

VAT Alert H1 2018



Transfer of Business as Going Concern

Within groups of companies in the UAE, it is common to transfer assets from one company to another either for commercial or corporate structuring purposes. Prior to the introduction of VAT in the UAE, businesses had to look at the impact on their financial reporting (IFRS) and the requirements from the relevant licensing authorities in the UAE. With VAT Laws in effect, businesses need to take this aspect into consideration.

If the transfer of asset happens within a tax group, then the VAT aspect can be disregarded. Things may get more complex if the asset transfer happens between entities that are not part of the same tax group.

In principal, the transfer of a Business from a Person to a Taxable Person for the purpose of continuing the Business is not subject to UAE VAT. The transfer of assets may be part of a Business transfer and fall under this category. In such case, businesses should not have any concern as to its VAT impact. This possibility, however, does not come without its own challenge and it shall be the burden of the businesses to provide the evidence that such transaction is not considered a Supply under the UAE VAT Law.

In the absence of such clarification, one may take the approach from other jurisdictions where VAT has been implemented for decades and this may include the following points:

- The transferred assets must be part of a continuing Business and after the transfer is completed, the Business shall continue to be active
- After the transfer is completed, the assets shall be used to operate the same type of Business
- It must be the assets of the transferred Business

Insufficient or incorrect documentation may expose both the seller and the buyer of the assets to incorrect VAT reporting as well as repayment of due taxes including applicable penalties.

VAT is not for Foreign Businesses

As an indirect tax, the UAE VAT is meant for the final consumers who are consuming goods and services in the UAE although the collectors of the tax are UAE and overseas businesses which are registered for VAT in the UAE.

Having said that, there have been many questions and queries from foreign resident businesses and individuals in regard to the VAT amount paid to UAE suppliers. In order to facilitate the government vision of attracting more tourists both for pleasure and business, the UAE VAT Laws have provided possibilities for tourists and non-resident businesses to recover VAT paid to UAE suppliers. The procedures for non-resident businesses are already made available by the FTA on their website but we are still waiting for clarity as to the refund for the VAT paid by tourists.

In regard to foreign businesses, it is crucial to note the following points to assess their eligibility in recovering the input VAT paid in the UAE:

- The foreign business
 - has no Place of Establishment or Fixed Establishment in the UAE or the Implementing GCC States, and is not a Taxable Person
 - is carrying on a Business and a registered establishment with a competent authority in the country of origin
- The foreign business does not carry out any supply that has its place of supply in the UAE and the recipient of the supply cannot reverse charge the supply
- The input VAT shall be recoverable if it was paid by a VAT registrant in the UAE
- The country where the foreign business is registered shall have the same treatment for UAE businesses
- The foreign business shall not be a foreign tour operator undertaking the activities as a tour operator
- The minimum VAT to be claimed is AED 2,000 and the period of the claim shall be 12 calendar months

Guide for Director's services fee

Individuals who are residents of the UAE, and members of a Board of Directors (BoD) shall assess whether the related remuneration is subject to VAT. This is applicable for being a member of a BoD for UAE and foreign companies. Before deciding whether or not the individual shall charge VAT on the directorship remuneration, the VAT registration threshold test shall be conducted. A non-VAT registrant cannot collect due VAT and remit it to the FTA.

In general, VAT is applicable when there is a supply and a consideration, whether it is monetary and/or non-monetary. Thus, it is crucial to have documentation establishing the nature of the supply for the remuneration received by the individual. This is especially critical if the individual has any other roles within the company, apart from being a member of its BoD, such as employee or shareholder.

If the individual is a VAT registrant and the nature of the service is providing directorship services -which of course must be supported by the relevant documentation - then the next stage is to determine which VAT rate is applicable for the supply. In general, directorship services is a taxable supply which can have a VAT rate of either 0% or 5%.

Currency for Tax Invoices

As per the UAE VAT Law, a tax invoice shall be stated in AED currency and the exchange rate, if applicable, shall be the exchange rate published by the UAE Central Bank on their website (https://www.centralbank.ae/en/index.php?option=com_jumi&fileid=61&Itemid=59). For the tax invoice (non-simplified version), a VAT registrant needs to ensure that the amount payable per item is also converted to AED.

It is our understanding that the purpose of unifying the currency and its exchange rate is to avoid the variation of reported figures by both the supplier and the recipient of supply. This unification, however, can pose administrative and commercial challenges for businesses that have their contracts in currencies other than AED. This is especially true for industries where it is a norm to transact in other currencies. Thus, it is recommended for such businesses to communicate with the FTA to seek clarification before deciding to issue tax invoices other than the one prescribed by the UAE VAT Law.

Let's talk a bit more about Tax Grouping

Forming a Tax Group is a VAT registration possibility which offers several benefits for groups of companies in the UAE. In practice, it is recommended that groups of companies opt for tax group registration instead of individual tax registration whenever possible.

Although the FTA has already stated the conditions for forming a tax group in the Executive Regulations on VAT in November 2017 and further clarified in them in the Tax Group User Guide in February 2017 as well as in the Taxable Person Guide in March 2018, there are still many topics to be addressed by the FTA.

Therefore, the FTA has recently published a "Tax Groups Guide" which raises certain issues not discussed before. Some of the clarified points, which we have seen to benefit our clients, are covered in the next paragraphs:

- As the UAE is a hub for international businesses, foreign companies operate through their subsidiaries or branches in the UAE to cater to the needs of the local and regional market.

In practice, two or more subsidiaries or branches of a foreign company in the UAE may apply for Tax Grouping where they fulfil the required criteria (e.g. business criteria, legal person criteria, establishment criteria, related parties criteria) although they do not share the exact same shareholding structure.

From now on foreign entities may apply to be included in the Tax Group under fixed establishment criteria. This type of registration may have a positive impact on the cash flow of the members of the Tax Group within or outside the UAE.

- The FTA also reconfirmed that natural persons cannot be registered as a member of a Tax Group.

According to the UAE VAT Law, the definition of a 'Person' is

very broad and includes any legal or natural person. As such, all types of persons, including individuals can be registered for VAT purposes if they fall under the definition of “Taxable Person” in the UAE.

However, in the Tax Groups Guide the FTA has highlighted that there is no option for a natural person to be a part of a Tax Group. The FTA has clarified that an applicant shall meet a legal person criteria.

- Finally, the Tax Groups Guide specifies that the FTA may oblige legal entities to register or deregister as a Tax Group for VAT purposes.

Where a group of companies in the UAE artificially separate business interests to avoid the full implications of VAT, the FTA may forcibly register them for VAT purposes as a Tax Group.

On the other hand, where there are serious grounds to consider that the Tax Group registration has caused a Tax Evasion or significantly decreases tax revenues or increases the administrative burden on the FTA, then such Tax Group may be dissolved by the FTA.

In conclusion, a group of companies operating in the UAE shall assess carefully before deciding to apply for a Tax Group as it is not voluntary in nature.

One less reason to decline a Tax Invoice

If there is no physical address stated on a Tax Invoice, this does not any more constitute a valid reason to reject the invoice as long as the mailing address is mentioned on the invoice. This is according to the new FTA Decision No 3, 2018 on Tax Invoice. Prior to this Decision, it was stated that the address of the recipient of the service or goods shall be mentioned on a Tax Invoice or Tax Credit Note (excluding a Simplified Tax Invoice) for it to be in compliant with the UAE VAT Law. However, it was not clear whether it has to be a physical address or any other address.

A Taxable Person has to ensure that the recovered input VAT shall be supported by a correct Tax Invoice from its supplier. If an input VAT is recovered without having a correct Tax Invoice, then a Taxable Person takes the risk that the FTA will decline their recovered input VAT and apply penalties in the amount of **AED 3,000 for the first time and AED 5,000 in case of repetition, as well as up to 50 % of the amount of VAT not paid to the FTA.**

Special rules for supply of gold and diamonds between traders in the UAE

The FTA has introduced a new VAT mechanism for the gold and diamond sector to ease the cash flow burden on traders in this industry. It is not uncommon in this industry to trade in precious metals, which fall under the zero-rated regime. Before this cabinet decision was issued, traders in the industry were required to charge the standard 5% VAT rate among themselves.

According to Cabinet Decision No. 25, 2018, a Trader who is registered for VAT in the UAE and purchases gold or diamond goods, may then recover input tax which has been reported in the same Tax Period.

However, the Trader must fulfil certain formal requirements to the Supplier, such as a declaration by the Trader to the Supplier. In case of failure to provide the correct documentation or verify such declaration, the Supplier and the Trader are jointly and severally liable for the tax due and relevant penalties in respect of the supply.

This Cabinet Decision is however not applicable for a Supplier that sells gold and diamonds to final consumers. In such case, the Trader has to charge and collect 5% VAT on the amount of supply. For tourists in the UAE, this may be less relevant as they may claim the input tax using the VAT refund scheme for tourists.

The refundable VAT on services provided in exhibitions and conferences

Ahead of Expo 2020, Dubai Plan 2021 and UAE Future plan, the UAE Government has issued a Cabinet Decision to provide support to the exhibition and conference sector in the UAE.

From the UAE VAT perspective, exhibition and conference services shall be:

- A granting the right to access, attend or participate in an exhibition or conference; or
- A granting the right to occupy space to conduct an exhibition or conference.

According to the Cabinet Decision No. 26, 2018 on the refund of VAT paid for services provided in exhibitions and conferences, the Supplier may not charge and collect a relevant VAT rate from an overseas Recipient in respect of exhibitions and conferences services. In this case, the Supplier may apply for a VAT refund of tax related to the provision of exhibition and conference services in the same Tax Period during which the date of supply of such services occurred.

The decision is only applicable where the overseas Recipient is not a Taxable Person in the UAE and does not have a Place of Establishment or a Fixed Establishment in the UAE. Moreover, the overseas Recipient shall provide a written declaration confirming these conditions.

However, the Supplier cannot receive the refund if the overseas Recipient is required to register for VAT in the UAE. Thus, before applying for this scheme, the Supplier in the UAE needs to conduct a thorough due diligence on its overseas customers.

Contact (UAE)

- Markus Susilo
Partner
VAT Service Team Leader – UAE
+971 4 2200198
markus.susilo@crowe.ae
- Zayd Maniar
International Liaison Partner
Crowe Horwath in UAE
+971 4 4473951
Zayd.maniar@crowe.ae

UAE VAT Service Team Members

- Narasimha Das
Associate Partner (Compliance and Legal)
- Vivek Batra
Partner, Advisory Services
Corporate Finance and VAT
- Michel Ruitenbergh
Senior Manager – Indirect Tax

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*Source: the ranking is based as per the International Accounting Bulletin's publication, April 2018, Issue 584.