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JGSA NEWS

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TAX NEUTRALITY IN DEMERGER-MERGER TRANSACTIONS

When we talk about demerger-merger, we are not dealing with the simple joining of two or more companies into one (merger) or the division of one company into two or more (demerger). The demerger-merger is characterized by combining elements of both operations: a company divides, and parts of its assets become part of other existing companies.

Although this figure is not expressly provided for in the law, the doctrine recognizes it as a legitimate operation, albeit atypical, resulting from the combination of demerger (articles 118 et seq.) and merger (articles 97 et seq.), both Commercial Companies Code.

When carried out by increasing the capital of the beneficiary company, this operation can benefit from the tax neutrality regime, provided that the companies involved are owned by the same partner(s). This avoids the taxation of capital gains or income, which, under normal conditions, would be subject to taxation.

This regime thus allows business reorganization without adverse tax effects, provided that the legal requirements set out in Article 73 of the IRC Code (CIRC) are met.

The operation qualifies for the tax neutrality regime when the demerged company transfers one or more branches of activity, organized as autonomous economic units, to the beneficiary company, under the terms of no. 2 of article 73 of the CIRC. The assets transferred must continue to be used in the same activity, ensuring the continuity of economic exploitation.

To achieve fiscal neutrality, it is still necessary:
1. That the operation be carried out through an increase in the capital of the beneficiary company.
2. That it accounts for the assets received (assets and liabilities) of the same values as in the accounts of the demerged company, as stipulated in no. 3 of article 73 of the CIRC, ensuring that the historical value is maintained and that no taxable gains or losses are generated.
3. Both companies involved are owned by the same shareholders, following paragraph 2d) of the same article.

Recently, the Tax and Customs Authority (AT), through a Binding Information, clarified the criteria for the applicability of this regime, based on an appreciated case: a private limited company, active in construction, building repair and real estate management, intends to transfer part of its assets to another company, with complementary activity in the area of real estate administrative construction.

The operation was structured in such a way as to allow each company to focus on a different area. The demerged company would maintain exclusively real estate development and management, while the beneficiary would take on construction and repair activities. The assets allocated to each branch would be transferred in an autonomous and organized manner, ensuring their operational continuity.

In this Binding Information, the AT reinforced the importance of the concept of "autonomous branch of activity", under the terms of no. 4 of Article 73 of the CIRC: this is a set of assets and liabilities organized in such a way as to constitute an economic unit capable of functioning autonomously, which already existed and was operational before the demerger.

In the case in question, the assets transferred (real estate, customer and supplier balances, employees, debts, among others) constituted, according to the AT, an autonomous branch of activity, allowing the application of the tax neutrality regime.

Finally, it should be noted that this scheme does not apply automatically. Its use must be based on valid economic reasons. Otherwise, the anti-abuse clause provided for in no. 10 of Article 73 of the CIRC may be triggered, allowing the AT to disregard the operation whenever it is found that its sole purpose is to obtain undue tax advantages.

Thus, even if the operation formally complies with the legal and tax requirements (maintenance of the shareholder ratio, clear separation of branches of activity, continuity of operation), it may be reversed by the AT if there are indications that the underlying motivation is exclusively fiscal, with no real economic basis.

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