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In or Out of Scope? The Peculiar Case of Company Directors' Services under UAE and EU VAT

Halil Erdem (Head of Tax Strategy for Careem and Author of 'Fundamentals of GCC VAT Law') and Giorgio Beretta (Editor) (Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam; Lund University) · Wednesday, December 21st, 2022

Should services performed by a member of a board of directors towards the company of which s/he is a member be subject to VAT? This is a question that keeps many VAT legislators, authorities, and advisors around the world busy. It is an area that has seen numerous changes in tax policy, sometimes as a result of interventions by tax policy strategy makers such as the European Commission, or as a result of judicial court decisions. This article discusses the most recent change in VAT legislation in the United Arab Emirates (UAE) as well as the state of play in the European Union (EU).

Recent changes to company directors' services treatment under UAE VAT law

The change in the new UAE VAT law entails that, as of 1 January 2023, the performance of a (UAE) director's function, by a natural person and for a remuneration (monetary or in-kind), on a board of directors of any government or private sector entity, shall not be considered to be a supply of services for VAT purposes.

When it comes to the rationale for the described changes in VAT, unfortunately, there is no reasoning provided by the UAE Ministry of Finance and/or the FTA.

There is also no published UAE court case that might have led to such a change.

In the absence of any guidance provided, it might be helpful to look at recent developments under EU VAT in this area to put the provision at comment into a broader perspective. The relevant analysis is made later in this article after describing the legislative changes under UAE VAT.

UAE VAT treatment of company director's services prior to 1 January 2023

For the period till 1 January 2023,^[1] the general rule is that services provided by company directors, whether the function is performed by a natural person or a legal person, are considered to be services for [UAE VAT purposes](#) when a person conducts an activity regularly on an ongoing

basis and independently, in any location.^[2]

The total value of taxable supplies and imports made by the company director, not limited to director services, should also exceed the mandatory registration threshold of AED 375,000.^[3]

This approach to company directors' services aligns with the general VAT concept of economic activity and the taxable person definition in the [Unified VAT Agreement for The Cooperation Council for the Arab States of the Gulf](#) (GCC countries).^[4]

UAE VAT treatment of company director's services as of 1 January 2023

The amended Article 3 in the [Executive Regulation](#)^[5] introduces a new provision. It states that the functions of a member of a board of company directors, performed by a natural person appointed as director for any government entity or private sector establishment, shall not be considered a supply of services.

The new article only applies to company director services performed by a natural person, irrespective of whether they are being performed by a resident in the UAE. This amendment does not extend to a legal person, whether private or public, who may delegate a natural person to act as a director in its own name.

Noteworthy is that only the services performed in the formal capacity as a company director can be excluded from the qualification of '*supply of services for UAE VAT purposes*'. Other services performed by a third-party natural person who is not a director during the meetings of a board of directors will still be considered to be supplies of services for VAT purposes and taxable according to the general UAE VAT rules.

In other scenarios, where the services are provided by company board directors who are not resident of the UAE, these services will also be excluded from the supply of services qualification for UAE VAT purposes and the reverse charge mechanism will not apply, or there will not be any registration obligation in the UAE for VAT purposes for non-resident natural persons.

Transitional rules, deregistration and rationale for UAE VAT changes

Natural persons providing services as company directors on a board of directors should review their tax obligations before and from 1 January 2023.

The date of supply rules in the VAT legislation and the VAT public clarification '*Date of Supply for Independent Directors*' will be instrumental in determining the tax obligations.^[6]

As a result of the amendment, natural persons not meeting the requirements^[7] for mandatory VAT registration anymore should deregister for VAT purposes.

Directors' services by natural persons under UAE Corporate Tax

A question might also arise on what the change in the UAE VAT Regulations and the exclusion of company directors' services from the scope of VAT means for the taxability of these services by natural persons under the recently published [UAE Corporate Tax \(CT\)](#).^[8] Will the exclusion for VAT mean that these services are also not taxable for CT purposes?

Although more clarifications will be published by the FTA and more details will be known to the public in UAE Cabinet Decisions, it can be assumed that the directors' services might fall under the 'business' definition in the new legislation:^[9] *'Any activity conducted regularly, on an ongoing and independent basis by any Person and in any location, such as industrial, commercial, agricultural, vocational, professional, service or excavation activities or any other activity related to the use of tangible or intangible properties'* and that natural persons are covered by the definition of a 'Person': *'Any natural person or juridical person'*. In short: a natural person conducting a business as defined in the legislation can be subject to UAE CT. This should be determined on a case-by-case basis.

Whilst all conditions in the business definition are important, we emphasise that the condition of conducting a business 'independently' might require extra attention. The reason for this will become evident in the following paragraphs, where the terminology 'independently' played a crucial role under EU VAT case law. Under normal circumstances, comparing definitions in different legislations covering different taxes is not a route tax practitioners take for predicting the tax determination. However, when you look at the 'business' definitions in UAE VAT and CT, you will notice that the two definitions are identical. In other words, facts that play an important role in determining UAE VAT and clarifications obtained for UAE VAT can shed some light while determining liabilities for other taxes (namely, UAE CT).

Treatment of company directors' services under EU VAT

EU VAT is silent on the VAT treatment of activities performed by a member of a board of directors towards the public or private company of which s/he is a member. No specific provision is contained in [Article 9 of the VAT Directive](#), which deals with the concept of 'taxable persons' for EU VAT purposes. The [VAT Implementing Regulation](#) is also agnostic about this issue.

Some indications on how to deal with company directors' services can be retrieved from other sources of EU VAT law. Notably, the VAT Committee's guidelines provide the following as regards services supplied by company directors: *'[...] services supplied by a legal person as a member of a company's board of directors should be regarded as economic activities carried out independently within the meaning of Article 4(1) and (2) [of Council Directive 77/388/EEC, now Article 9(1) of the VAT Directive] and that they should therefore be subject to VAT'*.^[10] However, the VAT Committee has not (yet)^[11] been entrusted with implementing legislative powers, and its guidelines are not legally binding on tax authorities and taxpayers.

CJEU's VAT case law on company directors' services

The Court of Justice of the European Union (CJEU) has also approached the VAT treatment of

company directors' services. More specifically, in *IO (TVA – Activité de membre d'un conseil de surveillance)* (C-420/18), the CJEU considered that a member of the supervisory board of a foundation did not carry out an economic activity independently, so that that individual was not a taxable person performing VAT-relevant activities.

In that case, the CJEU found no employer-employee relationship between the foundation and the member of its supervisory board. Accordingly, [Article 10 of the VAT Directive](#), which excludes 'employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability', could not apply to the case of a member of a supervisory board.^[12]

Nevertheless, the CJEU reasoned that the supervisory board's member did not act in his own name, on his own behalf or under his own responsibility, but on behalf of and under the responsibility of the supervisory board. The individual member also did not bear the economic risk arising from his activities, since he received a fixed remuneration which did not depend on his meetings or hours actually worked. As such, the supervisory board's member did not carry out an economic activity 'independently' within the meaning of [Article 9 of the VAT Directive](#).

The CJEU based its reasoning on a close examination of the role and functions performed by a supervisory board member. Apparently, the EU Court considered it relevant that the supervisor board's member acted as an instrument of the foundation and/or its supervisory board.^[13] This approach finds further correspondences in the precedent CJEU's case law, notably, in *Heerma* (C-23/98), where the EU Court implicitly referred to what is usually termed as the 'organic theory' of directors under company law.^[14] Previously, Advocate General (AG) Van Gerven expressed similar views in his opinion in *Polysar* (C-60/90).^[15]

Besides the CJEU's case law, the Supreme Court of the Netherlands (*Hoge Raad*) also applied an essentially equivalent reasoning with reference to the activity of a member of a public advisory committee in a decision issued in June 2020, after the CJEU's judgement in *IO (TVA – Activité de membre d'un conseil de surveillance)* (C-420/18).^[16]

Company directors' services: in or out of the scope of EU VAT?

Based on the considerations above, it might be assumed that activities by a board of directors shall remain outside the scope of VAT, since those activities must be viewed not as activities belonging to the individual materially carrying them out but as acts performed by the company itself. To translate this idea in EU VAT terms, a member of a board of directors lacks the capacity to act as a taxable person while performing duties on behalf of the company of which s/he is a director (although s/he might have taxable person's status and capacity for other activities).^[17]

Still, the VAT treatment of company directors' services under EU VAT remains unclear. EU Member States might adopt different approaches in this regard due to non-harmonised national company laws.^[18] It shall not be surprising that a case on the VAT treatment of company directors' services is pending before the CJEU. In its preliminary reference, the national court seeks

clarification on whether a member of the board of directors of a public limited company incorporated under Luxembourg law acts as a taxable person and, in such a role, whether s/he provides VAT-relevant activities to the company.^[19]

Comparison of company directors' services under UAE and EU VAT

From the comparative analysis carried out above, it can be concluded that company directors' services are excluded from the scope of VAT both in the UAE and the EU.

However, the authors note differences in how UAE and EU VAT law achieved this result. The UAE has decided to legislate on this issue, clarifying that company directors' services are irrelevant for VAT purposes.^[20] This implies that a company director acting only in such a capacity shall no longer be registered for UAE VAT purposes. Instead, EU VAT does not contain any provisions regarding the treatment of company directors' services. However, the VAT Committee and particularly the CJEU have analysed this issue in several cases.

There is a further (more substantial) point of departure in the treatment of company directors' services under UAE and EU VAT. This difference relates to the fact that UAE VAT (Article 3(2) of the amended **UAE VAT Regulation**) provides that *'functions of a member of a board of directors ... shall not be considered as a supply of service'*. Therefore, the exclusion from the scope of VAT applies at the level of the 'taxable transaction'. Under EU VAT, based on the CJEU's case law, the exclusion from the scope of VAT of company directors' services instead follows from those activities being carried out by an individual not acting independently and therefore not in a capacity of a 'taxable person'.

UAE VAT law can essentially be considered a legal transplant of EU VAT law.^[21] And yet, even if stemming from the same roots, the two branches might take different development patterns, as the peculiar case of company directors' services shows.

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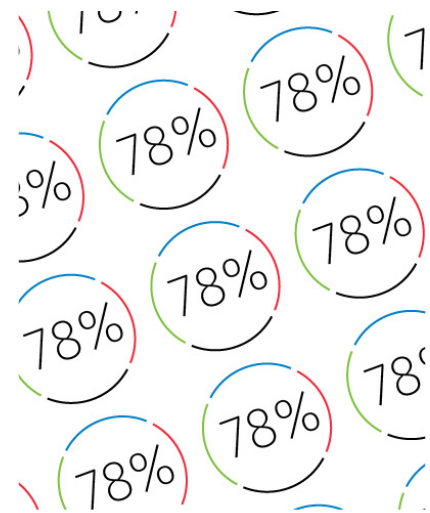
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