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MMJS Tax Alert

Tax Procedures Guide on
Tax Resident & Tax Residency Certificate

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The **Federal Tax Authority (FTA)** has recently published a comprehensive **Tax Procedures Guide on Tax Resident and Tax Residency Certificate - TPGTR1** (the Guide).

This Guide is important for both natural persons and juridical persons operating in UAE, as it provides a thorough overview of the criteria(s) that establishes Tax Residency in UAE, as well as Residency in UAE as per Federal Decree Law No. 47 of 2022 (UAE CT Law), alongside broad insights into the implications of Double Taxation Agreements (DTAs).

The Guide also provides information on obtaining a Tax Residency Certificate (TRC) along with key administrative aspects in relation to process of issuance of TRCs.

Importantly, the Guide also sheds light on the determinative factors on 'place of effective management and control' (EMC) as per UAE CT Law.
The Guide also provides various illustrations for the purpose of explaining various concepts which are discussed therein.

We have provided the key highlights of the Guide along with our insights as below:

Highlights of the Guide

A. Concept of Tax Residence

The concept of tax residence is essential for determining where a natural person or juridical person is liable to pay taxes.

In cases where the taxpayer happens to be a dual resident, the Guide clarifies that the applicable DTA, if in force, will provide guidance to identify the resident jurisdiction of the taxable person.

Further, provisions of DTA may also be used to claim relief in cases of double taxation, such as applying a reduced withholding tax rate on dividends, interests, royalties, etc. To benefit from these provisions, a taxpayer typically will have to provide a TRC.

The Guide also specifies that being a 'resident person for UAE CT purposes' does not mean the same as being 'tax resident' in UAE.

B. Tax Residency under UAE CT Law

1. With regards to Tax Residency under UAE CT Law, the Guide confirms that 'foundations', 'trusts', 'offshore entities' as well as 'Civil Companies' which are incorporated in UAE are also considered as resident juridical person.

2. In the context of exempt persons, the Guide mentions that such person is not considered a resident person subject to CT, unless such person conducts a business or business activity that is outside the scope of their exempted activity.

3. Place of effective management and control (EMC) of juridical persons

The Guide notably offers detailed guidance on factors for determining place of EMC in UAE. The concept of place of EMC under UAE CT Law is in line with many tax regimes in other countries that apply similar concepts such as "central management and control" or "place of effective management (POEM)" rules to determine tax residency.

Place of EMC is understood as the place where "key management and commercial decisions" that are necessary for the conduct of the juridical person's business as a whole are, in substance, made. This would be limited to strategic decisions only and does not include day to day decisions taken.

It has been mentioned in the Guide that the tests of place of EMC are in line with those provided in commentary in the OECD Model Tax Convention. It is also clarified that a juridical person can have multiple places of management, but only has one place of EMC at one time.

It is emphasized that the assessment of place of EMC should be a fact centric analysis, with thrust on de-facto activities and circumstances rather than mere legal authority i.e. substance over form approach needs to be adopted.

We have listed below a few illustrative examples as mentioned in the Guide in relation to key concepts relevant for determining place of EMC:

Concept/ term	Illustration provided in the Guide
Key managerial and commercial decisions (KMCD)	These include decisions about setting the company's general policies, decisions on major investments/ divestments, appointment of C-suite and other senior executives along with granting them authority, handing key finance matters such as profit distribution, etc.
Day-to-day decisions	Implementation of decisions made by others, legal and administration matters, formal finalization or approval of decisions made by others, etc.

The Guide outlines the following two-step approach to determine where a company's place of EMC is:

- Identifying key decision makers
- Determining the place of decision making

a) Identifying key decision makers

There are three tests outlined to identify **who makes the KMCD** for an entity:

Tests	Key parameters
Board of directors (BOD) test	• It is key to identify who possesses the **legal power** to make the decisions • Mere "rubber stamps" by the BOD does not constitute as EMC. Autonomy and independence of the BOD and their ability to operate without undue influence from other persons is critical. • Necessary to analyze if the BOD is competent/ knowledgeable enough to make the key decisions along with the composition of the BOD. • It is essential to ascertain, who is the ultimate decision maker, in substance.

Tests	Key parameters
Delegation of authority test	• Crucial to evaluate who has been delegated/ assigned the authority to take the KMCD (either formally or informally). • Key to evaluate whether the BOD has appointed other persons for day-to-day operations and the roles and responsibilities of the person to whom decision making has been delegated (whether in approver capacity or decision maker capacity).
Shareholders activity test	• If a shareholder is to be considered as exercising EMC, the key decisions taken by that shareholder must not be restricted to mere influence on the normal management and policy formulation. • Decisions taken by shareholders on dissolution, liquidation, etc. are not determinative for EMC.

b) Determining the place of decision making

The **location of the key decisions** is a critical factor in determining EMC. The place of residence / domicile of the decision makers may be considered while determining place of EMC but is not a definitive factor.

The Guide provides that the following factors need to be carefully considered while evaluating the place of decision making:

- Place where the board meetings are **physically held** – In cases where meetings are held wholly/partially virtually, the physical location of the board meetings may not be determinative – rather the country in which the directors who make the key decisions are present during the meeting may be determinative.

- Board or equivalent meetings may be considered for the purpose of EMC – where such meetings take place and who attends these meetings.

- Documentation to be maintained – Board minutes, emails, papers circulated to board members in advance of the meeting, etc., and the documentation should mention who are the decision makers and where such decisions are being made.

- Nature of business should be considered while taking into account the aforesaid aspects.

Factors like place of incorporation, the location of the registered office, where the shareholder register and accounting records are kept and where the day-to-day operations are conducted, do not have any significance in determining the place of EMC.

If the factors listed above are inconclusive in determining the place of EMC, the place in which the juridical person has the strongest economic nexus (i.e. assets, employees, activities) may be considered.

Exceptions to place of EMC

a. Physical presence of decision makers in UAE for one-off meetings should not generally be considered for determining place of EMC in UAE.

b. The presence of the decision maker in UAE due to certain exceptional circumstances (emergency, war, natural disasters) could be excluded for determining place of EMC.

C. Tax residency of natural person under UAE domestic law

The Guide provides following additional clarifications/ explanations regarding treatment of a natural person as a tax resident under UAE domestic law, as outlined in Article 4 of Cabinet Decision No. 85 of 2022 (CD No. 85):

Scenario	Key clarifications/ explanations
Stay in UAE for 183 days or more	In this scenario, the Guide clarifies that regardless of nationality or the nature of activities conducted in the UAE, such person should be treated as resident in the UAE.

Scenario	Key clarifications/ explanations
Stay in UAE for more than 90 days but up to 183 days (along with additional conditions prescribed under CD No. 85 being satisfied)	• In this scenario, the Guide clarifies the distinction between a 'permanent place of residence' and a 'usual or primary place of residence.' • A usual or primary place of residence refers to the country where a natural person normally resides, whereas a permanent place of residence refers to any dwelling that is continuously available to/ at the disposal of the individual (such as a residential property available for stay, whether owned or leased) • The Guide clarifies the scope of the term 'business' (aligning the same with the scope under the UAE CT Law) which may also include activities conducted regularly, on an ongoing and independent basis, such as industrial, commercial, agricultural, professional, vocational (skilled craft or trade), service, or excavation activities, or anything related to the use of tangible or intangible properties
'Usual or primary place of residence' and 'centre of financial and personal interests' in UAE	• In the context of this scenario, the Guide clarifies that both the conditions, i.e. having 'usual or primary place of residence' and the 'centre of financial and personal interests' must be satisfied simultaneously for an individual to be considered a tax resident in the UAE. • To determine the centre of financial and personal interests, the Guide discusses regarding additional considerations which could be relevant such as family and social connections, memberships in clubs and associations, and engagement in cultural and other activities. Importantly, it is specified that not merely the quantity of these connections that matters, but the depth and significance of each relationship.

Further, regarding the exceptional circumstances which will not be considered while calculating number of days stayed in UAE, the Guide provides certain illustrations as below:

- Local or national emergencies such as natural disasters, closing of borders, war, or civil unrest, etc.
- Personal emergencies such as sudden or critical illness or injury to the natural person.

D. Tax residency under DTA

The Guide highlights that residency conditions under DTAs may differ from UAE domestic laws, and therefore each DTA must be assessed on a case-by-case basis to determine residency under the DTA ('treaty residency').
The Guide provides following additional explanations in this context:

Relevant for	Key clarifications/ explanations
Juridical persons	• The Guide explains that, under most DTAs, tax residency is determined by legal connection (e.g., incorporation), economic connection (e.g., place of EMC/ POEM), being liable to tax, or a combination of these factors. • Additionally, for Government entities and other exempt persons, it is mentioned that the definitions and conditions set out in the DTA should be considered when determining treaty residency. • The Guide also addresses procedures for resolving dual residency cases and elucidates the tie-breaker rules under DTAs, which are generally based on: - POEM criteria - Mutual Agreement Procedure - Other criteria (E.g., location of head office or place of incorporation)
Natural persons	• The residency criteria under a DTA typically requires that an individual is either liable to tax, holds relevant citizenship or nationality, has physical presence in the relevant country, or is domiciled in/ residing there.

Relevant for	Key clarifications/ explanations
	• The Guide clarifies that, if a DTA refers to being 'resident under the laws of the United Arab Emirates,' then the requirements prescribed under CD No. 85 of 2022 apply. The Guide further specifies that, being a resident under UAE CT law may not be relevant in such context. - Further, the Guide also explains the following order of tie-breaker rules typically followed under DTAs: - Country of natural person's permanent home - If permanent home is in both countries, then place with 'centre of vital interests' should be reckoned - If there is no permanent home in either country, or if the location of the natural person's centre of vital interests cannot be determined, place of 'habitual abode' is to be considered - If habitual abode is in both jurisdictions or in neither of them, then nationality needs to be considered - Mutual Agreement Procedure to be followed in other cases • For the above, the Guide clarifies that the meanings of 'permanent home' and 'centre of vital interests' for the purposes of DTA are generally aligned with the terms 'permanent place of residence' and 'centre of financial and personal interests' under UAE domestic law. Additionally, it is specified that 'habitual abode' is determined by factors such as the frequency of visits, as well as the length and purpose of stays. • If an individual conducting business in the UAE (with turnover exceeding AED 1 million) is considered a resident of a foreign country under an applicable DTA, the UAE business can still be taxable in UAE, if such person has a permanent establishment in UAE. In other case, such income may be classified as state sourced income

E. Tax Residency Certificate

The Guide specifies that, FTA will issue TRCs in the UAE either for 'current tax period', 'prior tax period' or any other '12-month period' upon satisfying the specific conditions set out in CD No. 85 of 2022 (i.e. domestic TRC) or DTA (i.e. Treaty TRC), along with following additional eligibility criteria for filing TRC application:

Category	Period applied for	Eligibility period for applying TRC
Government entities/ Government controlled entities	Current tax period	One day into the period
	Prior tax period	Any time during the current period
Other Juridical Persons	Current tax period	After lapse of three (3) months into the current period
	Prior tax period	Any time during the current period
Natural Persons	Current tax period	As soon as the criteria to be Tax Resident/ treaty resident (as applicable) are met
	Prior tax period	

The Guide also states that a TRC will not be issued for a future tax period or any 12-month period that has not yet commenced.

The Guide specifies that a taxable person must provide their Corporate Tax TRN (Tax Registration Number) when applying for a TRC, especially when applying for a treaty TRC, as the TRN may be required by other countries to grant benefits under the DTA. Additionally, taxable persons could avail reduced fee benefits when applying for a TRC, if they provide their TRN.

When applying for a TRC, applicants must submit relevant documents to the FTA to prove they meet the specified conditions.

The Guide further explains the procedures to apply for a TRC and attestations of tax forms. Certain key aspects specified in the Guide are captured below:

- FTA can take up to 10 business days to process as an application once submitted.
- Applicant has 30 business days to respond to a request for additional information by FTA.
- Applicant has the option to seek for additional time to respond to a request for additional information.
- Any form that is required to be attested by FTA may be submitted electronically, instead of physical submission to FTA.
- Further, applicant can request FTA for scanned copies of tax form that are physically submitted with FTA for attestation.
- FTA will retain such tax forms that are physically submitted only for a period of 6 months from date of notifying the Applicant that the form is ready for collection.

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MMJS Insights

1. Issuance of this Guide is a welcome step from the FTA in issuing further clarity on the concepts of tax residency and procedural aspects for obtaining TRC.

2. The Guide provides useful guidance along with certain practical illustration on various concepts such as place of EMC under UAE CT Law, interplay of 'tax residency under UAE domestic laws' and 'residency under UAE CT Law', etc. The Guide also lays thrust on detailed factual evaluation on a case-by-case basis along with importance of documentation requirements to substantiate the facts.

3. It would still be pertinent to track developments on certain critical aspects such as implications (and related procedural aspects) of change in place of EMC in subsequent year, applicability of mutual agreement process (if required), alignment of guidance on issuance of TRC with practical implementation of the same on the portal, etc.

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