Changing Tax Laws, Changing Strategies: A New Outlook for Tax Attorneys and Clients

Bessem Ben Salem

Director

Ben Salem Law Firm

ASPATORE

Background of Tax Law in the Middle East and Africa

The History of Tax Laws

As economic and financial barriers disappear, tax differentials in the Middle East and Africa have a greater impact on trade and investment flows. Consequently, tax policy is an increasingly important element of a country's policy framework to attract and promote investment. Indeed, the most important tax laws in the Middle East and Africa are those promoting investment. Therefore, the objective of most countries in this region is to provide an efficient tax framework for investment and non-discriminatory tax incentives.

The tax laws in most countries of the Middle East and Africa have their origin in an income tax based on the Islamic concept of "Chariaa" (i.e., Islamic laws). The name of this tax is not always the same from one country to another; for example, income tax was originally called "Majba" in the countries of North Africa such as Tunisia, and "Zaket" in the countries of the Middle East, at least until the end of the nineteenth century.

At the outset of the twentieth century, the colonization of most of the countries of the Middle East and Africa led to the origins of a modern fiscal system, characterized by rationalization and judicial regulations. In particular, the recovery of tax was organized with strict and accurate rules; such rules apply to the registration tax, the revenue stamp tax, tax on stocks and shares, tax on industrial and commercial profits, tax on professional earnings, and tax on salaries.

Enforcement of Tax Laws

In most countries of the Middle East and Africa, the fiscal system is declaratory, meaning the taxpayer declares the subject matter of taxation or basis of tax. Consequently, the tax laws, even in the fiscal sector, are enforced based on the legitimacy of the promulgation authorities. This means that, by virtue of constitution, the institution of any tax requires a law and is enforced by this virtue.

In most cases, the fiscal laws of this region provide for fiscal tax penalties, such as fines in case of default or misrepresentation in a tax return.

Recent Changes to Tax Laws

The most recent changes to tax law in this region were enacted to improve the effectiveness of regional tax systems. This has been done by eliminating tax measures that distort trade and investment flows, and by enacting measures that help prevent double taxation and counter tax fraud.

The primary motivator for the recent changes to tax law in the Middle East and Africa was the desire to create transparent and predictable tax systems that encourage investments through a tax base with the lowest possible rates, and one that avoids double taxation. Many of these changes were the result of timely consultations with the business community on tax matters. One example is the ratification of several international treaties to guarantee no double taxation.

Multinational companies have been able to easily adapt to changes in Middle Eastern and African tax law because the new laws provide many attractive business incentives. For example, most of the countries in the Middle East and Africa have now adopted the international fiscal treaties on double taxation and transfer pricing. The most current rules regarding transfer pricing and tax law are instituted based on the model fiscal conventions of the Organization for Economic Cooperation and Development and the United Nations Organization. To avoid double taxation and transfer pricing, the member countries of the Organization for Economic Cooperation and Development are currently harmonizing their tax laws to establish a regional Middle East and Africa tax policy and develop an effective tax system.

Current tax rules define fiscal residency in order to identify the applicability of national or foreign law in a given case. For example, in Tunisia, Article 2 of the Income Tax Code defines Tunisian residency for a physical person by giving criteria such as having their major habitation be in Tunisia for at least 183 days in the referral taxation year. The criteria for determining the nationality of a taxpayer has previously been derelict in most Middle Eastern and African nations.

All of the current rules, which are, in the majority of cases, international fiscal rules, address income tax and other assimilated taxes.

Helping Companies Comply with Middle Eastern and African Tax Laws

Our client strategy is based on providing assistance before the client makes an investment, in order to provide the client with the best possible tax policy framework. Having an understanding of the local tax laws before investing helps the client comply with the applicable laws.

The primary advice the client needs to receive before investing is how to take advantage of the tax rules in order to save the maximum amount of profits while still complying with the tax laws. Fortunately, the tax laws in this region are not difficult to comply with, as they are transparent. The only laws that may be difficult to comply with pertain to family and personal matters, such as the estate tax.

Generally, local taxes are complementary to regional taxes, as the rules for local taxes are promulgated by the same legislator.

Key Tax Issues for Clients

The tax issues that most clients in the Middle East and Africa are concerned with include:

1. The rate of a particular tax
2. Accommodation of the tax within the client's scheme of investment
3. New incentives
4. How to avoid tax penalties

The main issue regarding corporate tax law in this region is how to conform a firm's accounts to the region's tax laws. The most important aspects of Middle Eastern and African asset and equity taxation rules are the payment of registration tax and the tax on unearned increments. Non-compliance with asset and equity taxation rules generally results in a tax penalty, resulting from official assessment procedures.

The Legal and Judicial System for Tax Law

The legal system for the enforcement of tax law in this region is based on the evaluation of individual tax returns, with the possibility of an official

assessment in case of violation. An official assessment is subject to judicial recourse in Tunisia, for example. The judicial system has the ability to enact or confirm fines and official assessments in the case of a tax law violation.

Best Practices for Client Strategies

The Interview Process for New Tax Law Clients

When taking on a new tax law client in the Middle East and Africa, our interview process is based on:

1. Understanding the client's tax matter and real needs
2. Explaining how to comply with tax law to avoid the risk of a tax penalty
3. Assisting the client in preparing the best way to handle his or her case before the beginning of a procedure before the administrative or judicial authorities

The responses we receive during the interview process are used to develop a client strategy that is precise and accurate, as it is based on the client's real needs. For example, if the client is involved in a merger and acquisition transaction, we need to determine the consequences of their merger and acquisition deal in the local market.

Research and Analysis for Developing Client Strategy

I always complete extensive legal and judicial research and analysis in order to be in a position to answer client requests with respect to their tax strategy. Country specifics generally influence the strategy in terms of the specific laws promulgated for promoting investment, such as the incentive tax rules regarding investment, production, and trade in a particular nation. The client's industry also helps determine the tax strategy, as it may increase certain costs.

Overcoming Challenges

Challenges for companies that do the majority of their business across borders include finding ways to achieve the lowest possible production costs while paying the minimum amount of income taxes. In addition, we always strive to assist the client in trying to simplify their tax strategy to make it more effective. For example, we look for ways to help the client increase their capital gains while reducing the cost of their investment.

Complying with Tax Laws: The Client's Role

It is important for clients doing business in this region to establish individual and corporate audit programs in order to comply with the tax rules. Such programs can help the client stay in compliance with the tax laws, lower their risk of an official assessment, and realize their tax strategies.

The client can contribute to the development of an effective tax strategy by providing their attorney with accurate information that reveals their true financial capacity, and by respecting the local tax rules and issues. Likewise, during an investigation or audit, the client can help the procedure by providing accurate information and the needed documents, including all necessary financial statements, tax returns, and accounts.

Client Expectations and Compliance

Managing Client Expectations

A client's primary expectations with respect to their tax law strategies include payment of the minimum amount of taxes and the avoidance of tax penalties, and tax lawyers typically have the same expectations. Clients generally measure the success of their tax strategy by the tax rate they must pay. We have found that clients are currently dedicating all possible resources to tax law compliance, and those resource allocations are generally very effective.

We always recommend that clients take steps to respect all local tax rules and regulations. Understanding regional tax law helps prevent double taxation and counter tax fraud. Fortunately, our clients are very well prepared for handling the region's tax laws, as we provide them with a periodic memorandum on how to meet current fiscal law requirements and information on what is new in tax law. We find that local clients are typically better prepared than foreign clients to handle local fiscal matters, and they are generally more aware of the latest news on fiscal changes.

If a client is well prepared in terms of compliance with local tax laws, they will pay the minimum amount of tax, and will not have to pay any tax penalties. The biggest mistake many clients make in this area is to proceed with filing a tax return when they are not fully informed about the local tax laws. Again, we try to prevent such deficiencies by providing the necessary information at the appropriate times, through the sending of a periodic memorandum to our clients.

Violations and Enforcement Issues

Common Tax Law Violations

There are many categories of tax law violation in the Middle East and Africa; the most common are those relating to the applicable rate of value-added tax. This is generally because the taxpayer does not have sufficient information, and the applicable rate is not uniform. Industries most often involved in tax law violations include the computer and automotive industries. This situation is changing quickly as economic barriers continue to disappear.

During a tax law investigation, transparency in terms of offering a good-faith defense is particularly important.

Tax Law Violation Procedures

Tax penalties in the Middle East and Africa are handed down through the procedure of an official assessment. Proof of the tax law violation is required. It must be shown, for example, that there was an intention of violation. Approximately 20 percent of tax law investigations are fully enforced.

The lawyer can assist the client during the investigation and before the courts after the delivery of the official assessment. Throughout the process, it is important to focus on transparency in order to make evident good faith. All information is shared by communication between the investigator and the taxpayer.

A government investigation of a tax matter is typically a procedure of cross-checking the information provided by the taxpayer in their returns. The most common outcome of an enforcement proceeding for violations is payment of due taxes together with tax penalties. Our goal is to help the client pay the minimum amount of taxes and penalties in an investigation scenario.

Mistakes to Avoid

Tax violations most often become criminal violations when the taxpayer does not declare the value-added tax they have collected without paying the appropriate share to the government, and if there is false invoicing on the part of the taxpayer.

Mistakes in this area are most often based on ignorance of new regulations; the consequences of these mistakes include the payment of tax penalties and an official assessment. Mistakes can best be avoided by being informed about law modifications.

Conclusion: Looking to the Future

The areas of tax law that are currently changing the most in the Middle East and Africa are the investment and financial areas. The global economy has had a great impact on the changes that have occurred in this area. However, many changes in the law are simply a consequence of economic evolution.

I advise lawyers practicing tax law in this part of the world to always ask for local tax advice before handling a case in the Middle East and Africa region.

In the years to come, I believe financial tax law will be the most challenging area, as it continues its evolution (for example, with respect to the stock exchange). However, all areas of tax law will continue to change in order to promote investment in this region.

Cases, Statutes, Regulations

Regulations that are relevant to the matters covered in this chapter include the Investment Incentives Code in Tunisia: Synthesis of the Investment Incentives Code (Law n°93-120 December 27, 1993 - JORT n°99 of December 28, 1993). The Investment Incentives Code covers all the activity sectors, with the exception of mining, energy, domestic commerce, and the financial sector, which are governed by specific texts.

For industrial and service activities, projects are declared at the API's offices (at the one-stop window or at regional API offices). Nevertheless, certain activities must be authorized by the relevant ministry. The High Commission for Investment must approve certain non-totally exporting service activities for investment when foreign investors hold the majority interest in the company.

Certain common tax advantages foreseen in Articles 7, 8, and 9 of the Investment Incentives Code may be granted upon a simple request. Financial advantages may be granted by the relative minister's decision after the advantage-granting commission's opinion is received. Additional advantages may be granted after the superior Commission for Investment gives its opinion.

Bessem Ben Salem is the director of Ben Salem Law Firm. He studied law at the University of Paris II Panthéon-Assas and the University of Paris Nord, earning L.L.M. degrees in economic law and business law. He joined the Tunisian Bar Association in 1998, and he is a regular author on his areas of expertise.

Ben Salem Law Firm has experience in all aspects of project financing, banking and stock exchange, insurance, transportation, corporate and commercial practices, economic law, information and communication technology, intellectual property rights and trademarks protection, franchising, foreign investments, mergers and acquisitions, concession and privatization, securities, real estate law, international trade law, international contracts, taxation law, enforcement, arbitration, and litigation.