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# TAX RESIDENCY CERTIFICATES

## *Has the FTA got it right on Place Of Effective Management?*

**Background**:

When UAE companies these days ask the FTA to issue a Tax Residence Certificate (TRC) there is much surprise when the FTA requests confirmation of the applicant's place of effective management (so called POEM) being in the UAE. Why the smirking?

The surprise is based on the understanding that a UAE juridical entity's tax residence is found in the country in which the company was incorporated, and it is also clear that most of the UAE double tax conventions (DTCs) accept that principle. That being the case, then POEM should only be relevant for a UAE organised company if at the same time as the company is UAE tax resident the same company is deemed by the tax laws of another country to also be tax resident in that other country. The tie must be broken, and the internationally accepted tie breaker is to allow the country in which the company's POEM is found to exist will take precedence. In that case asking for the POEM doesn't make sense but it does if a foreign company is applying for a UAE TRC.

So, against this background what does POEM mean, how do you determine where it is and what information might be helpful or harmful in coming to that conclusion.

**What then does POEM mean:**

### 1. Statutory law

The first place to look is the UAE Corporate Tax law[1]. Unfortunately, that Decree Law does not define the POEM meaning and nor is the concept defined in a UAE Cabinet Decision nor in a UAE Ministerial Statement. In the absence of any there being any helpful government issuances, we must look at the POEM meaning from case law or from ordinary parlance

[1] Decree Law 47, 2022

## 2. Case law

Unfortunately, the UAE Court has yet to issue any decisions on the meaning of POEM but searching other countries case law we find multiple relevant precedents some of which we have included here.

***Smallwood*[2] *(English Court of Appeal)*** confirmed that identifying a company's location of central management and control involves the same enquiry used when identifying the company's POEM location. For this purpose, the Court said that POEM was at the place at which the high-level decisions are made, which is normally where the authorised decision-making body meets, unless the decision-making functions have been usurped by others in another place.

**The *Italian Supreme Court, Case 35085*** is also helpful because it confirmed that a Luxembourg company's POEM existed at the place where the company's administrative headquarters are located, namely, the place where the main business decisions affecting the company are taken. In this case the Luxembourg Supreme Court concluded the taxpayer's POEM was in Italy because the company's strategic, industrial, financial and planning decisions were taken in Italy. So, the Court held decisions on strategic, industrial, financial and planning to be the decisions relevant for POEM.

**The *Belgian Court of Appeal in Ghent (Hof van Beroep Gent) case*** is also helpful because it determined the "POEM" meaning is to be understood in the context of the OECD Model Tax Treaty Convention and its Commentary which refers to POEM being found at the place where fundamental decisions of the company were taken and from which the company was effectively managed and where the business decisions were made. In applying this decision, the Court considered to varying degrees the relevance of a wide range of matters including whether the (a) the company had any Belgium shareholders (b) directors were "nominee directors" or natural persons, (c) real business activities were conducted in Belgium, (d) company's seat was registered at an accommodation or a real office, (e) taxpayer's financial management was performed remotely, (f) taxpayer realized a high profit margin on related-party transactions, without adding any value. How the Court balanced each of these factors is interesting to read but, in the end, concluded the taxpayer was a letter box company operated entirely from Belgium by its Belgian shareholders and decided the POEM was in Belgium and not in Luxembourg.

Maybe of greater significance to the UAE than these former three cases is the **Indian *Interworld Shipping Agency LLC v. DCIT*** case because that case concerned the meaning of POEM in the context of the Indian/UAE DTC. This should provide a reasonable precent of POEM for UAE purposes. In this case the Court held the UAE company was managed and controlled by a Greek national who did not manage and control the company from the UAE because except for filing a copy of residency card, no details were available confirming the Greek resident was in UAE for greater than 183 days. His days in the UAE were relevant since he was the sole effective manager and controller of the assessee. The Court also considered to be relevant the content of the minutes covering the Board's resolutions.

## 3. The UAE FTA's published position

How then do these precedents align with the FTA's published position on POEM?

The FTA has published that POEM is the place at which the "key management and commercial decisions" necessary for the conduct of the juridical person's business as a whole are, in substance, made[3].

[2] HM Revenue and Customs v Smallwood [2010] EWCA Civ 778

[3] Tax Procedures Guide | Tax Resident and Tax Residency Certificate | TPGTR1 16

The FTA cites that key management and commercial decisions[4] relevant to a POEM determination include (a) setting the general policies, for example, investment policies and operational policies, (b) determining the strategic direction of the company's operations, (c) deciding the type of transactions that the company can enter into, for example, mergers, acquisitions and purchase or sale of significant assets, (d) appointing c-suite and other senior executives and granting them authority to manage or carry out the day-to-day operations of the company, (e) directly or indirectly overseeing the persons appointed to manage or carry out the day-to-day business of the company, or (f) handling key finance matters such as the determination of how profits are used and declaration of dividends.

It seems the FTA concludes that POEM exists at the place where the strategic level of control (as opposed to day-to-day management) is conducted and in doing so seems to have aligned its position with the POEM commentary in the OECD Model Tax Convention ("OECD Commentary").

Helpfully the FTA has confirmed company decisions which are not considered to be key management and commercial decisions, and, therefore, not indicative of POEM include[5] (a) formal finalisation or approval of decisions made by others, (b) mere implementation of decisions made by others, (c) day-to-day conduct and management of a company's activities and operations, or (d) legal and administration matters such as keeping a share register or undertaking minimum acts necessary to maintain a company's registration.

## Has the FTA got it right?

After having considered the case law and the FTA's position we think the FTA has probably got the balance about right. We have come to this conclusion due to the overlap in the FTA's citing of the key POEM management and commercial decisions with those of the Courts.

The covered cases considered the POEM determining factors to be the place where the company's high-level decisions or fundamental decisions are made, which is normally where the authorised decision-making body meets, unless the decision-making functions have been usurped by others to another place and indicative examples of those high decisions would be the strategic, industrial, financial and planning decisions, the Courts also acknowledged that substance of the decisions is also relevant.

The FTA cites (a) setting the general policies, for example, investment policies and operational policies, (b) determining the strategic direction of the company's operations, (c) deciding the type of transactions that the company can enter into, for example, mergers, acquisitions and purchase or sale of significant assets, (d) appointing c-suite and other senior executives and granting them authority to manage or carry out the day-to-day operations of the company, (e) directly or indirectly overseeing the persons appointed to manage or carry out the day-to-day business of the company, or (f) handling key finance matters such as the determination of how profits are used and declaration of dividends there.

All this means that when the FTA asks for confirmation of the Taxable Person's POEM, this is not a question to be treated lightly, and it cannot be dealt with retroactively. This is a serious and difficult request and without a company properly taking the decisions that count in the UAE, properly documenting those decisions and giving due respect to the strategic, industrial, financial and planning decisions, don't expect the FTA to issue that TRC. The cost will be the taxpayer's because it will lose its rights to claim the DTC benefits including the lower DTC rates of foreign withholding tax, capital gains and allocation of trading profits.

*WARNING: These documents provide general information only, and are not to provide professional advice or to be relied upon by the reader in a legal or financial context. As PB First FZ LLC cannot know the circumstances in which this information may be used, we accept no responsibility should the reader base any action upon the same. We recommend you seek detailed tax advice from PB First FZ LLC for your specific circumstances.*

[4] Tax Procedures Guide | Tax Resident and Tax Residency Certificate | TPGTR1 16
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