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Place of effective management and control: **Are UAE family groups at risk?**

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Background

In the ever-changing landscape of international business, groups headquartered in the United Arab Emirates (UAE) may have a regional/global presence through subsidiaries in the countries they operate. The management of those foreign subsidiaries may vary. Within some multinational enterprises (MNEs) and depending on the operations involved, the foreign subsidiaries may have local boards of directors and management teams and relative independence in terms of decision-making within broad group policies set by the headquarter.

On the other hand, the headquarter could set limitations of authority, thus limiting the decision-making autonomy of the subsidiaries. Especially in the context of family run/owned MNEs, a more centralized approach is sometimes observed, where foreign operations are influenced by the headquarter and/or main shareholder/shareholder family. Such influence is sometimes embedded in corporate governance documentation, but it can also be de facto, i.e., based on actual conduct of the headquarter/owners.

The question arises as to whether these UAE outbound businesses are at risk and, specifically, whether the foreign subsidiaries could be subject to UAE corporate tax.

Overview of the relevant tax rules

According to Article. 11 para. 3 of the Federal Decree-Law No. (47) of 2022 on the Taxation of Corporations and Businesses foreign subsidiaries are subject to worldwide UAE corporate taxation if they are **effectively managed and controlled** in the UAE.

The Explanatory Guide provides further (limited) guidance and states the following:

"Whether a juridical person is effectively managed and controlled in the UAE needs to be determined with regard to the specific circumstances of the juridical entity and its activities, with a key factor being 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. This will ordinarily be where a company's board of directors (or any equivalent body for other types of juridical persons) make these decisions. However, depending on the specific circumstances, other factors such as where the controlling shareholders make decisions, the location of another Person or body to which the board has delegated its decision-making functions, or the location where the directors or executive management of the juridical person reside may also need to be considered."

Deloitte's 3-step approach

In order to ascertain where the company is effectively managed and controlled, the following questions need to be investigated and answered:

WHAT?	WHO?	WHERE?
The first item which needs to be clarified is "WHAT?" the key management and commercial decisions of a particular company are.	The second element is "WHO?" within the business or outside the business takes these decisions.	Lastly, the question is "From Where?" these decisions are being taken.
Step 1	**Step 2**	**Step 3**
What are the key management & commercial decisions?	Who takes them?	Where are they taken predominantly?
Day-to-day decisions	Board/management	
Shareholder decisions	Someone else?	Place of effective management

Examination of all relevant factors and circumstances on a case-by-case basis

What constitutes key management and commercial decisions depends on the business being conducted and may vary. In some cases, the conclusion of a contract could be a key decision, whereas in another business, it may be the establishment of standardized pricing (but not the conclusion of contracts). Also, key commercial decisions need to be distinguished from shareholder decisions/rights and day-to-day management decisions. The latter are generally not relevant in determining tax residency. Shareholder influence does not typically constitute effective management as long as the local board/management independently makes its own decisions. However, particularly within the context of family groups, the lines between actual independence and undue influence can become blurred in practice.

Often, decision-making authority is vested with the board, executive committees or management teams depending on the governance in place and applicable company laws. However, in practice, actual decision making could take place by people outside those perimeters. Nominee directors of companies abroad do not have discretionary power to independently make decisions. The key is to focus on substance rather than form. Who ultimately has the decision-making power?

Once the above has been clarified, the question arises as to where the identified individuals regularly and predominantly make those decisions. There can only be one place of effective management. Tie breaker rules exist to determine the place of effective management where senior management operates from different location on a relatively permanent basis.

To the extent that you are UAE headquartered or use the UAE as a regional hub to manage companies in the region, you may want to consider reviewing the governance around managing the foreign businesses to prevent uncertain tax positions and risks. Depending on the findings, it is critical to define a roadmap as to how the deal with the risks identified.

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