALUATIONS

The UAE's economy depends heavily on cross-border trade not only due to material exports of oil, petroleum products, and other raw materials but also because of high levels of imports of consumer goods or luxury items. Therefore, customs arrangements play an important part in designing business operations.

THE IMPORT VALUE OF GOODS

According to Article 35 of Federal Decree-Law No. 8/2017 on Value Added Tax, "the import value of Goods consists of the customs value pursuant to customs legislation, including the value of insurance, freight, and any customs fees and Excise Tax paid on the Import of the Goods". In addition, "Tax, which includes VAT, shall not be included in the value of the supply". The solution implemented in UAE VAT legislation is largely in line with current world practices, where jurisdictions like Australia, Singapore, the UK, and the EU are following a similar principle. Other jurisdictions in the GCC also follow the same approach of using customs value plus additional costs to determine the taxable base for import purposes. As a result of the wording in Article 28(1) of the Common VAT Agreement of the States of the Gulf Cooperation Council (GCC) also known as the Unified VAT Agreement those amounts are decisive in the import tax base calculation. This means to properly establish a VAT base for import purposes, taxpayers need to correctly assess the customs valuation and other fees incurred 'on the import of the goods'.

CUSTOMS VALUATION

The customs valuation process is governed by customs regulations and aims to establish the actual or closest value to the real value of goods which have been brought into the importing state to impose a customs duty at an appropriate rate. Internationally, customs values are determined in accordance with the World Trade Organisation Customs Valuation Agreement (WTO CVA). This agreement is binding upon WTO members and is a truly global tax agreement. All the GCC member states are members of the WTO and have implemented the Customs Valuation Agreement in the Common Customs Law of the GCC States. As per the Common Customs Law of the GCC States, importers need to use one of six methods to establish the customs value - the transaction value method; the transaction value of identical goods; the transaction value of similar goods;

the deductive value method; the computed value method or the fallback method. These methods are used in a sequence, i.e. the importer (or an agent acting on their behalf) can use another method only if the preceding method cannot be applied.

Customs valuation is complex, but basically the customs value needs to include the cost of goods incurred before reaching the moment of importation/ customs clearance in the country of destination and all the additional costs (e.g. royalties, license fees, insurance, freight, and storage) the importer has had to or would have to incur to bring goods to the place of importation.

Customs valuation can be a tricky process and unfortunately does not always work well with VAT, Transfer Pricing, and Income Tax provisions, as the numerous cases which have been heard by the WTO court in Geneva and endless World Customs Organisation opinions show.

One example involved an import of filaments (PLA, PETG, or ABS) used in 3-D printers with the accompanying blueprints which were provided electronically to the customer. If the digital data blueprint was invoiced separately, it could be argued that the customer was purchasing a blueprint that fell within the scope of 'electronic services' which are described in Article 23(2)(c) of Cabinet Decision No. 52/2017 – The Executive Regulations of Federal Decree-Law No. 8/2017 on Value Added Tax. Such services, if provided from overseas, should be taxed in the UAE, usually under the reverse-charge mechanism. However, the customs authorities may conclude when they are clearing the filament that most of the value should be allocated to the value of the blueprint provided with the filament and may wish to increase the customs value of the raw materials as a result. This case could potentially become more complex, if for example the cost of the blueprint (an electronic service) was reported in a different period than the actual filament import which, could potentially lead to a situation where there was a potential double report of output tax and potential double claim of input tax on arguably the same purchase. One output tax reporting would have been done via box 3 of the VAT return (import of services) and the other in a different tax period, would be done via box 6 of the VAT return due to enhanced customs valuation by the local customs authorities. This would not be in line with the VAT provisions and would require close tracking of box 6 data posted by customs authorities, as input tax due on such a customs declaration would have to be removed via box 7 of the VAT return and tracking of this incident would potentially be difficult if there were no robust financial systems in place.

TRANSFER PRICING

Under the current VAT system, transfer pricing adjustments are not regulated. One of the scenarios in which a transfer pricing adjustment can be required is where there has been a post-clearance, periodical adjustment on a customs value. In such cases where the adjustment is upward, technically this means the initial taxable supply (import) was undervalued from both a customs and tax perspective. Since 1 March 2023, when Federal Decree-Law No. 28/2022 On Tax Procedures came into force, any change in a past tax return requires the submission of a voluntary disclosure application. Under the voluntary disclosure mechanism, the correction should be made by identifying the tax period in which it occurred and submitting an adjusted tax return. From a customs point of view an incorrect customs declaration would have been submitted at the time of importation. This could again lead to penalties and potential criminal liabilities, as well as the additional duties on the higher import value which customs would wish to levy. If a periodical transfer pricing adjustment of imports is performed, this is typically detached from individual customs declarations, and this would in effect help to identify the tax period in which voluntary disclosure should be passed.

A taxpayer may end up in a situation, where a transfer pricing adjustment has been passed for corporate tax, but it is not feasible to link this adjustment with any of the past periods for VAT and customs purposes. Practically, in a scenario like this, tax authorities may allow a taxpayer to estimate the allocation of the adjusted values based on fair rules (e.g. based on the volume of imports in the past year) which should eliminate the risk of squeezing most adjustments in the recent VAT periods to minimise potential interest and penalties. It should be noted that there are no provisions in place where a value accepted for transfer pricing purposes is automatically binding on the customs authorities and vice versa when it comes to the customs value.

Although the purpose of Transfer Pricing and customs value regulations is to ensure the price is fair or at arm's length, the provisions and method available to arrive at this result have some differences which create complexity.

For example, the transaction value method used for customs purposes may give different results than the price arrived at when using transfer pricing methods such as the comparable uncontrolled price (CUP), the resale price method or the cost-plus method. This is because customs authorities and tax authorities (when it comes to transfer pricing) may apply a separate set of tests to determine to what extent being related parties has influenced the value of the items.

At present it remains to be seen how transfer pricing adjustments will be handled by customs and tax authorities once the corporate tax is implemented in the UAE. One solution might be to monitor intracompany prices on an ongoing basis and adjust prices going forward instead of retroactively.

This piece was written by Tax Lawyer, Patryk Karczewski, and Head of Tax, Siegert Slagman.

TAX PROFESSIONAL PROFILE

MANAGING PARTNER – CONSULTING

A DIFFERENT APPROACH

Mourad Chatar the Managing Partner at consulting firm Value Square, talks about the differences in approach between tax regimes in the region and his home jurisdiction in the EU.

YOUR BACKGROUND?

I have a Masters in business administration from the University of Liège in Belgium and a Masters in international tax management from Solvay Brussels School of Economics and Management. I am a Certified Tax Advisor with the International Tax Advisor and Accountant Institute in Belgium.

I have spent most of my career working in Big 4 firms in Belgium, including PwC and Deloitte in Brussels where I specialised in international tax and transfer pricing and focused on business model optimisation.

I have also worked inhouse as an Inhouse Transfer Pricing adviser in tier1 multinational groups in the energy and financial services industries.

While working as Director at Deloitte in Brussels, I got the opportunity to move to Deloitte's Middle East regional office in Dubai to lead their transfer pricing and customs teams and then in May 2021, set up my own consulting firm Value Square.

YOUR ROLE?

As Managing Partner in a consulting firm my role includes business development, managing the firm, client management and services delivery which has a specific focus on our corporate tax services and transfer pricing services offering.

Our work includes business and IP valuations in the context of business restructurings, investments, and divestments, capacity building programmes and training in corporate tax and transfer pricing, as well as transfer pricing services and corporate tax services, which include planning, advisory, compliance, documentation, audit and controversy work.

Corporate tax and transfer pricing regulation in the UAE, Saudi and Qatar has the biggest impact on my work.

At present changes to the UAE corporate income tax and transfer pricing regulations are having a big impact on our work, along with tax reform in Qatar where the 15% global minimum tax and Economic Substance Regulations are having an impact.

Like most tax advisory businesses in the GCC region we are having to expand our team to address the client demand being created by these regulatory changes.

JURISDICTIONAL DIFFERENCES?

In some respects, it is easier technically speaking working in the Middle East as tax is new for most people in this region.

However, it can be more challenging when it comes to soft skills as you have to adapt to your audience both when you are speaking to those working in the private sector and the tax authorities. You also have to be more flexible here.

In this region, culturally speaking, people sometimes are unwilling to openly say 'I do not know' and will either not respond at all to your questions or say something completely unexpected. That can be a challenge. Since moving here, I have been surprised by the size of penalties entities can face, compared to in Europe where penalties can be less significant.

This may be down to the current differences in the compliance culture between Europe and the Middle East. Tax compliance is a major issue for entities

PRACTITIONER PERSPECTIVE

Rami Qudah
Practitioner
Deloitte, Qatar

Rami Qudah, Practitioner at Deloitte in Qatar looks at significant recent changes to the Qatar Income Tax Law.

A number of significant changes were made to Qatar Law No. 24/2018 (the Income Tax Law) and came into force on 2 February 2022. These included the adoption of the minimum global tax rate and the extension of corporate income tax so that it now includes income derived from sources outside Qatar, as well as changes on economic substance reporting and tax exemptions. There have also been a number of significant changes to a whole host of definitions within this law including changes to the previous definition of Permanent Establishment, Interest and Residence and the addition of new definitions, including of terms such as Not for profit organisation, immovable property and Qatari Project.

Of these amendments a key change is an amendment to Article 34 of Qatar Law No. 24/2018 which includes a requirement to comply with international agreements to which Qatar is a party. There is also specific emphasis on forthcoming regulations on the GloBE rules under Pillar Two developed by the OECD and G20. These include the application of a global effective minimum tax rate of 15%. This amendment to Qatar Law No. 24/2018 acknowledges Qatar's commitment to adopting international tax reforms and aligns their domestic tax regime to international standards and best practices.

Previously, income generated from sources outside Qatar was not included within the scope of income tax in Qatar. However, an amendment to Article 2 of Qatar Law No. 24/2018 has brought it within the charge to Qatari income tax income generated from sources outside Qatar. However, it should be noted that this excludes income related to a Permanent Establishment of a Qatari project situated outside Qatar.

This amendment specifically refers to taxable income which is income derived from real estate situated outside Qatar, including income arising from the disposal of that real estate; income from distribution, marketing, telecommunications, and broadcasting; brokerage fees; and commissions on guarantees and other forms of financial support; as well as income from dividends, interest, royalties, and technical fees derived by a Qatari entity from sources outside Qatar. In addition, under Article 20 of Qatar Law No. 24/2018 credit relief is available for foreign taxes paid on foreign-source income which is within the scope of Qatar's income tax.

Another recent change is that public and private charitable and public interest organisations are now also within the scope of Qatar Law No. 24/2018 and must comply with all its provisions including those on the submission of tax returns. Previously, only certain provisions of Qatar Law No. 24/2018 applied to these organisations.

However, as a result of these amendments the tax exemptions available under Article 4 of Qatar Law No. 24/2018 have been extended so they apply to public and private charitable and public interest organisations; as well as interest and returns on Islamic financial instruments; and remuneration earned by Qatari projects in the form of directors' fees for providing board of director services to foreign projects.

The scope of the general anti-avoidance rule in Article 33 and 34 of Qatar Law No. 24/2018 have also been extended and the application of arm's length principles have been clarified.

There have also been changes on economic substance reporting. An amendment to Article 11 of Qatar Law No. 24/2018 requires certain entities to report on economic substance including core income generating activities performed in Qatar. It should be noted that entities which do not comply with this obligation will be unable to obtain a Qatari tax residency certificate.

Article 24 of Qatar Law No. 24/2018 also now provides for a penalty of 15% of net income for failure to comply with this obligation and an amendment to Article 13 of Qatar Law No. 24/2018 obliges businesses to provide information on legal and beneficial ownership and exchange other financial information when requested to do so by the General Tax Authority (GTA).

operating in Europe, while in this region you still find some entities here that take the approach 'if it is not seen, it is not caught'.

INTERESTING CASES

We are often called in for assistance with tax appeals and have been involved in some interesting cases in the region.

For example, in a recent tax appeal case in Qatar which involved withholding tax (WHT) refund requests, we learned that the General Tax Authority (GTA) in Qatar requests bank statements to prove the withholding tax has been made on the charge of the foreign service provider.

For multinational enterprises (MNEs) operating a cash pool system with auto sweeping cash movements and netting, it is not possible to bring the evidence and so it can be difficult for these groups to successfully get through the refund process even if they meet all the conditions for a refund.

AREAS FOR CHANGE

I have been pleased to see the UAE has not implemented withholding taxes, as I believe this tax regime can negatively impact foreign direct investment.

If countries in this region do decide to implement a withholding tax regime, it will also be important that they put the necessary processes in place so taxpayers can easily claim the refunds they are entitled to under double tax treaties.

ANY QUESTIONS?

WHAT ARE THE TAX BENEFITS OF SEZs OR SILZs?

Nabil A Issa of King & Spalding explains the tax benefits of Special Economic Zones and Special Integrated Logistics Zones in Saudi Arabia.

The recent establishment of four new special economic zones (SEZs) by the Economic Cities and Special Zones Authority (ECZA) in Saudi Arabia has led to questions about the potential tax benefits of establishing in one of these zones or in a Special Integrated Logistics Zone there.

The Regulation of the Economic Cities Authority (Saudi Arabia Royal Order No. M19/1431) was first introduced in 2010 and has since been recently amended to include the establishment of SEZs and delegate authority to ECZA which supervises entities and businesses established in these zones. There are four newly announced SEZs. These include: (i) King Abdullah Economic City (which will focus on automobile supply chains and assembly; consumer goods; electronic light manufacturing; pharmaceuticals; medical technology and logistics); (ii) Jazan Special Economic Zone (JSEZ) (which will focus on logistics; metal conversion; and food processing); and (iii) Ras Al Khair (RAK) which will focus on shipbuilding; maintenance, repair, operations, and overhaul (MRO), as well as rig platforms and MRO. Meanwhile the fourth SEZ is the new Cloud Computing SEZ in Riyadh that will enable investors to establish data centres and cloud computing infrastructure within Saudi Arabia.

ECZA has indicated that those who establish in these new SEZs will have a dedicated one-stop-shop government centre, which will provide access to governmental and specialist services, including tax and customs-related services.

Based on the current guidance, the new SEZs will be subject to a 5% Corporate Income Tax rate for up to 20 years (while non-GCC foreign owned entities normally pay a 20% tax on profits). They will also benefit from a 0% withholding tax rate for repatriation of dividends from the SEZ to outside Saudi rather than the usual 5% rate. There will also be a 0% customs duties deferral for equipment and goods inside the SEZ. A 0% VAT rate will apply on goods exchanged within each SEZ and between other SEZs. In addition, tax treatment will be in line with OECD principles for the avoidance of double taxation. Historically, there has been a means to import parts for a factory and semi-finished goods for assembly in Saudi Arabia on a duty-free basis.

ILBZ

In addition to these new SEZs, the Integrated Logistics Bonded Zone (ILBZ) was launched in October 2022, as part of plans to increase Saudi Arabia's participation in global supply chains and consolidate its position as a global logistics hub. ILBZ's activities include maintenance, repair, processing, modification, development, assembly and storage of goods; sorting, packaging, re-filling, trading, distributing, handling and use of goods, including any simple manufacturing processes; import, export and re-export; logistics and value-added services, and after-sale services; and recycling of waste and electronic waste. It has been established by Saudi Royal Order A/17 which is the regulatory framework for the formation of Special Integrated Logistics Zones (SILZs) in Saudi Arabia and regulating businesses established within these zones. Unlike other SEZs, the General Authority of Civil Aviation (GACA) is the governing authority for entities within SILZs.

GACA, in conjunction with Zakat and Tax and Customs Authority (ZATCA), has issued the Integrated Logistics Bonded Zone Customs Service Rules, which set out the customs ground rules which will apply to companies operating within SILZs.

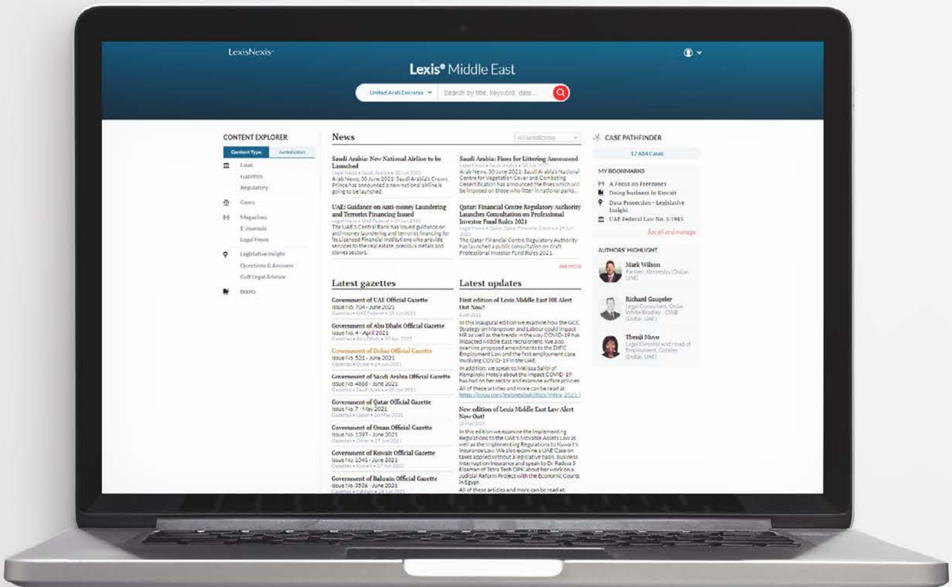
The regulator has announced a tax relief period of 50 years which will start from the incorporation of the SILZ entity. This includes a VAT exemption while within the ILBZ area. Although, when goods are removed from the ILBZ, the applicable Customs and VAT levies will likely apply in accordance with the applicable rules in Saudi. These entities will also have full exemption from corporate income tax and withholding tax on certain payments; a 100% suspension of customs and import restrictions: and there will be no restrictions on capital repatriation.

In April 2023, ECZA published the Companies' Regulation, Tax and Customs Regulation, and Employment Regulation in connection with businesses established and operating in the SEZs. This is likely to mean there will be further guidance and details on SEZ regulations and incentives. It should also be noted, the licensing of regional headquarters (RHQs) falls under a separate system from ECZA, but it is expected the RHQ tax rate will be considerably lower than the current taxation system in Saudi.

Osama Zaid, and Mohammed Basama of King & Spalding LLP also contributed to this article.

Contributor

Nabil A Issa,
King & Spalding LLP



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