

UAE CORPORATE INCOME TAX – THE POSITION OF A FOREIGN COMPANY

PRIOR TO THE INTRODUCTION OF UAE CORPORATE INCOME TAX, WHICH CAME INTO EFFECT ON 1 JUNE 2023, HAVING A UAE RESIDENT INVOLVED IN THE MANAGEMENT AND CONTROL OF A FOREIGN ENTITY WAS NOT AN ISSUE.

However, with the release of the latest ministerial and cabinet decisions, a foreign company has to be mindful of its connections to the UAE, specifically when it comes to concepts such as “permanent establishment” and “place of effective management”, as these factors may now cause such foreign entities to fall within the scope of UAE corporate income tax.

EFFECTIVE MANAGEMENT AND CONTROL

Article 11, sub-paragraph 3(b) of the Federal Decree-Law No. 47 of 2022 provides that when a foreign company is effectively managed and controlled in the UAE, it is a resident and therefore taxable person in the UAE.

To determine where a company is effectively managed and controlled, it is generally the location where the key decision makers, such as the directors, make the strategic decisions affecting the company.

In the Explanatory Guide published in May 2023, the Ministry states that it “is where key management and commercial decisions concerned with broader strategic and policy matters necessary for the conduct of the company’s business as a whole are regularly and predominantly made and given.”

Other factors to consider are also the location of the bank account signatory, the location of the company’s board of directors (or any equivalent body), the location of controlling shareholders, the location of any other person or body to whom the decision-making powers have been delegated by the board of directors, or the place of residence of directors or executive management. There is no hard and fast rule, and the authority may assess on a case-by-case basis.

PERMANENT ESTABLISHMENT

Article 11, sub-paragraph 4(a) of the Federal Decree-Law No. 47 of 2022 provides that when a foreign company has a permanent establishment in the UAE, its income from such permanent establishment can be taxable in the UAE despite its non-resident status.

Article 14 of the statute to a large extent follows the principles provided in Article 5 of the OECD Model Tax Convention on Income and Capital. Generally, a foreign person has a permanent establishment in the UAE when:

- > It has a fixed or permanent place in the UAE through which its business is carried on; or
- > There is a person, not including an independent agent, who habitually exercises an authority to conduct business in the UAE on behalf of it.

PRACTICAL CONSIDERATIONS

Individuals in the UAE have a long history of using holding companies in tax neutral jurisdictions such as BVI, Cayman, Jersey for their personal wealth and investment planning needs. A typical structure includes a UAE resident individual as the sole shareholder and sole director of an offshore company, which holds an investment portfolio or private bank account in another non-UAE jurisdiction, such as Switzerland or the UK.

The UAE resident individual, as the sole director, makes all decisions concerning the strategic and overall commercial direction of the company. They also take on the responsibility of making all investment decisions for the company assets.

The question is whether such involvement of a UAE resident would create a risk of permanent establishment, or effective management and control, in the UAE and therefore put the foreign company in a position of being exposed to UAE Corporate Income Tax.

POSSIBLE OPTIONS

For those individuals looking to set up an offshore company to hold offshore bank accounts and assets, one option is to appoint an offshore corporate service provider from a jurisdiction outside the UAE, which would cause the place of effective management and control to be outside the UAE.

For UAE residents, using a DIFC Foundation could be another option that will not only allow the resident to make an application under Article 17 for the Foundation to be treated as an Unincorporated Partnership (and therefore exempt from Corporate Tax), but which will also allow the client to cater for succession planning, whilst still retaining an element of control over the decision making of the Foundation.

In addition to corporate directorship, UAE residents could also consider the holding of shares in a foreign entity by an offshore trust.

HOW TRIDENT CAN ASSIST?

Trident is one of the largest global offshore corporate service providers and can provide offshore corporate directorships from multiple jurisdictions, help establish and administer DIFC Foundations, and also establish trusts in 17 jurisdictions worldwide.

Trident is also able to assist clients with registration of foreign incorporated entities on the FTA portal. Please note that late registration or failure to register may result in penalties and fines from the Authority.

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