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FEATURE SHIFTING SANDS OF RETT
Developments and next steps in Saudi Real Estate Transaction Tax

PROFILE CONGLOMERATE
John O'Leary of Ghobash Group

ANY QUESTIONS
Who is liable for related company tax?

A ROUND UP OF TAX DEVELOPMENTS ACROSS THE MIDDLE EAST

CREATING A STTR

Pillar Two Developments and the GCC

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BACK ON GLOBAL ISSUES

When we launched this magazine back in 2022 two concerns dominated the conversations we were having with GCC tax professionals - UAE Corporate Income Tax and the OECD's proposals on base erosion and profit shifting (BEPS). At the start of this year, particularly in the lead up to the 1 June 2023 coming into force date perhaps not surprisingly UAE Corporate Income Tax tended to dominate and there was less talk about BEPS.

However, as the summer progressed there were a series of developments at OECD level which have put the focus back onto global tax issues. Here the key question has not only been what exactly are the OECD saying now about the reforms in this area but how will individual countries respond to and be impacted by these changes, and from a practical perspective how will the mechanics of all this actually work.

The OECD has now published documents which explain how countries can efficiently implement the Subject to Tax Rules (STTR) in their existing bilateral tax treaties which we cover in this issue.

This is a change which will need to be considered by all six of the GCC countries - and that now includes Kuwait (which has also recently announced plans to reform its tax regime), as the OECD announced in November that Kuwait had joined the OECD's Inclusive Framework and has committed to applying the minimum standards of BEPS Actions 5, 6, 13 and 14.

As a result, we look at both the detail of these recent OECD publications, what that could mean for the six GCC states, and what has been said so far about the action they intend to take.

The UAE's decision to implement its new corporate income tax at 9% - a rate which matches the rate cited in the STTR is no coincidence. It looks likely too we will see other tax changes being implemented in domestic legislation in GCC countries which have been influenced by global changes.

Claire Melvin - Editor

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CREATING A STTR

The OECD has now issued Subject to Tax Rules (STTR) as part of the Pillar Two solution on minimum income tax levels for multinational companies. Anand Krishnan of KPMG Qatar looks at what this may mean for taxpayers in GCC countries.

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On 11 July 2023, 138 members of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) agreed on an Outcome Statement which summarised the package of deliverables developed by the Inclusive Framework (IF) on the remaining elements of the two-pillar solution which is designed to address the tax challenges which arise from the digitalisation of the economy.

A few days after this, the OECD, published a number of documents including one entitled 'Tax Challenges Arising from the Digitalisation of the Economy – Subject to Tax Rule (Pillar Two): Inclusive Framework on BEPS'. This document set out the text of a new article and associated commentary which individual jurisdictions can include in their various double tax treaties.

In the executive summary to this new article, the Inclusive Framework stated its policy rationale which is: 'where, under a tax treaty, a source State has ceded taxing rights on certain outbound intragroup payments, it should be able to recover some of those rights where the income in question is taxed (if at all) in the State of the payee (i.e. the residence State) at a rate below 9%. [...] By restoring taxing rights to the source State in these cases, the Subject to Tax Rule (STTR) is designed to help developing countries, notably those with lower administrative capacities, to protect their tax base.'

STTR IMPLEMENTATION

The STTR is a treaty-based rule which allows a source (or payor) state to impose additional tax on several categories of cross-border intragroup payments when such payments are subject to a nominal corporate income tax rate of below 9% in the residence (or payee) state.

The Subject to Tax Rule (STTR) was developed as a compromise solution on certain covered intra-group payments which are not subject to a nominal tax rate of at least 9% for developing countries who may not have the administrative capacity to implement the complex and challenging Pillar Two solution, as some demands from developing countries have been met, and others have been left out of scope.

For example, India wanted the STTR to include capital gains which are not in scope, although cross-border service payments are within scope – which is a departure from the OECD Model Convention.

Where an IF member country applies a nominal corporate tax rate of less than 9% to items of covered income, that country must implement the STTR in its bilateral tax treaties if and when requested to do so by a developing country.

For this purpose, a developing country is one with a GNI per capita of USD 12,535 or less in 2019 as per the World Bank Atlas method.

Although while there is a commitment towards developing countries in this regard there is nothing to suggest that other countries cannot implement the STTR based on bilateral negotiations if they choose to do so.

KEY ASPECTS

1. A tax treaty, and therefore STTR, only allocates taxing rights between two states. It does not create a new tax. So, if a source state is now allowed to 'tax-back' an item of covered income under the STTR on which it previously ceded taxing rights, that states may need to also amend their domestic tax legislation to be able to apply the STTR tax.

2. The GloBE Rules' revenue threshold of €750 million does not apply to the STTR. Multinational Enterprises irrespective of their consolidated revenue should review their intra-group cross border transactions (especially entities that may be located in low-tax jurisdictions or if the source country is a developing country for STTR implications).

3. A coordination rule provides a 'switch-off' when an enterprise carries on business in the source state through a permanent establishment (PE) and the covered income is interest or a royalty connected with, or in the case of other covered income to extent attributable to, the PE. This means taxation of such income is covered under the Business Profits Article 7.

4. If additional tax is allowed under STTR in the source state, an accompanying modification to the relief from double tax article makes it clear the residence state need not provide an exemption or credit on such additional tax. However, STTR is treated as a covered tax for the purpose of the top-up tax calculation under the GloBE Rules.

5. An anti-avoidance rule is intended to prevent the use of intermediaries to avoid STTR, e.g. interposing an unconnected person who reroutes the payments within 365 days to the ultimate beneficiary.

STTR is an integral part of the Pillar Two solution, which applies independently of and in priority to the Income Inclusion Rule (IIR) and the Under-taxed Payments Rule (UTPR), which together are commonly known as the GloBE Rules. In addition, STTR applies even before the Qualified Domestic Minimum Top-up Tax (QDMTT).

To make it easier for jurisdictions to efficiently implement STTR in their existing bilateral tax treaties without having to re-negotiate or update each of their treaties individually on 2 October 2023, a multilateral instrument (MLI) was opened for signature by individual states.

This will, with respect to all tax treaties it covers, amend those treaties to include the new STTR provisions, without the need for negotiation or amendment of those individual treaties.

The MLI Convention will act as an amending protocol to an existing tax treaty.

Countries which choose not to implement these modifications to their tax treaties in this way can still do so through bilateral renegotiation of their individual tax treaties.

However, it still remains to be seen how many of the world's 3000+ bilateral tax treaties will now be updated to take account of the STTR.

KEY FEATURES

STTR covers cross border payments between connected persons. Parties are deemed to be connected if they are both under control (50% or more) of the same person either directly or indirectly, or if the facts are such that there is a relationship of control. STTR will not apply when a payment is made by an individual or the recipient of the payment is an individual, a recognised pension fund, a non-profit organisation, a state or part of a state, the central bank, certain other persons, entities, agencies or authorities whose principal purpose is performing a government function and that do not carry on a trade or business, an international organisation, certain investment funds and arrangements, or entities owned, directly or indirectly, by certain excluded recipients.

STTR covers interest and royalties, payments in consideration for the use of, or right to use, distribution rights in respect of a product or service, insurance and reinsurance premiums, fees for providing a financial guarantee, or other financing fees, rent or any other payment for the use of, or the right to use, industrial commercial or scientific equipment, and income received for the provision of services.In addition, there is a special carve-out for shipping income which is defined to include rental income from leasing ships to be used in international transportation on a bare boat charter basis.

There is no similar carve-out for aircraft leasing income but there is one for income derived by a person whose tax liability in respect of that income is determined by reference to a tonnage tax regime.

There is also a mark-up and a materiality threshold which applies.

Subject to certain qualifications, and except for interest and royalties, STTR does not apply where the income is less than the costs incurred that are directly or indirectly attributable to earning such income plus

a mark-up of 8.5% on those costs.

This is likely to have most impact on service fee payments. STTR also has a materiality threshold with respect to the quantum of the covered income and size of the economy which is intended to ease the administrative burden.

STTR will not apply where the total sum of covered income paid in a fiscal year exceeds €1 million or €250,000 if the size of the smaller of the payer or payee jurisdiction has a GDP of less than €40 billion.

ADMINISTRATION

Paragraph 14 of the document states that any STTR tax due is to be determined 'following the end of that fiscal year and shall not be levied [...] until it is so determined'. Therefore, STTR tax is not levied at the time of the transaction and is only calculated at a later date.

The commentary on this paragraph notes that some of the information required to calculate any STTR tax charge is unlikely to be known at the time of the transaction. So by delaying this calculation until after the year end, this 'approach seeks to prevent over-taxation and to limit the delays and challenges that can arise in securing refunds of tax collected in excess of the amount properly due under the STTR'. Therefore, and contrary to popular belief, STTR is unlikely to apply as a withholding tax. However, there may be a requirement to file an STTR return although this and the way this would be done if that is the case are not known yet.

GCC COUNTRIES AND HIGH INCOME STATUS

All six of the GCC countries are classified as 'high income' countries, i.e. they have GNI per capita of USD 12,535 or more.

Therefore, they will not be classed as one of the 'developing countries' for this purpose.

Anand Krishnan
Director - International Tax
KPMG Qatar

GCC COUNTRIES AND IF MEMBERSHIP

However, all the GCC countries, including Kuwait are now IF members.

It should be noted in the case of Kuwait this is quite a recent change.

On 15 November 2023, the OECD announced that Kuwait had now joined the Inclusive Framework and had also committed to apply the minimum standards of BEPS Actions 5, 6, 13 and 14.

It should be noted that GCC countries which are IF members will have to implement STTR if and when they are requested to do this by any of their current treaty partners who are classified as developing countries.

IMPACT ON GCC COUNTRIES

There would be an impact for the countries in this region as many GCC countries have tax exemptions for GCC shareholding (particularly, Qatar and Kuwait which have these exemptions). Saudi Arabia also levies zakat on companies' zakat base at 2.5%, and Bahrain currently has no corporate income tax.

This may lead the GCC states to make decisions to change their domestic tax regime provisions, as a result of this development.

The UAE's decision to implement a broad-based corporate income tax at 9% through Federal Decree-Law No. 47/2022 is not a mere coincidence in this context. This tax rate has been clearly motivated by the STTR. At present there is limited information on how the individual GCC states will react to this change.

The UAE has already indicated that it will sign the STTR MLI.

However, Qatar may instead choose to go down the route of undertaking individual bilateral negotiations with treaty partners.

SHIFTING SANDS OF RETT

There have been a number of changes to the regulations and guidelines on Real Estate Transaction Tax (RETT) this year. Michael Camburn, Manish Bansal and Maliha Asghar of Deloitte Middle East explain the key developments and what might be next in this area.

There have been a number of different documents and changes issued on Real Estate Transaction Tax (RETT) this year. For example, this summer, the Saudi Arabian RETT regime underwent the latest in a series of amendments. These changes took effect from 11 August 2023. A key change which can be seen in these most recent amendments, which have led both to the issuing of new guidance and the updating of existing guidance is the apparent willingness of the Zakat, Tax and Customs Authority (ZATCA) to now listen to the issues and concerns of a number of industry players.

Michael Camburn

Senior Director – Head of Indirect Tax at Deloitte Middle East

Real estate development is a key pillar in Saudi Arabia's Vision 2030 objectives. These changes indicate it is Saudi Arabia's aim to create a conducive environment for investment in this sector. However, is there currently a clear understanding of the current status of RETT?

Unusually, although an actual law on this subject is yet to be published in Saudi Arabia, there are Implementing Regulations, specifically Saudi Arabia Ministerial Decision No. 712/1442 On the Approval of the Implementing Regulation of the Tax Imposed on Real Estate Transaction which were first issued back in 2020 and Saudi Arabia Royal Order No. A84/1442 On the Exemption of Real Estate Supplies from Value-Added Tax and the Imposition of a Tax in the Name of 'Real Estate Transaction Tax'. These

Regulations have now been amended multiple times since their issue. Under this legislation, ZATCA is able to levy and collect RETT at a rate of 5% on many different types of land and property transactions. It is expected that the actual law on this subject and new Implementing Regulations will be published soon.

Since September 2022, when the Revised RETT Guidelines were issued, Real Estate Companies for the purposes of RETT have been defined as companies with real estate representing more than 50% of their assets or owner's equity, rather than companies whose real estate represented more than 50% of their assets or capital, as was previously the case.

Manish Bansal

Director – Indirect Tax, KSA RETT Leader, Deloitte Middle East

It should be noted any company can qualify as a real estate company irrespective of whether the underlying real estate is being principally used for generating income, e.g. such as leasing or selling of real estate. So in principle, a company with idle land (not used for any business) may also qualify as a real estate company if the value of that land makes up the majority of its assets, even though the land is not used for any of its business.

RETT REGULATION CHANGES

One significant change introduced by the amendments to the RETT Implementing Regulations this summer is the widening of exemptions. This now includes real

RELEVANT LEGISLATION

Article 5 of Saudi Arabia Ministerial Decision No. 712/1442

Tax shall be collected on real estate transactions according to the following:

1- The tax due shall be collected from the alienator and he shall be bound to pay said tax together with any other obligations that may arise from it.

2- The parties may reach an agreement to the contrary to paragraph (1) of this article, and the alienator shall remain liable for payment before the Authority.

3- Without prejudice to the provisions of Paragraphs (1,2) of this Article, the alienator and the alienee shall be jointly liable for any tax obligations due under the present Regulation, and the Authority shall have the right to recourse against them, whether jointly or severally, as the case may be.

(Source: Lexis Middle East Law)

estate transfers by a natural person to an investment fund wholly owned by that person.

Previously, this exemption was limited to real estate transfers from a natural person to a company wholly owned by them.

In addition, the five-year claw back period for this exemption now also applies to funds.

There have also been changes to the 'RETT grouping' provisions which have been rationalised and widened.

It has now also been specifically spelt out that the real estate transactions between a company and its wholly owned subsidiary will be exempt from RETT.

Maliha Asghar
Manager - Indirect Tax, Deloitte Middle East

Furthermore, this exemption has been extended to transfers between a company and an investment fund which is wholly owned by such a company.

The RETT exemption also applies to real estate transactions between entities which are commonly and wholly owned, directly or indirectly, by the same person(s).

This could now apply to common shareholders who can be more than one person.

In the past this would not have been the case as the exemption was restricted to cases where the transferor and transferee entities were commonly owned by just one person.

This form of 'RETT grouping' is particularly welcome, as without it, internal company or group reorganisation would have ended up with self-generated tax costs.

A final significant change is the addition of a new article on rulings, guidelines, circulars, and interpretive decisions. These are now binding from the date they are issued.

This reflects ZATCA's commitment to continuing to build a transparent, fair, and stable tax system in Saudi Arabia.

This is important as there are a number of definitions, such as the definition of a real estate company, which are only found in the guidelines and not in the Implementing Regulations.

REAL ESTATE DEVELOPERS' VALUE-ADDED TAX (VAT) RECOVERY SCHEME

When RETT was introduced in Saudi Arabia, one of the challenges for taxpayers was the recoverability of input VAT with respect to transactions which were ostensibly now exempt for VAT purposes. ZATCA subsequently issued the 'Rules and Procedures for Real Estate Developers' on this area.

Although this was welcomed by taxpayers, the mechanism which was first set up, unfortunately, prevented some developers from being able to use any VAT recovery means until they had registered as 'Eligible Persons'.

This was a separate process.

As a result, there was a period when ZATCA denied VAT refunds to taxpayers engaged in construction and development projects. This had a significant impact on them, as 15% of the project cost in VAT was being denied.

Recognising the difficulties taxpayers faced as a result, ZATCA provided relief through the Board of Directors Decision No. (04-08-22) dated 3 October 2022, allowing the recovery of input VAT subject to certain conditions.

However, we are aware that some taxpayers were still unable to secure refunds despite these changes. Finally, in June 2023, ZATCA introduced a General Guideline for VAT Recovery under the Real Estate Developers Scheme.

Although this does not provide any new updates, it does consolidate all existing information into one document which should make it easier for those making applications under this scheme.

REVISED RETT GUIDELINES

In addition, the General Secretariat of Zakat, Tax and Customs Committees (GSZTCC) has also issued a guideline on its official website explaining their interpretation of RETT regulations and the related appeal procedures.

These guidelines state that taxpayers have the right to appeal before the Tax Violations Disputes and Resolution Committee (TVDRC) within 30 days of either receiving ZATCA's decision on the taxpayer's objection or 90 days if they have not received any response from ZATCA on an objection submitted by the taxpayer.

Following a TVDRC decision, both parties have the right to appeal before the Appellate Committee of Tax Violations and Dispute Resolution (ACTVDR) against the decision issued by the TVDRC within 30 days of receiving the TVDRC decision.

OUTSTANDING QUESTIONS

At present, there are a large number of large-scale real estate transactions happening or about to happen in Saudi Arabia.

With some of the 'giga' projects, a key question being raised by some tax experts is whether RETT will also apply in special zones like NEOM.

Despite all these changes, questions such as this one and the dramatic expansion which is expected in the Saudi property market are making the issue of a new RETT law and implementing regulations more pressing.

WHAT'S CHANGED
VAT AND ELECTRONIC DEVICES

KEY TAKEAWAYS
Taxpayers engaged in B2B local supplies of electronic devices in the UAE must ensure they are compliant with the new VAT reporting and documentary requirements which took effect on 30 October 2023.

CHANGE

Cabinet Decision No. 91/2023 On the Application of the Reverse Charge Mechanism to Electronic Devices Among Those Registered in the State for the Purposes of Value-Added Tax was issued in August 2023 and introduced a reverse charge mechanism for local supply of electronic devices in the UAE. On 16 October 2023 a Federal Tax Authority Public Clarification VATP034 clarified the scope and compliance requirements for this reverse charge mechanism for supply of electronic devices. Ministerial Decision No. 262/2023 was then issued on 30 October 2023, clarifying the parts and pieces of electronic devices which are covered by the VAT reverse charge mechanism. These laws and guidance follow Article 48(8) of Federal Decree-Law No. 8/2017 On Value Added Tax which enables the Cabinet to issue a decision specifying goods or services which are subject to the VAT reverse charge mechanism.

RELEVANCY

The following goods and types of supplies are covered by this VAT reverse charge mechanism:

- Mobile and smart phones – ranging from mobile phones with only call and/or text functions to smart phones which have many additional functions. However, it should be noted that the scope is limited to only phones which operate through wireless transmission, so landline telephones would not be covered.
- Computer devices – regardless of whether they operate through wireless transmission or require physical means in order to operate.
- Tablets – including wireless, portable personal computers with touch-screen interfaces, and those which are hybrid in form and have features which put them somewhere between a smart phone and a computer device.
- Parts and pieces of electronic devices – including parts and pieces which are normally used for the manufacturing or production of electronic devices, and/or considered necessary for the normal operation of these devices.

In addition, the following transaction types are in scope.

- Resale Transactions – if the customer intends to trade the electronic devices as part of its business either at a retail or wholesale level.
- For use in production or manufacturing – Electronic devices which are to be used by the customers in either partial or full production of other electronic devices are also covered.

These laws and guidance also detail the compliance requirements for the VAT reverse charge mechanism for supply of electronic devices. A written declaration must be provided by the customer to the supplier before the date of supply.

This includes a declaration the customer is VAT-registered and they intend to resell or use the devices in producing or manufacturing another electronic devices.

The declaration must contain details of the customer's tax registration to allow the supplier to meet the required conditions. In addition, the supplier must verify and confirm the customer's tax registration through the FTA website, i.e., under the 'TRN verification' tab on the right side of the homepage.

If a supply of electronic devices is subject to the VAT reverse charge mechanism and the conditions are fulfilled by the supplier and customer, the customer will be liable to account for VAT instead of the supplier.

REMEMBER

- If conditions for zero-rating are met for export of electronic devices, it will be reported as a VAT zero-rated export of goods supply by the seller.
- The VAT reverse charge mechanism does not apply to the direct and indirect export of electronic devices subject to the zero-rating.
- Movement of electronic devices from the UAE mainland to a Designated Zone is not a VAT zero-rated export of goods and therefore, the VAT reverse charge mechanism will apply in this case.
- If the supplier and customer are unable to meet the compliance requirements, the supplier must account for VAT on the supply and the VAT paid on the purchase of the devices cannot be recovered by the customer.

TAX NEWS ROUND-UP

COVERING RECENT KEY DEVELOPMENTS – REGION-WIDE

UAE

TRANSFER PRICING

The UAE Federal Tax Authority (FTA) has issued has a Guide (CTGTP1) on Transfer Pricing. Under Article 55(1) of Federal Decree-Law No. 47/2022 all taxpayers undertaking transactions with related parties must submit a transfer pricing disclosure form, a sample of which will be provided on the FTA portal. This form will be submitted along with the tax return and include information on the nature and value of the controlled transactions, related party details, and transfer pricing methods used to determine the arm's length value of the transactions. Large businesses specified in Ministerial Decision No. 97/2023 must submit a Master file which follows the requirements in Annex 1 to Chapter V of the OECD Transfer Pricing Guidelines. There are also details of the local file requirements. The UAE Country by Country Report (CbCR) rules will apply to Multinational Enterprise (MNE) groups head-quartered in the UAE with over 3.15 billion AED in consolidated revenue in the preceding fiscal year. The requirements are in line with Annex 3 to Chapter V of the OECD Transfer Pricing Guidelines. Cabinet Decision No. 44/2020 explains the preparation, submission, and notification process.

SUPPLEMENTARY TAX

Federal Decree-Law No. 60/2023 has been issued and has amended the Corporate Income Tax Law (Federal Decree-Law No. 47/2022). As a result a new Supplementary Tax definition has been added to Article 1 of Federal Decree-Law No. 47/2022. Supplementary tax will be imposed on multinational enterprises in line with rules and controls specified by the Cabinet in line with Article 3 of Federal Decree-Law No. 47/2022 in order to comply with OECD's Pillar 2 Rules. A new Multinational Enterprise definition has also been added and defines multinational enterprises as an entity and/ or one or more of its member entities which are located in the country or in a foreign territory as determined by a decision issued by its board of directors. A Decision is to be issued regulating the imposition of the supplementary tax on multinational enterprises and exempting institutions from it, so the total percentage of actual tax imposed on them is 15%.

DIVIDEND EXEMPTIONS

The UAE Federal Tax Authority (FTA) has issued guidance CTG EX111 'Exempt Income: Dividends and Participation Exemption'. The Guide provides information on UAE Corporate Income Tax exemptions involving dividends, other profit distributions, and capital gains. These exemptions are automatic and do not require any election. The regime permits specific income streams, including dividends and capital gains, to be exempt from UAE Corporate Income Tax if the taxable person has a significant, long-term ownership stake in a legal entity. Companies subject to Zakat (e.g. in Saudi) may qualify for the subject to tax criteria if effectively they are subject to 9%. The FTA disallows the participation exemption if the parent entity is a mere conduit. If a business may be subject to a theoretical effective tax rate of 9%, they would also qualify. Dividends from a UAE resident legal entity are always exempt, and the exemption also applies to dividends received from Qualifying Free Zone Persons. However, foreign dividends are only exempt if they meet the conditions of the participation exemption. It is confirmed that subsidiaries which are holding companies are an exception to the subject to tax test. However, they are amongst others subject to substance requirements for the participation exemption to apply at the level of the parent, and their income must substantially consist of passive income. It is expected more guidance will be provided by the FTA in future on this as some areas such as unincorporated partnerships have not yet been covered.

FREEZONE TAX

The UAE Finance Ministry has altered the Corporate Tax Regulations on Freezones. Cabinet Decision No. 100/2023 On Determining Qualifying Income for the Qualifying Free Zone Person for the Purposes of Federal Decree-Law No. 47/2022 on the Taxation of Corporations and Businesses has been issued and has repealed the requirements on this area which were issued in Cabinet Decision No. 55/2023 in May. The long awaited guidance on Qualifying Activities for the purpose of freezone exemptions has also been included in Ministerial Decision No. 265/2023 Regarding Qualifying Activities and Excluded Activities for the Purposes of Federal Decree-Law No. 47/2022 on the Taxation of Corporations and Businesses which repealed Ministerial Decision No. 139/2023.

It covers areas including the De Minimis requirements in Article 4 and income derived from qualifying Intellectual Property under Article 7(1) of Cabinet Decision No. 100/2023.

SAUDI ARABIA

DRAFT INCOME TAX LAW

Saudi Arabia's Zakat, Tax and Customs Authority (ZATCA) has published a draft Income Tax Law for a consultation which will end on 25 December 2023. Changes from the current position include proposals that income derived from an indirect disposal of shares in a resident company would be considered as Saudi sourced income.

TAX TREATY UPDATE

Egypt: Egypt has ratified its double taxation treaty with Qatar.
UAE: The UAE Cabinet has approved a double taxation treaty with Tanzania which was signed in September 2022.
Saudi Arabia: Saudi Arabia has signed a double taxation avoidance agreement with Slovakia.

Although taxation of capital gains realised on indirect share transfers, has been a long-standing practice in Saudi Arabia, it has not previously been codified in law. In addition, income derived from services rendered remotely through technical or electronic means which facilitate the deriving of the income would be included in Saudi source income.

The draft law also includes a new Services Permanent Establishment (PE) concept for non-resident companies who perform services in the Saudi, which continue for more than 30 days in any 12 month period.

A Principal Purpose Test (PPT), has also been introduced denying a tax benefit if obtaining that benefit was the principal, or one of the principal, purposes of an arrangement or transaction which resulted in the benefit. A comprehensive Participation Exemption regime is also being proposed, which would exempt qualifying dividend income, capital gains and liquidation proceeds from taxation at Saudi Arabian shareholder level.

CUSTOMS PROCEDURES

The Zakat, Tax, and Customs Authority (ZATCA) has issued 'Draft Controls Governing Customs Procedures' as part of a consultation which ended on 28 October 2023.

Under this proposed all guidance on customs-related operations would be covered in a single unified document and would align closely with the articles in the GCC Common Customs Law and its implementing regulations. Areas covered have included required documentation when importing goods, inspection procedures, goods exempt from customs duties, when goods can enter Saudi without customs duties or be reclaimed by the competent tax authority, as well as circumstances that would lead to a seizure of the goods..

QATAR

CUSTOMS NOTICE

Qatar's General Customs Authority has issued a notice to travellers coming to the country. Travellers have been asked to follow the customs procedures which apply to personal luggage and gifts they have brought with them. Personal luggage and gifts brought with them must not exceed 3,000 Qatari Riyals, or its equivalent in other currencies. It must also be of a personal nature and in non-commercial quantities.

TRADE WITH TURKEY

Turkey's Trade Minister has announced a comprehensive trade and economic agreement with Qatar is expected to be finalised by the end of 2023. Under this agreement customs duties would be abolished.

OMAN

VAT E-INVOICING

The Omani Tax Authority has announced plans to introduce e-invoicing for VAT purposes and has issued a formal tender request. E-invoicing would be voluntary for taxable persons from April to September 2024 but would become mandatory as of October 2024. It is not yet clear if a post audit system or a clearance model will be used.

TAX EXEMPTION DECREE

A short law Oman Sultani Decree No. 80/2023 On Tax Exemption has been issued. It states the Finance Minister will be responsible for tax exemption wherever it is mentioned in legislation.

KUWAIT

BUSINESS PROFIT TAX

According to local press reports the Kuwaiti government is studying a proposal to introduce a Business Profit Tax (BPT) at 15% on the profits of all legal entities operating there, except small businesses. Details are limited but it appears BPT will be applied in two phases. Phase one will take effect on 1 January 2025 when BPT will apply to large Multinational Enterprises (MNEs) with turnover over €750 million. Phase two will take effect from 1 January 2026 and BPT will then apply to all other legal persons.

At this stage, it has been suggested all existing direct or corporate taxes in Kuwait would be eliminated as a result of this change. It is understood there is also a proposal to exempt small businesses from BPT but no threshold for this has yet been announced.

During a recent parliamentary discussion, the Ministry of Finance clarified that it was currently studying policy options for Kuwait to collect any taxes payable by Kuwait MNEs in-scope for the OECD's Pillar Two initiative.

A special governmental committee has been set up to discuss the Proposal.

IN BRIEF

UAE: The Federal Tax Authority (FTA) has issued a guide on Non-Resident Persons from a Corporate Income Tax perspective...

UAE: The Federal Tax Authority (FTA) has issued CTGACS1 on Accounting Standards and Interaction with Corporate Tax...

Saudi Arabia: Phase 9 of the e-invoicing system is to be introduced and taxpayers whose revenues is subject to VAT over 30 million Riyals during 2021 or 2022 will need to have changes in place by 1 June 2024...

Saudi Arabia: The deadline for a fine cancellation and penalty exemption initiative for taxpayers who have submitted all required tax returns and made all required payments has been extended to 31 December 2023...

Qatar: The Cabinet has approved a Cabinet Decision amending Qatar Cabinet Decision No. 18/2011 on the nomination of the President and Members of the Tax Exemption Committee,organising its work and determining its remuneration...

Oman: Oman Decision No. 521/2023 has added a new Article 196 (bis) to Oman Decision No. 53/2021 which has brought in changes on VAT paid by charitable organisations on their procurement...

Bahrain: The Assistant Under-secretary for Aviation and Aircraft Safety and Security at Bahrain's Transportation and Telecommunications Ministry has announced all aircraft items will be exempt from custom fees, as will all aircraft equipment....

Bahrain: Two business owners who were found guilty of excise tax evasion on e-cigarette cartridges have been fined 116,309 Dinars and 4,262 Dinars respectively and ordered to pay the unpaid tax...

Egypt: Egypt Ministerial Decree No. 4283/2023 extending the validity and enforcement of Egypt Ministerial Decree No. 1801/2023 on the exemption of some imports to customs ports, accompanied by passengers entering Egypt from abroad, from customs tax and other fees except for VAT has been issued ...

FOCUS ON RELATIONSHIPS

There are now two categories of related entities prescribed in UAE tax law, where the relationship level between parties plays a key role in the tax analysis and tax consequences. These are the Related Party and the Connected Person. A Related Party is a concept recognised for VAT and Corporate Income Tax purposes, although the term is defined differently in each of the regimes, whereas the Connected Person is a concept which only exists under the new UAE Corporate Tax regime.

RELATED PARTY TRANSACTIONS

Under Article 1 of Federal Decree-Law No. 8/2017 on Value Added Tax) and Article 9 of Cabinet Decision No. 52/2017 (the VAT Implementing Regulations) a Related Party is defined as two or more persons who are not separated on the economic, financial, or regulatory level, where one can control the other either by law or through the acquisition of shares or voting rights. Furthermore, the VAT Implementing Regulations limit Related Parties only to legal persons for tax grouping purposes and have a more detailed description of the required level of connection between parties. This requires for example, 50% of the voting interest in each of those legal persons, achieving a common commercial objective, or having common shareholders or economic ownership. Being a Related Party is one of the requirements when tax grouping legal persons. In addition, being a Related Party for VAT purposes has another interesting consequence on the value of supply for transactions concluded between Related Parties. Under Article 36 of Federal Decree-Law No. 8/2017, if the value of a supply between Related Parties is below the market value and the recipient of the supply does not have the right to fully recover input tax on this purchase (i.e. treating the VAT charged as a permanent cost) then VAT is calculated based on an assumption that the value of the supply between parties is equal to the market value. This provision has been introduced to prevent the artificial lowering of prices between Related Parties and to decrease the permanent cost of unrecoverable input tax.

On the other hand when it comes to corporate income tax rather than VAT, Related Parties are defined more broadly as they cover both juridical and natural persons. The definition states they include two or more natural persons related within the fourth degree or kinship or affiliation (including by adoption and guardianship); a natural person and a juridical person where the level of ownership interest in a juridical person by the natural person (or their Related Parties) equals 50% or more, and this extends to voting rights, the composition of the Board of Directors, entitlement to the profits, or significant influence. Related Parties will also include a natural or juridical person and their Permanent Establishment or Foreign Permanent Establishment; partners in the same unincorporated partnership, or a trustee, founder, settlor, or beneficiary of a trust or foundation and its Related Parties.

CONNECTED PERSON TRANSACTIONS

When it comes to Corporate Income Tax in the UAE there is also another concept which needs to be considered. Article 36 of Federal Decree-Law No. 47/2022 introduced the concept of a Connected Person into UAE tax law. This is a person who is either the owner of the taxpayer; director or officer of the taxpayer; or a Related Party to an owner, director or officer of the taxpayer.

It is then explained that an owner is a natural person who directly or indirectly owns an ownership interest in or controls the taxpayer. However, no further guidance has been provided on who will be considered to be a director or an officer of a taxpayer. According to Article 36(3) of Federal Decree-Law No. 47/2022, the owner is a natural person who directly or indirectly owns an ownership interest in the Taxable Person or Controls such Taxable Person. So, it is important not only to determine whether the owner has an ownership interest but also whether they exercise control over the Taxpayer. Interestingly, exercising significant influence over the business or affairs of the Taxpayer is recognised as control. So for example, if a natural person grants a significant loan to the Taxpayer through which it can influence the Taxpayer's affairs, a lender of this type is likely to be considered as the Connected Person to the borrowing Taxpayer.

INTERACTION BETWEEN THESE CONCEPTS

Transactions with Related Parties and Connected Persons need to be performed in compliance with the arm's length principle (ALP) but not all of them need to be included in the transfer pricing documentation. Ministerial Decision No. 97/2023 limits transactions that have to be included in the local file for transactions with Resident Related Parties to those made with exempt persons, taxpayers that have elected to benefit from the Small Business Relief and entities that are applying a different tax rate than the other party (e.g. a Qualifying Free Zone Person). Transactions with natural persons, and juridical persons acting as partners in Unincorporated Partnerships (assuming that the independence test is passed for both categories) also do not need to be included in the local file for Transfer Pricing purposes (although pricing needs to comply with the ALP). Lastly, transactions with the permanent establishment of the Non-Resident Person (e.g. a branch of the foreign entity) do not have to form part of the local file under the condition that both the Taxable Person and this permanent establishment are subject to the same Corporate Tax rate.

Failing to observe the ALP between Related Parties or Connected Persons may result in adjustments in taxable base made by the tax authorities during the audit. Another consequence of being a Related Party for corporate income tax purposes results from the application of Article 31 of Federal Decree-Law No. 47/2022 on the specific interest limitation rule. Generally, a taxpayer can deduct net interest expenditure up to 30% of EBITDA or 12 million AED, whichever is higher. However, this deduction cannot be applied if the interest expenditure relates to a loan obtained from a Related Party for the purpose of dividend or profit distribution to a Related Party; a redemption, repurchase, reduction, or return of share capital to a Related Party, a capital contribution to a Related Party or the acquisition of an ownership interest in a Person that is related or will become related as a result of the acquisition.

However, these restriction can be lifted if the taxpayer can prove to the tax authorities that the main purpose of the loan or transaction was not to gain a corporate tax advantage. Meanwhile, Article 36 of Federal Decree-Law No. 47/2022 has introduced certain restrictions that apply to Connected Persons.

In this case, the restriction applies if the payment made to the Connected Person is not incurred wholly and exclusively for business purposes and if its value does not correspond with the market value of the service or benefit received in return for the payment. In other words, this provision blocks the well-known method of decreasing profits by paying out material amounts to directors for management services (or directors' fees), where the benefit obtained or valuation of the services rendered is always debatable.

However, it should be noted this restriction does not apply to taxpayers who have shares traded on a stock exchange market or entities which are subject to the regulatory oversight of the competent governmental authority.

Therefore, proper determination of Related Parties and Connected Persons is required under the Corporate Tax provisions to correctly apply transfer pricing rules and potential deductions (general net interest expenditure deduction and deductions of payments made to Connected Persons).

Taxpayers can mitigate the risk of their tax treatment of transactions with Related Parties or Connected Persons being challenged by preparing proper documentation and comparability studies that sometimes can pose a challenge for in-house teams.

This article was written by Patryk Karczewski, Partner, Amereller.

TAX PROFESSIONAL PROFILE

GROUP HEAD OF TAX – CONGLOMERATE

DIVERSE APPROACHES

John O'Leary, Group Head of Tax at Ghobash Group, discusses the challenges of working in a group where diversification is a key strategy.

ABOUT YOU

After completing a Bachelor of Business Studies, I received a Masters of Taxation from the University of Limerick. I then went to work for Ernst & Young in Dublin, where I qualified as a Chartered Accountant with the Chartered Accountants of Ireland. Training to be an accountant at night while balancing work commitments with EY during the day prepared me for the grit, determination and focus needed in the corporate world today. It required time management skills, structure and the ability to prioritise, which are attributes that have become more crucial as my career has progressed. At EY Ireland I gained great experience as Ireland is home to the largest multinational corporation HQs in the world. The standards set by the E&Y partners on these multinational corporation (MNC) accounts, taught me a lot about minimum requirements in terms of professionalism, responsiveness, and quality. In 2018, I moved to the Middle East and spent almost four years with Aramex UAE.

From a development perspective, there is no substitute for working in a global multinational corporation. In Aramex I was exposed to 50-plus tax jurisdictions which educated me on the different policies and practices of the various tax systems. As one of a few groups back in 2018 to have a fully-fledged tax team located in the region, Aramex was ahead of its time. I watched VAT implementation play out, along with the development of the transfer pricing policy and global corporate income tax planning there. The tools and lessons I learnt from working in that environment and tax function are important in the work I do today. After leaving Aramex, I had a brief stint in the crypto world where I led the tax function at BitOasis. I stepped into a start-up company on a scale up journey. Having come from a stereotypical finance team background, it was interesting to see the different working parameters and behaviours in the business. It was a difficult transition to make at the start, but the energy and enthusiasm brought much needed positivity to my day-to-day routine. If I am ever given the opportunity to lead a company in the future, this experience would certainly shape the culture I would set for the better.

At the start of 2023 I moved on to the Ghobash Group where I am the Group Head of Tax. Ghobash

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Group is a UAE family conglomerate which was established in 1981. It employs nearly 2,000 people across seven different sectors - technology, energy, healthcare, chemicals, business-to-consumer, real estate and investments. The Group has a presence in the UAE, Saudi Arabia, Oman, India, Kenya, Indonesia, Kuwait and Iraq. Our business has strong partnerships with world class international brands. My role involves managing all Ghobash Group tax matters. On a day to day basis I work alongside the Group's various finance and legal teams in order to ensure compliance and well-being in all areas of tax. Diversification is one of the main growth strategies being defined by our Group's leadership. We believe that our businesses can grow through increased market penetration, market development, product development, and diversification.

Our Group has diversified its activities to achieve strength and stability throughout different economic cycles and to benefit from synergies between the diverse activities.

This in turn requires additional tax planning as well as managing and maintaining sophisticated systems and processes which are able to support the various tax treatments which are appropriate to our different supplies.

PREPARATION

Like most tax professional in the region, I have been managing the implementation of the new UAE Corporate Income Tax Law, Federal Decree-Law No. 47/2022 and monitoring BEPS Pillar 2 updates worldwide.

These two areas are among our biggest challenges at the moment. We have been navigating the latest decisions and guides released by the UAE Ministry of

PRACTITIONER PERSPECTIVE

Mithilesh Reddy

Senior Partner - Transfer Pricing,SBC Tax Consulting LLC

UAE corporation tax kicks in for most businesses from 1 January 2024, Mithilesh Reddy of SBC Tax Consulting LLC looks at the key actions to be taken before the tax period begins.

Federal Decree-Law No. 47/2022's introduction of 9% corporate income tax has been a significant change in the UAE's fiscal landscape. Businesses operating there face this tax on taxable profits, effective from their first financial year starting on or after 1 June 2023. For the many businesses which align with the Gregorian calendar year, their first tax period will begin on 1 January 2024. Conducting a comprehensive Corporate Income Tax impact assessment is a crucial part of this. This includes an evaluation of restructuring options, free zone reliefs, forming a qualifying group, Place of Effective Management (POEM), Permanent Establishment (PE) deductions, and exemptions, followed by implementation. Businesses may explore the availability of reliefs in the context of restructuring to optimise their tax position while aligning with the Corporate Income Tax Law's provisions.

This assessment must extend beyond the immediate financial implications to encompass the broader effects on business operations and group structures. In addition, the interactive relationship between Corporate Income Tax, transfer pricing policies, and VAT needs careful consideration in order to avoid unintended consequences. Federal Decree-Law No. 47/2022 mandates registration for every taxable person with the Federal Tax Authority (FTA), but certain entities are exempt. Businesses contemplating liquidation or those effectively managed outside the UAE must review their group structures to align with these registration requirements. Businesses operating in the Free Zones (FZs) are also eligible for a 0% corporate tax rate. However, the criteria for being classified as a Qualifying Free Zone Person (QFZP) is not straight forward, and firms operating in Free Zones should not presume that they will automatically fulfil these requirements. Therefore, entities in the freezones should check their presence and profile in order to guarantee compliance with all requirements by 1 January 2024. In particular they should check they have examined the advantages and disadvantages of being eligible for the standard 9% Corporate Income Tax regime compared to those if they were to remain in the regular freezone regime. They should also evaluate and consider the strategy if any modifications are necessary to areas including transactions, pricing, intercompany agreements, and paperwork, in order to fulfil all requirements. A Group's tax profile is influenced by its holding, financing, investment, and operational structure. It can also affect its capacity to carry out certain elections such as grouping, or whether tax applies to specific sources of income, such as dividends and profits. It is also important to assess if the legal entity structure leads to any inefficiencies in terms of corporate tax or restricts potential, such as the ability to join a tax group. The financing structure should also be assessed to see if this gives rise to possibilities or concerns, such as a limitation on interest deductions, or non-deductible capital. It is important to identify and implement any necessary adjustments which might involve streamlining redundant entities or structures bearing in mind potential implications under the General Anti-Abuse Rule (GAAR). Arm's Length Pricing for intra-group transactions should also be considered. Meanwhile with Transfer Pricing the key considerations before the first tax period will be the identification of related parties and review of related party transactions. It is also necessary to consider the formulation of a group vis-à-vis entity-wise transfer pricing policies.

In addition, it is also necessary to ensure Arm's Length Price (ALP) compliance for the transactions with related parties.

There should also be careful allocation of cross charges by adding mark ups. Any excessive payments to Key Managerial Personnel (KMP) will need careful consideration. Entities should also undertake any year-end transfer pricing adjustments in accordance with transitional rules. This is crucial and requires opting for practices that are widely applied and accepted globally. Intercompany agreements should also be drafted in such a way that they have a clear description of the roles and responsibilities of the parties entering the transaction.

Transitioning from a non-tax period to a Tax Period is a complex process, particularly when it comes to the treatment of opening balance sheets, provisions in books created before the Tax Period, deferred taxes, items requiring realisation accounting, and rules for immovable properties, intangible assets, and financial assets recorded at cost.

It is important to engage with auditors so it is possible to evaluate the closing balance sheet and review provisions for potential tax implications.

For example, if a company has significant intangible assets it may be possible to ensure compliance with the transitional rules and avoid adverse tax consequences, if this approach is taken.

Finance (MOF) which along with Federal Decree-Law No. 47/2022 have occupied most tax professionals' year. As we approach the end of the year, most groups now seem to understand how their taxability will operate from 1 January 2024. While UAE groups have been computing impact assessments and using the vast amounts of information which have been made available throughout the year as a results of events, webinars and tax days, I have found one of the more important aspects has been to ensure all our internal teams across the business are aligned.

This provided greater clarity on the necessary preparations and effects to meet our group's specific business needs

ANY QUESTIONS?

WHO IS LIABLE FOR RELATED COMPANY TAX

Mahmoud Abuwasel of Wasel & Wasel explains the view the UAE Federal Supreme Court has recently taken on this question.

A recent as yet unreported UAE Federal Supreme Court ruling considered the tax position where a subsidiary had a unique identity in terms of its name, domicile, and nationality, which was distinct from its parent company. This independence was critical when looking at the subsidiary's tax position. Traditionally, corporate tax law operates based on the principle that each legal entity is responsible for its own taxes. This clear demarcation of the subsidiary's identity, means its tax obligations are assessed based on its own transactions and operations.

This separation is a key point in multinational companies, where subsidiaries in different jurisdictions may be operating under a variety of different tax regimes.

The UAE Federal Court's ruling in this case has acknowledged this diversity and reinforced the principle of separate legal identity, which means a subsidiary's tax liabilities are isolated from those of its parent.

CASE QUESTION

This case involved a parent company which was based in Europe and a branch of the foreign parent company in the UAE. Transactions were taking place in the UAE and in Europe.

What was challenged in the case was whether the goods which had been sold in Europe and were also received by clients in Europe but were then exported to the UAE by the client and separately serviced in the UAE would oblige the UAE entity to pay taxes on the sale of the goods in Europe.

THE TAX EVENT LOCATION

The location of the 'tax event' was central to the decision. This was a new test and has significantly altered the position on tax liabilities. When a tax event, such as a sale or supply of goods or services, occurs within the UAE, the entity involved in this transaction within the UAE will be the one which is held liable for the corresponding taxes. This liability is based on the principle that economic activities within a jurisdiction also generate tax obligations in that jurisdiction. However, if the tax event occurs outside the UAE (say in Europe as was the case here), the tax liabilities will not automatically transfer to related entities within the UAE. This is because of the recognition of each entity's legal independence. So for example, a subsidiary operating outside the UAE, involved in a tax event in its own jurisdiction, would bear its tax obligations, which would not automatically extend to its parent company or other related entities in the UAE. The Supreme Court stated, 'the legal personality of both companies must be respected, and it is not permissible to penetrate it or decide the liability of one for the tax debts of the other, except in exceptional cases… As by logical necessity, as long as the tax event has occurred, the tax assessment becomes based on the correct law'. This distinction highlights the importance of the tax event's geographical locus and its implications when determining tax liabilities in a globalised corporate framework.

TAX OBLIGATIONS

However it is still possible in certain exceptional cases, for one related entity to become liable for the tax obligations of another. This recent UAE Supreme Court ruling has introduced this possibility in situations which go beyond normal corporate operations. These exceptional circumstances may arise, for example, in cases where a strict adherence to the principle of corporate separateness would result in an unfair outcome. These special circumstances can include instances of tax evasion or unjust enrichment. In such cases, the legal veil which separates the two corporate entities can be pierced. This means that in cases where there is a complex corporate structure, where the formal separation of the entities might obscure the economic substance of transactions, UAE tax authorities may assess tax liabilities by looking beyond mere corporate forms. For example, this type of approach could be especially relevant when transactions have been designed in such a way in order to exploit the benefits of separate legal personalities so as to circumvent tax obligations. In such cases, the Court may consider the overall economic impact and intent behind the transactions, and then potentially hold one entity responsible for what were the tax liabilities of another. The significance of this judgment should be kept in mind particularly when multinational corporations are using sophisticated structures and strategies for tax planning. There is likely to be a more substantive assessment of tax obligations, where the actual economic substance and intent are given precedence over formal corporate structures.

Contributor
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