Neutral Citation Number: [2017] EWHC 279 (Comm)

Case No: CL-2012-001044

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/02/2017

Before :

MR JUSTICE KNOWLES CBE

- -

Between :

ATHEER TELECOM IRAQ LIMITED	**Claimant**
- and -	
(1) ORASCOM TELECOM IRAQ CORP. LIMITED **(2) GLOBAL TELECOM HOLDING S.A.E. (formerly known as ORASCOM TELECOM HOLDING S.A.E.)**	**Defendants**

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- -

Mark Howard QC and Conall Patton (instructed by **Linklaters LLP**) for the **Claimant**
Lord Falconer of Thoroton QC, Penelope Madden QC and Deepak Nambisan (instructed by **Gibson Dunn & Crutcher LLP**) for the **Defendants**

Hearing dates: 14-18 November 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE KNOWLES

Mr Justice Knowles:

The sale of Iraqna

1. Iraqna Company for Mobile Phone Services Limited ("Iraqna") is a telecommunications business incorporated in Iraq.

2. Iraqna was originally owned by the First Defendant ("Orascom"). Then, in 2007, by a Share Purchase Agreement ("the SPA") dated 1 December 2007 Orascom sold the entire issued share capital of Iraqna.

3. This was a major sale in a strategically significant sector. The purchaser was the Claimant ("Atheer"), part of the group branded as Zain. The Second Defendant ("OTH") also took on obligations under the SPA. "Closing", defined under the SPA as "the completion of the sale of the Shares pursuant to Clauses 6.1 and 6.2 of this Agreement", was on 31 December 2007.

The Tax Covenant

4. Schedule 7 of the SPA was entitled "Tax Covenant".

5. By paragraph 2.1 of Schedule 7 Orascom and OTH each "covenant[ed] to pay to [Atheer]. subject to the other provisions of [the] Schedule, an amount equal to … any Tax Liability of [Iraqna] which arises: (a) as a result of any Event which occurred on or before Closing; or (b) in respect of any Income, Profits or Gains which were earned, accrued or received on or before Closing …".

6. The Appendix to this judgment contains material definitions and paragraphs from the SPA, including Schedules 5 and 7 of the SPA. The SPA also provided a number of Tax Warranties, in addition to the Tax Covenant.

7. Paragraph 2.3 of Schedule 5 provides for a US$60 million limit for Tax Covenant claims.

The 2011 and 2012 Notices

8. In due course Iraqna received a document ("the 2011 Notice") dated 27 December 2011 from the General Authority for Taxes, Ministry of Finance of the Republic of Iraq.

9. The 2011 Notice was entitled "Assessment Notice". It stated: "We have assessed your income that is subject to income tax as outlined below for the assessment year ending

on 31/12/2007, pursuant to the provisions of the Income Tax Law No. 113 of 1982, as amended in Article 32 of the same." A single amount was then given, of 219,045 million Iraq Dinars.

10. Iraqna then received two documents ("the 2012 Notices") dated 16 May 2012 from the Republic of Iraq Ministry of Finance General Tax Commission. Each was entitled "Notice of Assessment". Each stated: "We have assessed your revenues subject to income taxes as indicated below for the assessment year … in accordance with the Income Tax Act no. 113 of 1982." In one, an "Amount of Tax" of 19,299,873,000 Dinars was given on an "Amount Assessed" of 128,665,818,000 Dinars for the assessment year ended 31 December 2007. In the other, an "Amount of Tax" of 19,772,788,000 Dinars was given on an "Amount Assessed" of 131,818,583,000 Dinars for the assessment year ended 31 December 2008.

11. It is tolerably clear that the 2011 and the 2012 Notices required payment within 21 days, whether there was to be an objection to the assessment or not.

The 17 May 2012 Letter

12. The 2012 Notices were both referred to in a letter dated the next day, 17 May 2012, from the Republic of Iraq Ministry of Finance General Tax Commission Companies Department to Iraqna ("the 17 May 2012 Letter").

13. The 17 May 2012 Letter opened with a statement in these terms: "Pursuant to the decision of the opinion committee at the Ministry of Finance conveyed to us in the meeting of the opinion committee held on 9 February 2012 and endorsed by the Minister of Finance and the members of the committee."

14. Under the heading "Subject: taxes due for payment" the 17 May 2012 Letter stated that Iraqna had "incurred income taxes due for payment as listed below". Listed below were amounts of "Taxed Owed". A total of 56,842,690,000 Dinars was given, divided between fiscal years 2004 (19,060,105,000 Dinars), 2005 (33,702,806,000 Dinars) and 2007.

15. For 2006 an amount was not given but the letter stated "(according to [the first of the two 2012 Notices])". The amount given for fiscal year 2007 (4,079,779,000 Dinars) was stated to be "(addition to the tax amount due for payment according to)" the second of the two 2012 Notices. The 17 May 2012 Letter stated that the "income taxes due for payment as listed" included "unpaid taxes, surcharges, and bank interests for the fiscal years 2006 and 2007" which were "as communicated to you" in the 2012 Notices, which were attached.

16. The 17 May 2012 Letter sought payment of the "above balance" of 56,842,690,000 Dinars, a sum that does not include the amounts sought in the 2012 Notices. The payment was sought "as soon as you receive this message". The letter added that the "balance" to which it referred did not include "the direct deduction amount due for payment from the salaries and payments to employees of [Iraqna]".

Withholding tax

17. Withholding tax "by means of direct deduction" was the subject of a letter dated 23 May 2012 to "Iraqna from Republic of Iraq Ministry of Finance General Commission for Taxes Direct Withholding Division" ("the 23 May 2012 Letter").

18. This stated (in translation):

> "Based on the instructions for withholding tax by means of direct deduction No. (1) of year 2007 and considering your failure to settle all the tax payable by you for the salaries and wages granted [illegible] from the date of incorporation and as shown below, you are kindly requested to pay as soon as possible otherwise we will resort to assess you according to the principle controls."

There followed figures for years 2003 to 2007, but a total of those figures for 2004 to 2007 only, in the amount of 7,156,936,678 Dinars.

The Tax Law of Iraq and the Tax System in Iraq

19. The evidence at trial, factual and expert, showed the tax system in Iraq to be far from highly developed. This is far from surprising given the conditions in which the Iraqi authorities, including the relevant authority ("the Financial Authority"), sought to operate. As Lord Falconer QC put it in the course of argument, and expressly without criticism of the legal system or the people working in it, "you have a legal system that has come out of an incredible series of wars". This is part of the factual matrix against which the parties to the SPA contracted.

20. Real practical challenges persisted; Mr Hannouche, the expert called by Atheer, described how liquidity challenges facing the government in Iraq meant that tax refunds were usually in the form of credits for the following year. As will be seen, a great deal of the context of this case concerns whether and when money had to be paid to the Financial Authority and at whose risk when there was a dispute; the commercial importance of that context will be clear.

21. Tax legislation in Iraq predates more recent conflict and goes back to a time of dictatorship. The relevant legislation is the Income Tax Law 113 of 1982 of Iraq ("the Tax Law of Iraq").

22. For present purposes it is convenient to set out Articles 33, 34, 44, 45 and 49 of the Tax Law of Iraq in the following order (in agreed translation):

> "44 The Financial Authority shall notify the taxpayer in writing to pay the tax stating the amount thereof and the date it becomes due. The signature of the taxpayer on the notice of the assessment shall be considered as notification for payment."

> "33(1) The taxpayer, after being notified of the assessed income and the tax payable thereon, may submit an objection in writing to the Financial Authority which notified him of the assessment or to any of the offices of the General Commission for Taxes within 21 days from the date he is notified, showing

reasons for his objection and the amendment demanded by him. He shall have to submit to the Financial Authority such books, records and the necessary statements regarding his income as it may require in order to verify his objection.

(2) The Financial Authority may accept the objection after the lapse of the period set out in paragraph (1) if it is satisfied that the objector was unable to submit it owing to absence from Iraq, sickness incapacitating him from work, or other event of force majeure.

(3) The taxpayer's objection shall not be considered, unless the taxpayer pays the tax assessed on him. If the taxpayer is unable to pay the entire amount of the assessed tax, the Financial Authority may, if satisfied, collect the tax by instalments in accordance with instructions to be issued by the Minister, with due consideration to be given to the text of Article 46 of this law."

"34 If agreement is reached between the objector and the Financial Authority regarding the assessment of the income and the amount of the tax, or if the objection is submitted after the legal period and the Financial Authority does not agree on an extension, the assessment shall become final and no appeal shall be accepted thereto."

"45 If the tax is not paid within 21 days from the date of notification in accordance with Article 44, there shall be added 5% of the amount of tax. This amount shall be doubled if the tax is not paid within 21 days after the lapse of the first period. The Minister, or the person authorised by him, may exempt the taxpayer from the additional amount, wholly or partially, if [] he is satisfied that the delay in payment by the taxpayer was due to his absence from Iraq, sickness incapacitating him from work or any other event of force majeure.

The Minister may also refund the additional amount if paid under one of the said circumstances."

"49. The Financial Authority shall refund to the taxpayer any amount of tax paid by him in excess of the amount due from him, provided that he shall submit an application in this respect within five years from the close of the financial year in which the excess has been paid. …"

23. Article 16 of the Tax Law of Iraq addresses the dissolution or liquidation of a company, and is in these terms:

"16 The dissolution or liquidation of a company shall be considered as tantamount to distribution of dividends and any sum becoming due to the shareholder over the original value paid for his shares, shall be liable to tax except amounts of reserve on which the tax has already been paid. The liquidator and the founding members shall pay the tax due in the said manner and the liquidation shall not be finalised except with the approval of the Financial Authority."

24. Article 147 of the Companies Law of Iraq provides:

> "A company is terminated in accordance with the provisions of this law for the following reasons: … Second: Suspension of its activity for more than one year without any legitimate reason. … Fourth: Merger with another company or transformation into another type of company under the provisions of this law."

25. In understanding these provisions, and other aspects of Iraq Law, I heard expert evidence from two witnesses, Mr Hannouche and Mr Mezu. There were limits to the expertise either could offer, but it is unlikely that the position would be otherwise for almost anyone given the circumstances prevailing in Iraq. I found Mr Hannouche's evidence cogent, frank and usefully set in context. I gained little assistance from the evidence of Mr Mezu, who had less current contact with Iraq and its laws.

The dispute (1): "on or before Closing"

26. Given the definition of Tax Liability in the SPA we are concerned with liabilities of Iraqna (the acquired company, not the purchaser or the seller) to make payments of, or in respect of, tax.

27. The parties disagree on the question whether the sums claimed by the 2011 Notice are within paragraph 2.1 of Schedule 7 of the SPA. The 2011 Notice claimed to assess Iraqna's income to income tax for the assessment year ending on 31 December 2007. Did that arise "(a) as a result of any Event which occurred on or before Closing; or (b) in respect of any Income, Profits or Gains which were earned, accrued or received on or before Closing …"?

28. Atheer, through Mr Howard QC and Mr Patton say it did. Orascom and OTH, through Lord Falconer QC, Ms Madden QC and Mr Nambisan say it did not because it arises from Iraqna's cessation of trade which was after Closing.

29. No conclusion that is satisfying in terms of the strength of its evidential foundation is possible on this issue. Far more is not known that is known. I will do the best I can.

30. The expert evidence on Iraq Law supported the view that (so far as material) tax is not payable on a capital gain realised on a sale of shares. In any event a capital gain on the sale of Iraqna would be that of the seller of the shares in the acquired company and not that of the acquired company.

31. Before Closing, reference to Article 16 had been made by the parties. However there is no sign of reliance on that Article by the Financial Authority before or at the time of the 2011 Notice.

32. Later, in court proceedings in Iraq after the 2011 Notice, Article 16 of the Tax Law of Iraq has been relied by the Financial Authority to justify an assessment on Iraqna. But in my judgment that does not provide a convincing explanation of what was behind the 2011 Notice at the time it was given. Very fairly, the highest that Lord Falconer QC, for Orascom, could put the treatment of the issue by the Iraqi courts in his oral closing argument was that "the Tax Authority's contention made to the court that this is an article 16 tax liability is not set aside".

33. Article 16 concerns dissolution or liquidation of a corporate entity. There was not an actual dissolution or liquidation of Iraqna. I have seen nothing to suggest that at the time of the 2011 Notice the Financial Authority was proceeding on the basis of a deemed dissolution. Later references (for example in minutes of a meeting of 7 April 2015) to "dissolution" do not, in my judgment, throw light on how things were seen in 2011.

34. I accept that what happened was announced as a merger, and in practice Iraqna's business was then absorbed into Atheer's, but that is not enough. Further, the 2011 Notice was in respect of the assessment year ended 31 December 2007 and thus not in respect of events after Closing.

35. It is my conclusion that there was no sophistication or analysis behind the 2011 Notice at the time it was given. The 2011 Notice was on the balance of probabilities simply inspired by a sense on the part of the Financial Authority that a tax receipt by the state should accompany a major sale such as the sale of Iraqna.

36. Rightly or wrongly the Financial Authority chose to make this assessment on Iraqna rather than anyone else, including Orascom. It may be that an objection under Article 33 of the Iraq Tax Law to the assessment could have prevailed, or may yet prevail. But, so far as concerns the parties to the SPA, the assessment has been made, and any liability of Iraqna that arises is as a result of what occurred on Closing, rather than after Closing.

The dispute (2): "on or after Closing"

37. Exception 3.1(f) engages if "the Tax Liability would not have arisen but for a cessation of trade by, or a change in the nature or conduct of the trade of, [Iraqna] on or after Closing".

38. I heard no evidence that persuaded me that this exception was engaged on the facts, i.e. in summary that it was cessation of or change in trade that caused the liability to which the 2011 Notice was directed, to make payments of or in respect of tax.

The dispute (3): "finally liable"

39. Orascom and OTH contend that paragraph 10.1(a) of Schedule 7 of the SPA engages only when payment is imminent in respect of a final liability of Iraqna to make payments of or in respect of Tax, and in the present case no final liability is yet established.

40. They argue that "whether the defendants have to pay under clause [10.1] does not depend on whether there is an Iraqi law obligation to pay, but on whether, as a matter of practicality, the claimants are actually required to make the payment within the next 10 days". This point is taken in relation to all tax claimed by the Tax Authority under the 2011 and 2012 Notices and the 17 May 2012 Letter.

41. Paragraph 10.1(a) is concerned with an Actual Tax Liability (itself defined within the definition of "Tax Liability" as "a liability of the Company to make payments of, or in respect of, Tax"). Clause 10.1(a) refers to payment on the date ten Business Days before the date on which Iraqna "will finally be liable to pay the Tax without incurring a liability to interest and/or penalties in respect of the relevant Claim". In my judgment Mr Howard QC and Mr Patton are correct that the words just quoted do not require finality in the narrower sense of the absence of any possibility of appeal or subsequent compromise.

42. Where the taxpayer has been notified of an assessment but considers the assessment is not correct, I find that Article 33(3) of the Tax Law of Iraq requires payment of the tax assessed to be made as a pre-condition to consideration of an objection to the assessment. The Article allows a procedure to mitigate this requirement only "if the tax payer is unable to pay the entire amount of the assessed tax".

43. This is a robust system, to say the least. The evidence in the case also showed a system prepared in due course to direct, through the Financial Authority, a large number of banks across Iraq to freeze Atheer's (and Iraqna's) assets across the country. I accept however that it is only realistic to recognise that in some situations the system may in practice be able to be more flexible; it is very difficult, as Lord Falconer QC submits, to reach conclusions about "what happens where the Iraqi Tax Authorities considered an objection without the payment having been made".

44. Articles 33 and 45 both require payment within 21 days from the date of notification of an assessment. Articles 33(3) and 44 require the payment to be of the amount of the tax stated in the assessment, save where instalments are allowed. Article 45 will (unless the Minister exempts the taxpayer on specified grounds) add a penalty of 5% of the amount of the tax where tax is not paid within the 21 day period.

45. There was no exemption by the Minister in the present case. If in accordance with paragraph 10.1(a) of Schedule 7 payment is to be ten Business Days before the date on which Iraqna "will finally be liable to pay the Tax" and so liable "without incurring a liability to interest and/or penalties in respect of the relevant Claim", the payment would have to be ten Business Days before the end of 21 days from the date of notification of the assessment.

46. Orascom's argument to the contrary sits unhappily with the scheme of Schedule 7. Paragraph 2 read with paragraph 5.1(d)(ii) makes clear that paragraph 2 includes payments which may later be followed by recovery from the Financial Authority. Paragraph 9 does not only apply "immediately following settlement, compromise or abandonment of the Disputed Claim". It also applies where "action requested by the Seller pursuant to [paragraph 8.3] cannot be taken prior to the Tax the subject matter of the Disputed Claim being paid". It is the latter application of paragraph 9 that is engaged where the relevant tax law provides as Iraq Law does.

47. Consistently, if any sum paid by Orascom under paragraphs 9 or 10 of Schedule 7 proves to be greater than the amount found due after the taxpayer's objection has been considered under Article 33, the excess "recover[ed] from … [the] Tax Authority" (paragraph 5.1) is to be paid to Orascom as seller. Paragraph 8 provides similarly for repayment of any difference after (later) settlement or compromise.

48. On Orascom's case if it disputed the assessment it could decline to use the reasonably elaborate arrangements under the SPA that are designed for the purpose (and which would require it to fund payment within 21 days in order to avoid penalties and in order to maintain the right to challenge) and instead leave Iraqna to fund payment for the same purposes. I do not, with due respect to the arguments made, consider this to be a commercial interpretation of Schedule 7 as a whole, or of paragraph 10.1 in particular.

49. Lord Falconer QC, Ms Madden QC and Mr Nambisan argue forcefully that Atheer's argument might lead to a situation where Orascom was required to pay Atheer when Atheer would hold on to the money and not pay it on to the Financial Authority. However on my reading of Schedule 7, under paragraph 9 Orascom would be entitled, as against Atheer, to make the "Disputed Tax Payment" itself (direct to the Financial Authority). If that was declined by the Financial Authority (because the payment is due from Iraqna) Orascom could require Atheer under paragraph 8.3(a) to procure that Iraqna took action to dispute the Claim by paying to the Financial Authority the sum provided by Orascom.

50. There was evidence that recently, with the intervention of the acting Minister of Finance, and Prime Minister, the Financial Authority will or may be prepared to receive an objection now. Orascom points out persuasively that there will be negotiations and a figure will be reached. Mr Hannouche's evidence was that the Financial Authority had the right to amend an assessment if discussions were successful for the taxpayer.

51. In these circumstances, referring, fairly, to the paucity of information disclosed by Atheer as to the current position, Lord Falconer QC argues that "nobody … is pressing for payment[;] [i]f nobody is pressing for payment, then there isn't a requirement to pay under clause 10.1". Until a figure is reached, or there is a requirement to pay as a matter of fact, argues Lord Falconer QC, there is no final liability to pay within the meaning of paragraph 10.

52. I respectfully disagree. The fact that payment is not being pressed for does not affect that point at which "liability to interest and/or penalties in respect of the relevant Claim" accrues. In my judgment the date "ten Business Days before the date on which [Iraqna] will finally be liable to pay the Tax without incurring" that liability to interest or penalties has already long accrued.

The dispute (4): engaging contractual exceptions; dishonesty

53. A number of exceptions under paragraph 3.1 of Schedule 7 are relied on. Exception 3.1(f) has already been referred to. Some of those originally relied upon were not pursued.

54. Others of the exceptions are said to be engaged by reason of dishonesty on the part of Atheer. Orascom and OTH argued that the Tax Liability the subject of the 2011 Notice was caused by dishonest conduct on the part of Atheer. The dishonesty alleged concerned the conduct of Atheer towards the Financial Authority in responding to the

2011 Notice. An implied term that Atheer would conduct negotiations honestly was also contended for.

55. Atheer accepts that a Mr Al-Ajeeli held himself out as having authority to represent an Orascom entity in proceedings before the Iraqi courts. He purported to make admissions of liability on that entity's behalf in respect of the 2011 Notice. This whole course of conduct was dishonest.

56. I have listened to the three witnesses - Mr Musleh, Mr Moneer and Mr Shalabi - called to give oral evidence by Atheer, and I have read their written evidence. I found none of them open and straightforward in an account of dealings with a Mr Moussawi and with Mr Al-Ajeeli. None of them was frank in the evidence given to the Court, including variously on the availability of documents, in relation to discussions with the Financial Authority, and as to the progress of court proceedings in Iraq.

57. And between them these witnesses, who had relatively senior roles, gave a poor impression of corporate standards at Atheer or within the group of which it is part. Lord Falconer QC more than persuades me that I should not trust the factual witnesses called by Atheer. I am also persuaded I should not put reliance on a letter dated 20 March 2012 produced by Atheer.

58. However the short point is that this does not assist. The dishonesty did not lead to the 2011 Notice but came later. The obligation under Schedule 7 in respect of the Tax Liability the subject of the 2011 Notice was not caused by the dishonest conduct that there was.

59. Lord Falconer QC argues that there is an inference to be drawn from the later dishonest conduct that allows one to draw a conclusion against Atheer at an earlier point, where dishonest conduct would be causative. He argues the Court "cannot rely on anything that has gone on between the tax authorities and Atheer" because Atheer has not made full disclosure and what is known about their conduct shows it to be dishonest conduct. I am not persuaded that the suggested inference can be drawn at the earlier point suggested.

60. In the context of the exceptions under paragraph 3 of Schedule 7, Orascom and OTH sought permission at the end of the trial to amend to contend that a failure by Atheer to raise an objection in 2015 to the assessments to income tax a liability to tax would not have arisen. Although the proposed amendment was very late, it is the case that some of what had been happening in 2015 was disclosed late by Atheer. However, given the conclusions I have reached as to when there was a final liability to pay under the assessments, within the meaning of paragraph 10, the proposed amendment is not material to the outcome of the case and I formally refuse permission.

The dispute: (5) contractual time-bar

61. Paragraph 3 of Schedule 5 provides time limits for claiming under the Tax Covenant. It requires "written notice containing reasonably sufficient details of" such a claim to be "given by or on behalf of [Atheer] to [Orascom] … by no later than 6 (six) years from the end of the year during which the Closing shall take place". And it provides

that any such claim shall "be deemed to have been withdrawn and shall absolutely determine unless legal proceedings in respect of it have been properly issued and validly served within 6 (six) months of such written notice being given to [Orascom]."

62. By letter dated 20 July 2012 Atheer's solicitors wrote to Orascom referring to the 2011 Notice, explaining Atheer's position that the Tax Covenant was engaged and how, and stating that Atheer was giving notice of its intention to bring a claim under the Tax Covenant. This was within 6 years from the end of the year during which Closing took place. The present legal proceedings before the Commercial Court were issued and served within 6 months.

63. Orascom and OTH say that Atheer gave notice of its intention to bring a claim under the Tax Covenant by an earlier letter dated 29 December 2011 (and by what Orascom and OTH call "an update" dated 10 April 2012). The present legal proceedings before the Commercial Court were not issued and served within 6 months of those earlier letters.

64. However those earlier letters in my judgment did not give notice of intention to bring a claim under the Tax Covenant. They gave details of the claim made in the 2011 Notice by the Tax Authority. These details were required by the separate obligation under paragraph 8.2 of Schedule 7 to "give written details of the relevant matters" to Orascom where Atheer or Iraqna became aware of such claim (or any determination or direction in respect of losses which could increase a Tax Liability).

The dispute: (6) invalid, abandoned and out of time assessments

65. Orascom and OTH contend that the Financial Authority has abandoned the tax sought in the 17 May 2012 Letter (as regards 2004 and 2005) and the 23 May 2012 Letter (as regards all years). They did not provide evidence that satisfied me that this contention was made out.

66. The demands for 2004 and 2005, and at least some of the demands in respect of withholding tax, do appear to be out of time under Iraq Law but I prefer the expert evidence of Mr Hannouche that this does not invalidate the assessment. It is instead a point that can be raised by way of objection to the assessment. The liability remains unless and until an objection is taken and prevails.

67. Orascom and OTH also suggested that the case involved invalid assessments because of the form of the documents. I accept that a multi-year assessment (as in the letter dated 23 May 2012 dealing with withholding tax, and the Letter dated 17 May 2012), was not usual. However I also accept that the requirements as to form are to be found in Article 44, which requires only notification to the taxpayer in writing to pay tax, with a statement of the amount and the date it becomes due. In my judgment, the case does not involve assessments that are invalid by reason of the form of the documents.

68. Orascom and OTH presented, through Mr Mezu, an analysis that contended that Iraqna had already paid the income tax and withholding tax it should have paid for the tax years 2004 to 2007 and that the additional income tax claimed for those years bore no correlation to its actual profits. This does not affect the point, material to the

present case, that the assessments must be paid by the taxpayer. If the assessments are wrong then an objection may be made, and if the objection is upheld then the taxpayer will be entitled to repayment.

Conclusion

69. In these circumstances the Claimant succeeds. I will be pleased to consider the appropriate terms of an Order to reflect this judgment.

Appendix

The term "Tax" was defined in the SPA as follows:

> " **"Taxation"** or **"Tax"** means all forms of taxation and statutory and governmental, state, provincial, local governmental or municipal charges, duties, contributions and levies, withholdings and deductions, in each case whether of Iraq or elsewhere and whenever imposed and all related penalties, charges, costs and interest (in all cases, regardless of whether such taxes, penalties and interest are directly or primarily chargeable against or attributable to [Iraqna] or any other person and regardless of whether [Iraqna] has or may have any right of reimbursement against any other person)."

The terms "Tax Liability", "Event" and "Income, Profits or Gains" were defined in Schedule 7 to the SPA as follows ("unless the context require[d] otherwise"):

> **"Tax Liability** means a liability of [Iraqna] to make payments of, or in respect of, Tax (an "Actual Tax Liability") but also the setting off against any Tax Liability or against Income, Profits or Gains earned, accrued, incurred or received on or before Closing of any Post-Closing Relief, in circumstances, where, but for such setting off the relevant Group Company would have had an Actual Tax Liability in respect of which [Atheer] would have been able to make a claim against [Orascom] under this Schedule and so that the amount of the Tax Liability shall be the amount of Tax which has been saved in consequence of such set off of the Post-Closing Relief."
>
> "**Event** means an event, transaction, action or omission whether alone or in conjunction with any other transaction, action or omission and includes further (without limitation) becoming, being or ceasing to be a member of a group of companies (however defined) for the purposes of any Tax;"
>
> **"Income, Profits or Gains** means revenue profits, chargeable gains and any other similar measure by reference to which Tax is chargeable or assessed;
>
> **…** In this Schedule references to any **Income, Profits or Gains** earned, accrued or received before a particular date or in respect of a particular period include Income, Profits or Gains which are deemed for the purposes of any Tax to have been earned, accrued or received at or before the date or in respect of that period."

By paragraph 3.1 of Schedule 7 to the SPA:

> "The covenant at paragraph 2 does not apply in respect of any Tax Liability of [Iraqna] to the extent that:

…

(d) the Tax Liability arises or is increased as a result of:

(i) a change in Tax rates or in legislation made after Closing; or

(ii) a change or withdrawal after Closing of any previously published practice, concession or interpretation of any Tax Authority; or

(e) the Tax Liability would not have arisen but for an omission or a voluntary act or transaction carried out (other than in fulfilment of a legally binding commitment entered into by [Iraqna] on or before Closing) by [Atheer] or [Iraqna] (including any act or omission by any director, officer, employee, agent, representative or adviser of or to [Atheer] or [Iraqna]) after Closing and otherwise than in the ordinary course of business of [Iraqna] as such business was conducted at Closing; or

(f) the Tax Liability would not have arisen but for a cessation of trade by, or a change in the nature or conduct of the trade of, [Iraqna] on or after Closing; or

(g) the Tax Liability arises or is increased in consequence of any failure by [Atheer] to comply with, or a failure to procure the compliance of [Iraqna] with, any of their respective obligations under this Agreement; or

…

(k) the Tax Liability would not have arisen but for:

(i) the making of a claim, election, surrender or disclaimer, the giving of a notice or consent, or the doing of any other thing under the provisions of any enactment or regulation relating to Tax, in each case after Closing by [Atheer] or [Iraqna], other than at [Orascom]'s direction in accordance with paragraph 8; or

(ii) the failure or omission on the part of [Iraqna] (other than at [Orascom]'s direction in accordance with paragraph 8) to make any such valid claim, election, surrender or disclaimer, or to give any such notice or consent or to do any other such thing, as [Orascom] may require in respect of periods or matters for which [Orascom] has conduct under paragraph 8."

By paragraphs 1.1, 5.1, 8, 9 and 10.1(a) of Schedule 7 to the SPA:

"1.1 In this Schedule, unless the context requires otherwise:

Claim means (in any jurisdiction):

(a) any assessment, notice, letter, determination, demand or other document issued by or on behalf of any Tax Authority …

in any case, from which it appears that: (i) a Tax Liability has been, or may be, imposed on [Iraqna]; or (ii) increased or further payment to a Tax Authority is required to be made by [Iraqna]; …"

5. Recovery from third parties

5.1 If [Iraqna] is entitled to recover from any person (other than [Atheer] but including, without limitation, any Tax Authority) any sum in respect of any Tax Liability to which paragraph 2 applies, [Atheer] shall procure that [Iraqna] shall:

(a) promptly notify [Orascom] of all relevant details concerning such entitlement after [Iraqna] becomes aware of such entitlement;

(b) take all appropriate steps to enforce recovery under such entitlement (if so required by [Orascom] and at [Orascom]'s expense);

(c) keep [Orascom] fully informed of the progress of any such action for the purpose of making recovery in accordance with this paragraph 5.1; and

(d) promptly pay to [Orascom] the sum equal to the lesser of:

(i) any amount so recovered (together with an amount equal to any interest payment or repayment supplement received by [Iraqna] in connection with the recovery); and

(ii) the amount already paid by [Orascom] in respect of such Tax Liability under paragraph 2.

8. Conduct of Claims

8.1 [Orascom] shall be entitled, at its expense, to resist any Claim for and on behalf of in the name of [Iraqna] which is or could relate to a Tax Liability for which [Orascom] might be liable under paragraph 2, subject to the remaining provisions of this paragraph 8.

8.2 If [Atheer] or [Iraqna] becomes aware of a Claim (or any determination or direction in respect of losses which could increase a Tax Liability), [Atheer] shall give written details of the relevant matters to [Orascom] as soon as reasonably practicable.

8.3 [Atheer] shall (and where relevant, shall procure that [Iraqna] shall):

(a) take such action as [Orascom] may reasonably request in writing to avoid, dispute, defend, resist, appeal or compromise any Claim (or any determination or direction in respect of losses) (a "Disputed Claim"), subject to [Orascom]

agreeing (to [Atheer]'s reasonable satisfaction) to indemnify [Atheer] or [Iraqna] (as applicable) against any reasonable costs which they may suffer or incur as a result of taking such action;

(b) make available to [Orascom] such employees of [Iraqna] or [Atheer] as [Orascom] may reasonably require and all information as may be available and as may reasonably be requested by [Orascom] for avoiding, disputing, resisting, appealing, compromising or contesting any such claim; and

(c) not accept or pay or compromise any such Claim without [Orascom]'s prior written consent.

…

8.5 Paragraph 8.3 shall not apply in respect of any Claim:

(a) to the extent that it would involve [Atheer] or [Iraqna] contesting a Disputed Claim beyond the first appellate body (excluding the Tax Authority which has made the Disputed Claim) in the jurisdiction concerned unless tax counsel appointed by [Orascom] confirms that … it would be reasonable for [Orascom] to pursue that course of action; or

(b) if [Orascom] does not request [Iraqna] to take any action within 30 Business Days following [Orascom]'s receipt of written details relation to the Claim from [Atheer] in accordance with paragraph 8.2 (in which case [Atheer] or [Iraqna] shall be free to pay or settle the Claim on such terms as it reasonably considers appropriate).

9. Payment of Disputed Claims

In respect of a Disputed Claim, [Orascom] shall pay any required sum under paragraph 2 immediately following settlement, compromise or abandonment of the Disputed Claim unless the action requested by [Orascom] pursuant to paragraph [8.3] cannot be taken prior to the Tax the subject matter of the Disputed Claim being paid (in which case, an amount equal to that amount of Tax (a "Disputed Tax Payment") shall be paid by [Orascom] promptly upon receipt by [Orascom] of a written notice from [Atheer] for that amount). For the avoidance of doubt, if [Orascom] is required to make a Disputed Tax Payment and the Disputed Claim is settled or compromised for a lesser sum that the amount of the Disputed Tax Payment, the difference between the Disputed Tax Payment and the amount at which the Disputed Claim is settled or compromised shall be repaid promptly to [Orascom].

10. Payment of Other Claims

10.1 Other than in respect of Disputed Claims (which are subject to the provisions of paragraph 9) [Orascom] shall pay any required sum under paragraph 2 on:

> (a) in respect of any payment under paragraph 2.1 which is an Actual Tax Liability, the later of (i) the date ten Business Days after the date on which [Orascom] receives written details of the amount of the liability from [Atheer] or (ii) the date ten Business Days before the date on which the [Iraqna] will finally be liable to pay the Tax without incurring a liability to interest and/or penalties in respect of the relevant Claim; …
>
> …"

By paragraph 3 of Schedule 5:

> "3. Time limits
>
> [Orascom] and [OTH] shall not be liable in respect of any Claim or Tax Covenant Claim unless written notice containing reasonably sufficient details of such Claim is given by or on behalf of [Atheer] to [Orascom]:
>
> 3.1 in the case of a Claim under the Agreement (other than the Tax Warranties and the Tax Covenant) by no later than 24 (twenty four) months from the Closing Date;
>
> 3.2 in the case of a Claim under the Tax Warranties or the Tax Covenant by no later than 6 (six) years from the end of the year during which the Closing shall take place,
>
> provided that any such Claim shall (if not previously satisfied, settled or withdrawn) be deemed to have been withdrawn and shall absolutely determine unless legal proceedings in respect of it have been properly issued and validly served within 6 (six) months of such written notice being given to [Orascom]. No new Claim may be made in respect of the facts, matters, events or circumstances giving rise to any such withdrawn Claim. "