

## UAE Supreme Court continues its rulings in favour of tax payers, sets another landmark principle

Habib Al Mulla & Partners, a member firm of Baker & McKenzie International successfully represented a global e-commerce company in a series of appeals filed against administrative penalties imposed by the Federal Tax Authority ("FTA") in connection with delayed payment of VAT due. The UAE Federal Supreme Court recently dismissed an appeal filed by the FTA to impose administrative fines and penalties against the company, and ordered that the FTA to repay the **full amount of the penalties** to the company.

Habib Al Mulla & Partners, a member firm of Baker & McKenzie International had also successfully represented the company at all stages of the dispute resolution process: before the Court of Appeal, Court of First Instance, and Court Appointed Experts. Both the Court of First Instance and Court of Appeal had also rejected the FTA's appeal against the decision of the TDRC, and allowed the company's counter appeal against the decision of the TDRC (in doing so, both Courts held that no penalties should be due based on the court experts' findings).

The Federal Supreme Court held that the administrative penalties were imposed on the incorrect premise that the company was late in paying the due tax, as the delay mainly stemmed from the FTA's failure to share the correct transfer details for payments from abroad, as published by the FTA at the relevant time.

The company had, in this case, taken all necessary steps to communicate with the FTA and the Central Bank to address the issue. After the lapse of a considerable time, the matter was resolved and payment was received by the FTA. Nonetheless, given the lengthy delay before the company was able to obtain the required details to make the payment, significant delay penalties were assessed by the FTA on the company.

The company therefore took all the necessary legal procedures to challenge the administrative penalties imposed before the competent courts.

The Court, in this case, deemed that the decisive factor in the matter was the actual date for enabling the company to transfer the due tax amount according to the details provided by the FTA, which is the date the Central Bank amended the details (in order to correct the transfer details provided by the FTA). That then enabled the company to complete the transfer process. These facts were confirmed by the opinion given by the court appointed expert as mandated by the court.

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The UAE legislature has also adopted this approach (which the Court concluded in the present Case) in Cabinet Resolution No. (105) of 2021 concerning the Controls and Procedures of the Administrative Penalty Waiver and Installment, as Article (4) of this Decree stipulated that: *"The administrative penalty waiver shall be applied if the following condition is met: ... E. There is a general defect in the Authority's systems, payment systems, or used telecommunications services, whenever this is a direct cause of a group of persons' failure to implement tax duties on their time."*

This judgment sets a final and conclusive precedent that could be very relevant in the consideration of several ongoing tax challenges, including any other taxes. It establishes a clear principle pertaining to the appropriate conditions for the "waiver of administrative penalties".

The Federal Supreme Court's relevant reasoning is set out in the Annex hereto.

### Challenge process

These judgments confirm the robustness of the UAE judiciary with respect to the adjudication of tax matters, upholding taxpayers' lawful rights to challenge the FTA's assessment on taxes and penalties. When challenging the FTA's assessment, taxpayers should adhere to the specific procedures and timeline for re-calculations, re-considerations and objections before the TDRC and the relevant UAE courts.

### Seek legal counsel

Over the last two years, Habib Al Mulla & Partners, a member firm of Baker & McKenzie International has increasingly been instructed to handle multiple first-of-its kind cases involving complex issues of VAT, excise duty, and penalties relating to tax returns and voluntary disclosures and others. The matter was led by senior lawyer **Mohamed El Baghdady** who specializes in tax litigation. We have successfully represented clients across various industries, including consumer goods and retail, services and banking and finance, before the tax tribunals and courts.

We are happy to support you throughout the challenge process in relation to your taxes and penalties. For further information, please contact **Mohamed El Baghdady** and **Reggie Mezu**, members of our UAE Tax Litigation team.

*This alert is prepared by Mohamed El Baghdady (Senior Associate, Tax Litigation, Dubai).*

### Annex (Non-Official Translation)

The Court in its reasoning stated the following:

*After reviewing the papers, hearing the pleadings and legally deliberating and since the facts of the Case have been included in the Appealed Judgment, to which this Court refers in order to avoid repetition and prolongation. The Court summarizes such facts in the following words. On 30/09/2020, the Plaintiff filed the Case under a statement of claim submitted to the Case Management Office, which the Defendant has been duly notified thereof. In the conclusion of the said statement, the Plaintiff claimed:*

- I. *to admit the Challenge for cassation in form because it fulfilled its formal and legal requirements.*

II.

1. *Originally: to revoke the decision of the Tax Dispute Resolution Committee of the Emirate of Abu Dhabi regarding Objection No. ( - ), and to revoke the delay penalties imposed on the Plaintiff, the subject matter of the present Challenge for cassation, amounting to AED ( - ).*
2. *Alternatively: to prove the existence of reasons for exempting the Plaintiff from penalties, and to oblige the Defendant to refund the penalties it received from the Plaintiff, because the delay was not due to the Plaintiff, but rather to the Defendant.*
3. *Totally alternatively: to delegate a committee of experts specialized in banking works to review the information that was on the Defendant's official electronic portal and to review the electronic correspondence exchanged between the Plaintiff and the Defendant, as well as the correspondence exchanged between the Plaintiff and the UAE Central Bank to state whether the Plaintiff took the payment procedures within the legal dates and to state the reasons for the failure of the transfer process and up to the date of its fulfillment after providing the Plaintiff with the correct account data by the UAE Central Bank in order to prove that the delay was not caused by the Plaintiff and that it was due to the Defendant's procedures. Accordingly, render a judgment accepting the Plaintiff's claims.*

*On the ground that the Plaintiff is a Foreign Company that does not have any office or headquarters in the United Arab Emirates, nor does it have any bank accounts in any of the banks of the United Arab Emirates. Whereas the Company is a Foreign Company and because it has carried out a transaction for which value-added tax is payable in accordance with the laws of the United Arab Emirates, the Plaintiff submitted its tax returns on the due amounts of tax, and then proceeded to pay the tax on the dates stipulated by the law. This is done by following the instructions stipulated in the electronic portal of the Defendant Authority.*

*Whereas, the Plaintiff will transfer a large amount from outside the country, and according to the regulations of banks abroad, it made a transfer to test and make sure that the amount, that will be transferred, will enter the account of the Defendant Authority, but the transfer failed as the account data set by the Defendant Authority was not found on the services portal. The Plaintiff contacted the Defendant Authority immediately and requested it to know the reason for the failure of the transfer process on the account whose data is on the Defendant's official information portal.*

*After many attempts to transfer and many correspondences and suggestions made by the Plaintiff, all attempts to receive any amounts from abroad by the Defendant Authority failed. After the failure of all transfer attempts, and after the Authority communicated with the UAE Central Bank, it was found that the data set by the Authority on its official electronic portal is incorrect and that there are other data. Therefore, on 14/02/2019, the Plaintiff Company was referred to an official in the UAE Central Bank in order to solve the problem of the Defendant's account with the mentioned Bank. After communicating with the official at the UAE Central Bank, on 19/02/2019 he provided the Plaintiff Company with the correct number and data for the Defendant's account with the mentioned Bank, meaning that the Central Bank was the one who provided the solution to enable the Company to pay. The solution was not included in the guidelines of the Federal Tax Authority. The Central Bank clarified in an e-mail dated 19/02/2019 that the*

*Federal Tax Authority is a direct participant in the real-time local aggregate settlement; and that the beneficiary bank shall therefore be the Federal Tax Authority (rather than the Central Bank). Then the Central Bank submitted the Bank ID code to the Federal Tax Authority, which is E868.*

*Then, the Plaintiff transferred a trial payment on 21/02/2019 based on the data that was sent from the UAE Central Bank, and the transfer actually succeeded, and then the entire amount was transferred on 26/02/2019. Therefore, the tax payment process has been completed. The Plaintiff was surprised that the Defendant had imposed penalties on it for delaying the payment of tax, although the Company, since the first day of tax payment entitlement, has followed the procedures stipulated by the Defendant Authority to pay from outside the country, although the payment process was not possible and impossible in light of the fact that the Authority had not set or specified the correct data for the account through which the payment should be made with the UAE Central Bank. This is established in the letters of the Authority itself, and even established in the Central Bank letter dated 19/02/2019, and it is established through the many failed transfers which prove that the Plaintiff was keen to pay the tax on time, but the delay was due to the Defendant Authority itself. Since the decision to impose penalties prejudiced the Plaintiff's rights, in accordance with the procedures on 06/05/2019, it submitted a request to the Federal Tax Authority for a reconsideration of the administrative penalties imposed on it for the purpose of revoking them and exempting from the penalty imposed due to the delay in the payment of VAT due to the absence of any breach by the Plaintiff, and that the delay was due to the Defendant. Whereas, the Authority's decision on 22/06/2020 and almost a year later stipulated a request for reconsideration to reduce the amount of AED ( - ) and to remain the penalty in the amount of (AED ( - )). Accordingly, the Plaintiff, in accordance with the law, and after paying all amounts and the penalty, submitted an objection to the Tax Dispute Resolution Committee to the penalty imposed by the Federal Tax Authority, which is the payment of an amount of (AED ( - )), and registered under number ( - ) and dated (02/09/2020) before the Plaintiff's objection in form, and should be dismissed on the merits by a decision issued by the Tax Dispute Resolution Committee. This prompted the Plaintiff to file this Case in order to be awarded its claims. Whereas, the Court of First Instance ruled at the hearing of 30/08/2020:*

- I. to admit the Case in the form.  
On the merits, to revoke the appealed decision, and to rule again to revoke the delay penalties imposed on the Plaintiff, amounting to AED( - ), and to oblige the Defendant to refund them to the Plaintiff, and oblige it to pay the expenses.*

*Whereas, the Appellant was not satisfied with the aforesaid judgment, therefore it challenged the same with the present Appeal under a statement submitted to the Court's Clerk on 20/09/2021, exempted from fees. In the conclusion of the said statement, the Appellant requested:*

- II. to admit the Appeal in form.*
- III. On the merits: Originally: to revoke the Appealed Judgment, and to uphold the Authority's decision to impose a penalty for delaying the payment of the tax due, and to oblige the Appellee to pay the charges, expenses and fees. Alternatively, to revoke Appealed Judgment, which rules to revoke the Authority's decision to impose a penalty for delaying the payment of the value of tax due for the period preceding the first attempt to pay, and to uphold the penalties related thereto, with the Appellant bearing the charges, expenses and fees.*

*Whereas, the Appellant contested the Appealed Judgment for the first reason: the trial court exceeded the limits of its authority to understand the fact and infer the truth in the*

*Case "In particular with regard to the decision of non-responsibility for late payment during the phase prior to the Company's first attempt to pay on the basis that the Appealed Judgment did not strike the required balance between the two opinions contained in the technical expert's report, in a manner that reveals an understanding of the fact of the Case and a correct assessment of its evidence, which led it to form its belief based on false evidence that contradicts the truth in the Case and the true law, so it conclude an outcome that is inconsistent with the law and the facts of the Case. Such outcome involved the invalid inference that affects and relates to "decision of complete non-responsibility of the Appellee" for the violation of the late payment during all the time phases without taking into consideration the time factor to be examined in verifying the commission of this violation. The judgment was flawed by invalid inference while balancing and weighing the two opinions contained in the technical expert's report, due to its omission of what was shown by the minority opinion of the expert committee regarding the decision of the Appellee's responsibility for the long period of time in late payment that preceded the first attempt to pay (from the date of late payment of the dues of the first tax period on 28/06/2018 until the first attempt to make a transfer on 06/11/2018). The Appellee Company has not granted the country its right for more than four months, during which it has completely failed to fulfill its legal obligation to pay the tax amounts due for several tax periods, it did not make the slightest attempt to do so, and no sane person could imagine abandoning the Company's accountability for the late payment, to give it the advantage of benefiting from its clear failure to perform this obligation.*

*The Appellant also contested using the second reason which is the wrongful causation, faulty inference, and violation of the right of defense "in terms of the Judgment being based on fragile evidence when it decides that the Appellee was not responsible for the delayed payment for the period preceding its first attempt of payment, saying that the Judgment relied, in determining the non-responsibility of the Appellee for the Paying the prescribed tax amounts for the first tax period (which is due on 28/06/2018) and the second tax period (which is due on 30/09/2018) before the first actual payment attempt (the attempt that took place on 06/11/2018), on what was stated in the report made by most of the experts: ". the Plaintiff has right to claim full refund of the Delay Penalties, which amount to AED (-), because It tried to pay the value-added tax before the date of payment of the first period tax which was due on 28/06/2018, according to the emails exchanged between the internal departments of the Plaintiff Company and the Company's advisor in the UAE, the (-), Dubai office, which is rejected in law and against the nature of things and the correct reasoning; Is it correct to rely on mere internal correspondence to absolve the Company of its responsibility to pay, or to rely on its actual initiatives and attempts to pay. So the Judgment is tainted by wrongful reasoning, faulty inference, and violation of the right of defense "because the Judgment relied, on poor evidences, in determining the non-responsibility of the Appellee for delaying the Payment of the prescribed tax amounts for the previous tax period (which is due on 28/06/2018) until the first actual payment attempt (that took place on 06/11/2018), because the Judgment relied on the internal correspondences "e-mails exchanged between the internal departments of the Defendant Company and with the Company's advisor in the UAE, ", without being certain of the legal basis on which the responsibility of the Defendant was determined regarding defaulting on paying the tax payable, and the extent of the Defendant's commitment to make an actual attempt to pay on the legal dates or not, and if the Judgment did so, it would have found out from the facts of the Case and what the experts statement that the Defendant delayed its first attempt to transfer until 06/11/2018; and it would have then decided that the Defendant is fully responsible for the late payment during such period.*

*The third reason in the Appellant contest was attributed to the judgment's misapplication of law "The Judgment contradicts the legal provisions related to the violation of delayed payment of tax, because the Judgment prove the Appellant's entitlement to recover the*

*delay penalty, whether in full or just what is related to the period after its attempt to pay. In addition, the Judgment totally contradicts the legal provisions regulating the payment of tax; relying on the allegations of the Appellee Company that it was unable to pay due to the difficulty of transferring with the bank it deals with collides directly with the taxpayers' legal responsibility to pay the tax dues.*

*The Appellant's fourth reason: The Appealed Judgment is in violation of the explicit legal regulation of excuses for committing tax delays, saying that considering the excuses for committing tax violations is an authority granted to the enforcement Authority by making the reduction and exemption is a permissive power for the Authority; This mechanism is legally left to the Authority to apply it in a permissive manner after considering the requests submitted thereto case by case, and this is what was stated by the promulgation of Article 26/, 21, which stipulates that:*

*"1- The Authority may reduce or exempt administrative penalties for any person or category that are proven to have violated the provisions of the law or the tax law, if the following conditions are met: ....*

*2. Without prejudice to the provisions of Clause (1) of this Article, any person or group proven to have violated the provisions of the law or the tax law may submit a request to the Authority to reduce or exempt the penalties that it has imposed, and since on 12/2021 the Appellee's attorney submitted a plea and the conclusion thereof it requested the following:*

**First:** *To dismiss the Appeal in form if it does not meet its legal requirements.*  
**Second:** *To dismiss the Appeal and uphold the Appealed Judgment.*

*Whereas, the Case was considered as recorded in the minutes of the hearings, and in the hearing of 01/11/2021, the Appellant was represented online by an attorney, and the Appellant, who had previously appeared before the Case Management Office where it submitted the memos, did not appeared in the said hearing, the Court then decided to end the pleading and pronounce the verdict in today's hearing.*

*As for the subject of the Appeal and since it is established that "There is no need for the Court of Appeal to uphold the reasons on which the Judgment rendered by the Court of First Instance was based on, without adding "as long as it deems these reasons substitute for listing new reasons and are sufficient to construe its judgment" and without adhering to follow the arguments, requests and statements of the litigants and respond to them (Challenge for cassation Nos. 228 and 318 of 14 L Hearing 1993).*

*Based on the foregoing, and since the Appealed Judgment had applied the correct law regarding the Incident in question in terms of its collection, the correctness of its understanding, the estimation of the evidence on which it relied on, the sufficiency of the response to the pleas, defenses, and requests raised and expressed by the litigants, and the validity of the conclusion of the Judgment, and then the Court adopts the reasons of the Appealed Judgment and considers them as grounds for its ruling, especially since it included a response to all the unacceptable aspects of the Appeal, and adds to them that the Appellee's delayed payment of the due tax was for reasons related to the Appellant's system and beyond the will of the Appellee, who took all means to complete the payment process, but they failed due to the failure of the Appellant's deposit system. In addition, the Appellant did not provide evidence of other alternatives that the transactors could take due to the failure of the system. Therefore, the Appealed Judgment adhered to the correct law and was based on justifiable reasons derived from the Case papers, so this Court decided to entirely dismiss the Appeal and to uphold the Appealed Judgment.*

*As for the fees and expenses, the Court obliges the Appellant to pay them, pursuant to Article 55 of the Regulations.*

**Now & Therefore.**

*The Court ruled to: First:- Admit the Appeal in form.*

**Second:-** *Dismiss the Appeal in terms of the subject matter thereof, uphold the Appealed Judgment, and oblige the Appellant to pay the fees and expenses, amounting to AED 2000 as attorney's fees.*