

Re-domiciliation into the UAE: Key tax and legal considerations

While the concept of Re-domiciliation is not new in general and there has always been a certain level of demand for it, we are now seeing a spike in popularity in its application, mainly driven by regulatory changes.

We generally note that the process of Re-domiciliation is sometimes portrayed in the public domain as quite straightforward. While the level of complexity depends on the specific facts, the process of Re-domiciliation can be challenging and may cause business interruption as it has a number of legal, operational and tax implications. In this article we will discuss the concept of Re-domiciliation and the related benefits. In addition, we will comment on the general tax and legal implications and set out best practices in terms of due diligence to mitigate some of the complexities.

Due to practical relevance, the authors will mainly focus on the Re-domiciliation of a non-United Arab Emirates (UAE) incorporated entity into the UAE. The purpose of the article is to provide practical guidance and highlight issues commonly encountered in practice and not to provide a comprehensive overview.



Concept of a Re-domiciliation in general

Re-domiciliation is a legal process which allows a company to transfer its domicile/seat of incorporation from one jurisdiction to another, while maintaining the same legal entity. The legal continuation enables the company to maintain all of its history and track record.

The concept of a Re-domiciliation has been legislated in company laws in a number of jurisdictions. Jurisdictions started to implement such legislation some twenty years ago. It is common in civil law jurisdictions (for example, Switzerland and Luxembourg) as well as common law jurisdictions (for example, Malta and Singapore). It is also prevalent in island states/jurisdictions such as the British Virgin Islands (BVI), Jersey and Mauritius etc.

In the UAE, the UAE Federal Law No. 2 of 2015 concerning Commercial Companies does not make reference to the Re-domiciliation to the UAE of companies that are established outside the UAE: there is therefore no legislative framework for the Re-domiciliation of a company "onshore" in the UAE, that is, in the UAE but outside a Free Zone.

The regulations that apply to companies in a number of Free Zones in the UAE do, however, include provisions which allow Re-domiciliations to take place.

Examples of Free Zones which allow Re-domiciliations to take place include the following:

- the Abu Dhabi Global Market;
- the Dubai Airport Free Zone;
- the Dubai Development Authority Free Zone;
- the Dubai International Financial Centre;
- the Jebel Ali Free Zone; and
- the Ras Al Khaimah Free Trade Zone.

In most, if not all, of those cases, those regulations are relatively new and the processes for re-domiciling a company to the relevant Free Zones are not always fully established or developed. A company that re-domiciles to a Free Zone in the UAE would be required, as part of the Re-domiciliation process, to comply with the regulations that apply in that Free Zone, for example, in respect of share capital or as far as the appointment of directors and officers is concerned.

In order to execute a Re-domiciliation, both jurisdictions involved, i.e. the jurisdiction from which the company emigrates (Emigrating State) and the jurisdiction into which the company immigrates (Immigrating State) need to have legislated respective rules (as discussed below under section 4 of this article).

Benefits, practical application and drivers

One of the key benefits is that the company maintains its legal identity which reduces change costs. For example, contracts in place do not have to be novated but consideration would still need to be made as to whether the company can continue to carry on its obligations under its existing contracts. The use cases of Re-domiciliation transactions can be manifold. The concept of a Re-domiciliation is useful in the context of legal structure optimization/simplification projects.

One of the drivers of business restructurings involving Re-domiciliation are regulatory/tax changes, especially related to Base Erosion and Profit Shifting (BEPS), Economic Substance Regulations (ESR) and more recently the announcement of a Global Minimum Tax of at least 15%.

BEPS is aimed at ensuring that profits are taxed where the underlying income economic activities are performed. This has led to a shift of offshore operations to “mid-” or onshore jurisdictions such as the UAE for years. The recently ESR implemented in no or nominal tax jurisdictions have further accelerated operating business model changes and restructurings. Under the ESR, companies that carry on qualifying activities (so called ‘Relevant Activities’) are required to demonstrate substance including core income generating activities and headcount.

For example, a BVI company of a UAE headquartered group that performs group treasury/finance income whereby the treasury team is based in the UAE is unlikely able to meet the economic substance rules in the BVI. In this environment, the concept of a Re-domiciliation to the UAE may be helpful to align income with underlying operations and could be one possible option to restructure the business.

Finally, the impending introduction of a Global Minimum Tax of at least 15% will further disincentivize offshore structures. Therefore, we are seeing an increased interest in re-domiciling offshore companies to the UAE where businesses have genuine substance and are able to comply with the ESR.

Tax and legal implications

In the following we are setting out the key tax and legal requirements related to the Re-domiciliation in both, the Emigrating State and the Immigrating State. Given that there could be a number of Emigrating States depending on the state of the company, we keep the Emigrating State comments general.

a. Emigrating State

Legal

The laws and regulations of the Emigrating State should have a mechanism and should permit a company to re-domicile to another jurisdiction. Jurisdictions in the UAE which allow for Re-domiciliation typically require, amongst others, the following from the emigrating company and/or Emigrating State:

- a) a confirmation that the company is authorized, under the laws of its jurisdiction, to make an application for continuance in another jurisdiction;
- b) that the authorization required under the company's constitution or the laws of its jurisdiction is given for the application for the Re-domiciliation;
- c) a certificate of continuance be issued by the respective registrar, that the company will cease to be incorporated in the Emigrating State;
- d) a confirmation that once a certificate of continuance is issued by the respective registrar, the interests of the members and the creditors of the company will not be unfairly prejudiced; and
- e) a statement of solvency of the company.

Tax

The tax implications in the Emigrating State depend on the applicable tax regime. If the Emigrating State has no material taxes, there will generally not be adverse tax implications upon emigration. This is usually the case where the company is based in an island state/jurisdiction such as the BVI, Jersey etc. While such jurisdictions do not impose taxes, there could potentially be tax filing obligations. Accordingly, the emigrating company may be subject to certain tax compliance requirements. This is for example the case in Jersey.

If the emigrating company is based in a jurisdiction that has a tax regime and in particular levies direct taxes, there could be exit taxes (including final tax filing obligations and tax audits). The exit charge depends on the particular jurisdiction. Very often taxes may be imposed on a deemed gain consisting of hidden (untaxed) reserves and intangible assets/goodwill. The value of such assets and the gain may have to be assessed applying the arm's length principle. To the extent that such gains relate to investments, the tax charge may be reduced under a participation exemption regime. We note that such taxes are generally gaining momentum and are also provided for under the Anti-Tax Avoidance Directives (ATAD).

There could be additional reporting requirements. Re-domiciliation transactions may potentially be viewed as reportable transactions under EU Council Directive 2018/882/EU (DAC 6) rules. This would apply if the re-domiciling company is based in or has a connection with a European jurisdiction.

b. Immigrating State (UAE)

Legal

As mentioned earlier, Re-domiciliation would only be possible into a Free Zone which has a Re-domiciliation regime in place. That said, careful consideration would need to be given as to the appropriate free zone to re-domicile into. There are many Free Zones in the UAE. Most of the major Free Zones have been designed and developed for a particular purpose and to attract a certain type of business. A company wishing to re-domicile into a Free Zone must apply to the authority administering that Free Zone for a licence (FZ Licence) to carry on business. An FZ Licence will permit a company ("Licensee") to carry on the activity or activities (Licence Activities) listed on its FZ Licence within the Free Zone in which the Licensee is registered and to operate outside the UAE (subject to compliance with laws in any jurisdiction outside the UAE in which it does business). An FZ Licence will not permit the Licensee to conduct business 'onshore' in the UAE.

Tax

The UAE as the Immigrating State has a benign tax regime. The UAE does not impose any direct taxes under current regulations. Therefore, the immigration as such does not lead to adverse tax implications. To the extent that the immigrating company engages in the supply of goods/services subject to VAT, a VAT registration and ongoing VAT compliance requirements may apply. In addition, the UAE ESR need to be considered if the company conducts a Relevant Activity.

Potential implications in other countries, especially underlying levels

Legal

- As discussed above, while there should generally not be adverse legal implications in the offshore Emigrating State and the UAE as the Immigrating State, there could be legal implications in other jurisdictions if for example the company has subsidiaries and/or branches in such jurisdictions.
- In addition, the Re-domiciliation is likely to trigger notification requirements in respect of subsidiaries and/or branches in other jurisdictions and, while there is no transfer of shares in the context of the Re-domiciliation, some authorities may require further supporting documents and fees may be levied. Careful thought needs to be given to these considerations before a Re-domiciliation is implemented.

Tax

Similar to the legal implications, while there should generally not be adverse tax implications in the offshore Emigrating State and the UAE as the Immigrating State, there could be tax implications in other jurisdictions where the company has a nexus and for example owns assets in such jurisdiction. A common example is are underlying subsidiaries (or foreign branches).

There are a number of countries that impose a tax on the transfer of shares by a non-resident transferor¹. While there is no transfer of shares in the context of the Re-domiciliation, relevant authorities may deem the transaction to be a disposal of shares in the underlying subsidiaries and attempt to levy a capital gains tax under domestic capital gains tax rules or based on General Anti Avoidance Rule (GAAR) provisions. It is vital that position is checked and that the transaction is supported by a clear commercial rationale to mitigate any implications. Depending on the country involved, tax rulings confirming the position should be considered.

Conclusion and recommended approach

Re-domiciliation is undoubtedly a strong corporate structuring tool due the various benefits set out above. The UAE provides for a strong value proposition due to the number of different options available combined with the ability to create genuine substance. Our recent experience indicates that this has led to increase in Re-domiciliation to the UAE. We also note that the relevant free zone authorities tend to be supportive of these transactions.

On the flip side, businesses and advisors should be aware of the complexities involved. A due diligence should be performed prior to the Re-domiciliation to mitigate adverse implications. Besides a UAE free zone feasibility study, businesses should perform a legal and tax due diligence.

¹ E.g. the Kingdom of Saudi Arabia, Kuwait, China and India, Burkina Faso, Cameroon, Chad, Egypt, Gabon, Eritrea, Mali, Niger, Rwanda, Senegal and Uganda.

The tax due diligence should encompass reviewing the exit/entry tax implications, ongoing tax filing obligations (e.g. UAE ESR) as well any implications associated with any assets such as subsidiaries (capital gains taxes, stamp duty, impact on tax attributes such as losses).

The legal due diligence should, amongst others, address and consider the impact of the Re-domiciliation on the licensing of the company, third party contracts, subsidiaries and branches, financing arrangements, intellectual property, officer requirements, regulatory requirements and ESR.

Deloitte and Clyde & Co have dedicated teams that advise regularly on the legal and tax implications of Re-domiciliation in and out of the UAE. Should you have any questions, please do not hesitate to contact the authors of this article:

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