

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and
Mr Fouad Mohammed Thunyan Alghanim v Hashemite Kingdom of Jordan
(ICSID Case No. ARB/13/38)**

**PROCEDURAL ORDER No 10
ON RESPONDENT'S APPLICATION TO EXCLUDE DOCUMENTS**

12 April 2016

The Tribunal

The Honourable L. Yves Fortier, PC CC OQ QC
Professor Marcelo G. Kohen
Professor Campbell McLachlan, QC (President)

Secretary to the Tribunal

Ms. Aïssatou Diop

Assistant to the Tribunal

Mr. Jack Wass

Whereas:

On 15 February 2016, the Respondent submitted its Rejoinder on the Merits and Reply on Jurisdiction (**Rejoinder**), together with witness statements and expert reports, as contemplated by Procedural Order No. 1 dated 16 October 2014 (**PO No. 1**);

By Procedural Order No. 6 dated 21 March 2016 (**PO No. 6**), the Tribunal determined an application by the Claimants for leave to file rebuttal evidence in response to the Respondent's submissions. The Tribunal denied the majority of the Claimants' requests to file rebuttal evidence, but granted part of Request 4 (corresponding to part of Requests 10, 11 and 13 in the Respondent's formulation) and Request 5 (corresponding to Request 14);

Claimants' Request 4 concerned the evidence of Mr Rabah, the legal expert called by the Respondent, in relation to the capital gains exemptions in the 2009 and 2014 Tax Laws (corresponding to Article 7.A.15.A of the 1985 Tax Law applicable to the transaction in the present case) (**Rabah 2**).

Claimants' original Request 4 sought leave to respond to four arguments advanced by Mr Rabah and Mr Batarseh, including by adducing additional documentary evidence. The Claimants' application did not identify to which of those arguments the documentary evidence would relate, simply referring to documentary evidence concerning the sale of 'closely held companies...from 1977-2014' and 'public shareholding companies whose substantial part of shares was sold between 2010-2015'.

The Tribunal granted leave to the Claimants to file rebuttal evidence in relation to the first two points raised in Request 4, but denied leave in relation to the latter two points. The Claimants were granted leave to respond to the following arguments advanced by Mr Rabah:

- (a) In relation to the 2014 Tax Law, Mr Rabah makes a new statement that paragraphs 7 and 8 of Article 4 of the 2014 Tax Law would be redundant if profits generated from the sale of shares were capital gains *per se*.
- (b) Mr Rabah also states, for the first time, that the legislator intended, in paragraphs 7 and 8 of Article 4 of the 2014 Tax Law, that the 'income accrued from trading in "husas" shares and "ashom" shares may consist of goodwill element.'

As the Respondent acknowledges in its response to the Claimants' application, Rabah 2 discusses both Article 4(a)(7)-(8) of the 2009 Tax Law and Article 4(a)(6)-(7) of the 2014 Tax Law, which Mr Rabah testifies is in similar terms, a point that the Tribunal had expressly noted in PO No 6;¹

The Tribunal granted the Claimants leave to file evidence in response to these arguments on the following limited terms set forth in paragraph 48 of PO No 6:²

- (a) The Claimants' experts should have the opportunity to respond to the first two points raised by Mr Rabah.

¹ [46] n 23.

² Emphasis added. Those terms are also reflected in Annex A to PO No. 6.

- (b) The Claimants also seek leave to produce two sets of “documentary evidence”, recording “closely held companies...which were wholly or substantially sold from 1977-2014” and “records of public shareholding companies whose substantial part of shares was sold between 2010-2015.” The Claimants have not explained to which aspects of the new arguments these documents would relate. The Tribunal also recalls that the parties have submitted considerable documentary evidence already in support of their positions. *The Claimants are permitted to submit only specific documents that are strictly necessary to support any opinions expressed by Dr Masa’deh and Mr Al-Akhras in accordance with the preceding paragraph. Claimants may not have leave to adduce these documents from these additional sets for any other purpose.*

Claimants’ Request 5 concerned Mr Rabah’s evidence that Article 7.A.15 of the 1985 Tax Law only applies to shares that have been bought as well as sold. The Tribunal granted the Claimants leave to file rebuttal evidence from Dr Masa’deh and Mr Al-Akhras in relation to this argument, but the Claimants did not seek and the Tribunal did not grant leave to submit any further documentation in support;

On 31 March 2016, the Claimants submitted rebuttal reports from Dr Masa’deh (**Masa’deh 3**) and Mr Al-Akhras (**Al-Akhras 2**), along with Appendices to Masa’deh 3 and what is described as ‘[a] table and supporting documentation which support paragraph 2.8 of the third report of Dr Masa’deh’ (which addresses Request 4 above);

The table (described as ‘Claimants’ Additional Rebuttal Evidence’) summarises 9 transactions in respect of which the Claimants allege that tax was not imposed; of these, 1-4 occurred in 2011 or 2012 and 5-9 occurred before 2009;

The Claimants’ letter accompanying their submission acknowledged that the supporting documentation had not yet been translated.³ The Respondent states that it is about 200 pages long, and that extracted passages of Annexes 1-9 were provided to the Respondent on 5 April 2016.

Notwithstanding the statement in paragraph 5 of the document entitled ‘Claimants’ Additional Rebuttal Evidence’, the Tribunal has not as yet received a copy of the Annexes referred to in the Claimants’ table, whether in Arabic or in translation;

The table in that document includes 9 separate items (as does the table in the Claimants’ letter of 10 April 2016), but the Respondent’s letter of 7 April 2016 refers to 10 items;

In their subsequent letter of 10 April 2016, the Claimants explain that Annexes 1-4 concern transactions governed by the 2009 and 2014 Tax Laws, whereas Annexes 5-9 concern transactions governed by the 1985 Tax Law;

At paragraph 63(b) of PO No. 6, the Tribunal gave leave to the Respondent to file sur-rebuttal evidence strictly in reply by close of business, London time, on Thursday 14 April 2016;

By letter of 7 April 2016, the Respondent sought an order that the Tribunal exclude the Claimants’ additional documentary evidence on the ground that it has been submitted without leave,⁴ submitting in footnote 3 that ‘[e]ven if the scope of the leave granted to the Claimants encompassed the interpretation of Article 4(a)(7)-(8) of the 2009 Tax Law

³ Paragraphs 11.2 and 11.3 of PO No. 1 require all documents filed in any language other than English to be accompanied by a translation of at least the relevant parts.

⁴ The Respondent does not seek the exclusion of Masa’deh 3 or Al-Akhras 2.

[i.e. was not confined to the 2014 Tax Law], the additional evidence found in Annexes 5-10 would still fall outside the scope of that leave since those documents all relate to transactions occurring before the entry into force of the 2009 Tax Law’;

By letter of 11 April 2016, the Claimants responded to the Respondent’s application, submitting in particular that Mr Rabah had put in issue the relevance of the 2009 and 2014 Tax Laws for the interpretation of the 1985 Tax Law;

By letter dated 12 April 2016, the Respondent replied to the Claimants’ letter;

The Tribunal decides as follows:

1. In the light of the specific terms of paragraph 48 of PO No 6, the documents described as Annexes 1-4 above are within the scope of the leave that the Tribunal granted to the Claimants to adduce additional documents, since the Table states that each concerns transactions governed by the 2009 Tax Law. For the reasons stated above, PO No 6, reflecting the terms of Mr Rabah's evidence to which leave was granted to respond, includes the relevant provisions of the 2009 Tax Law that, according to Mr Rabah's evidence, are in similar terms to those of the 2014 Tax Law.
2. With respect to the documents described as Annexes 5-10:⁵
 - (a) It was Mr Rabah’s introduction of new arguments based on the formulation of the 2009 and 2014 Tax Laws that formed the ground for the Tribunal's decision in PO No 6 that the Claimants be given an opportunity to respond in the form of rebuttal evidence.
 - (b) The Claimants’ leave was limited to the submission of documents specifically in relation to Mr Rabah’s discussion of those Tax Laws.
 - (c) At paragraph 28 of his second report, Mr Rabah draws a link between the 2009/2014 Tax Laws and Article 7.A.15.A of the 1985 Tax Law. In the Tribunal’s view, that link is not sufficient to justify the Claimants adducing documents relating to transactions that predate the 2009 Tax Law. The tenor of Mr Rabah’s opinion is that the 2009/2014 Tax Laws assist in understanding the 1985 Tax Law. It does not follow that the Claimants are entitled to adduce additional documents concerning transactions under the 1985 Law on the basis that they are relevant to the interpretation of the *later* statutes.
 - (d) The 1985 Law has always been at the heart of these proceedings. Both Parties have had a full and proper opportunity to adduce evidence relevant to the interpretation and application of that Law in the two rounds of written pleadings. The addition into the record of further documentary evidence on practice under that Law cannot be permitted now, after the close of written pleadings, where leave has been specifically limited to a new point relating to the impact of the subsequent statutes on the interpretation of the 1985 Law.
3. The fact exhibits that may be admitted into the arbitration record as a result of the present application concern the subsequent practice – in particular of the Income and Sales Tax Department – in the application of the relevant statutes to other transactions. These are in a category distinct from legal authorities, including judicial decisions on Jordanian law (such as those of the Court of Cassation) that both parties have already adduced in

⁵ As noted above, the Respondent’s letter only describes 9 Annexes, but the Claimants have identified 10.

support of their submissions. The Tribunal hereby notifies the parties that it will wish to hear from Dr Masa'deh and Mr Rabah at the Hearing on the extent to which the evidence of such subsequent practice is, *as a matter of Jordanian law*, admissible and relevant in the interpretation of Jordanian tax legislation. To the extent that either Party wishes to refer to or rely upon any further legal authorities of Jordanian law on this issue of interpretation, they must file and serve the same, accompanied by a translation in English by close of business, London time, on Wednesday 20 April 2016.

For these reasons, the Tribunal orders that:

- (1) The Respondent's application is granted in relation to the documents described as Annexes 5-10 of the Claimants' Additional Rebuttal Evidence, which are hereby excluded from the record;
- (2) The Respondent's application is otherwise denied;
- (3) Leave to both Parties to file any additional legal authorities (with translations) strictly limited to the specific issue set forth in paragraph 3 above by close of business in London on Wednesday 20 April 2016.

For and on behalf of the Arbitral Tribunal

SIGNED

Professor Campbell McLachlan QC
President of the Tribunal
Date: 12 April 2016