
MERGERS, ACQUISITIONS AND SPIN-OFFS AS TAX PLANNING

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Mergers, Acquisitions and Spin-Offs are usually performed for economic purposes aiming to achieve interests of the market existing among the parties involved.

However, such operations can also be used as instruments for tax planning, which may be defined as a set of measures and actions adopted by the taxpayer in order to reduce the tax charges on its business activity.

Mergers, Acquisitions and Spin-Offs as a form of corporate restructuring are defined by the Law n. 6.404/76 (Joint-Stock Companies Law).

Merger is the operation by which two or more companies combine to organize a new company that will succeed them in all rights and obligations.¹

Acquisition is the transaction in which one or more companies are absorbed by another, which will succeed them in all rights and obligations.²

Spin-off is the operation by which the company transfers part of its assets to one or more companies, which are organized for such purpose or already existing, extinguishing the divided company if there is transferring of the entire asset, or

dividing its capital if the transferring is partial.³

It is common that such operations, when performed with the purpose of tax planning, are claimed by the Tax Administration under the argument that its intention would be to avoid the payment of due taxes. For this reason it is important to analyze and distinguish the concepts of tax avoidance and tax evasion.

Tax avoidance intends to avoid or minimize the tax charges levied on the taxpayer through lawful operations mainly used for such purpose. Otherwise, tax evasion is illegal, once it hides from the tax authorities the occurrence of taxable events through fraudulent transactions.⁴

Tax authorities, in order to dismiss the legality of a tax planning, argue the theory of rights abuse by which the acts, facts, contracts and businesses established in tax law as the basis for taxation must be interpreted in accordance with its economic effects and not according to their legal form, which means it is based on the assumption that similar economic

¹ Article 228 of Law n. 6404/76

² Article 227 of Law n. 6.404/76

³ Article 229 of Law n. 6.404/76

⁴ CARVALHO, Cristiano. Brief Comments on Tax Evasion and tax mitigation. In: PEIXOTO, Marcelo Magalhaes (Coord.). **Tax Planning**. Sao Paulo: Quartier Latin, 2004. p. 51 to 70.

situations must necessarily have equal taxation.⁵

The mentioned theory, however, violates the individual autonomy through a direct state intervention opening the possibility for the Judge or the Tax Administration to interpret the fact without any observance to standard guidelines of the tax law, among them the typicity and legal surety.⁶

Meanwhile, there are cases where the tax planning may be declared illegal by the Tax Administration.

The theory that best defines and classifies such cases is the simulation. For tax law simulation consists in distorting a factual or legal event that deviate the tax levy.⁷

The Civil Code establishes the hypothesis of simulation in its article 167⁸; except for these ones, the tax authorities would be

unable to claim the illegality of tax planning.

We may conclude that tax planning - once adopted as a preventive tool, with the intention to enable the businesses or future transactions to be performed with reduced burdensome to the taxpayer - will not lead to tax fraud.

Therefore, it is perfectly possible to the taxpayer to consider the merger, acquisition and spin-off as tools for tax planning in order to reduce the tax charges arising from the exercise of its economic activity, avoiding the excessive tax collection.

Almeida Advogados' Tax Department has a specialized team in development and implementation of tax planning and remains at your entire disposal for any clarification on the matter herein discussed.

⁵ ALVES, Adler Anaximandro de Cruz e. The legality of merger, acquisition and spin-off as tools for tax planning. Jus Navigandi, Teresina, year 7, n. 61, January 2003. Available at: <http://jus2.uol.com.br/doutrina/texto.asp?id=3583> . Access in: October 28, 2008.

⁶ CARVALHO, Cristiano, op. cit., loc. cit.

⁷ Idem

⁸ Article 167. It is null the sham transaction, but it remains valid the disguised transaction provided that it is valid in its substance and form.

Paragraph 1 - There will be simulation in legal transactions when:

I - apparently grants or conveys rights to individuals different from who it actually grants or conveys;

II - contains false statements, confessions, conditions or provisions;

III - the private instruments are pre-dated or post-dated.