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by Roberto Succio

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General Principles of Italy's CCCTB and Corporate Spinoffs

by Roberto Succio

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As part of the tax reform of 2004, Italy introduced the common consolidated corporate tax base (CCCTB) as a comprehensive approach to cross-border loss compensation. It also addressed the harmonization of the tax base and the reduction of compliance costs.

The CCCTB requires a common tax base across the EU and consolidates the profits and losses of group companies to calculate a single tax base.

To qualify for consolidation, the Italian parent company must own, directly or indirectly, at least 50.1 percent of the voting rights of each subsidiary. The election for domestic consolidation is binding for three fiscal years. However, if the holding company loses control over a subsidiary, that subsidiary is automatically excluded from the consolidation.

The tax consolidation regime provides for 100 percent attribution to the consolidating company of profits and losses of the consolidated companies, even if the companies are not fully controlled by the consolidating company.

The Spinoff Process

In a broad sense, a corporate spinoff process is the division of one existing company into two, usually a larger one (the parent company) and a smaller one (the spinoff).

Basically, the process consists of three phases: the decision phase, the separation phase, and the post-separation phase. In the first phase, the management makes the decision to separate the entities into two or more parts. In the second phase, the separation occurs and the new entities are founded and assets are redistributed. In the last phase, the management of the entire group establishes the new kinds of relationships among the entities.

Depending on the motivations behind the spinoff, two types can be distinguished:

- *Restructuring-driven* spinoffs are initiated by the parent company for strategic or operational motives related to the parent company. They are often the consequence of restructuring or refocusing activities of the parent company.
- *Entrepreneurial* spinoffs are driven by one or more individuals (spinoff entrepreneurs) who want to exploit unused potential based on their experience acquired within the parent company.

Antiavoidance Rule

The general antiavoidance rule is found in article 37-*bis* of Presidential Decree 600/1973.

Under this article, the Italian tax authorities may consider a transaction involving single or connected acts to be a tax avoidance transaction if it meets all of the following requirements:

- the transaction involves one or more of the following operations:
  - contributions to companies or transfers or use of going concern;
  - assignments of credits;
  - assignments of excess tax credits;
  - transactions ruled by EU Directive 90/434/CEE;
  - transactions (including appraisal) regarding participations, securities, certificates, currencies, precious metals, swaps, options, edging instruments, and other detailed items; or
  - the transfer of assets carried out as tax-neutral transactions between members joining the domestic group taxation regime; and
- the transaction was entered into without a sound economic reason;
- the transaction was entered into to get around the law; and
- the transaction was entered into to achieve an undue income tax savings or tax refund.

In these cases, the tax authorities may disregard a tax avoidance transaction.

Taxpayers may rebut the presumption and avoid the application of this law if they have proof of the sound business reason for which the transaction was fulfilled.

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Tax Authority's Opinion

The rules for spinoffs and corporate reorganizations are contained in article 11, part 6 of the Ministerial Decree of June 9, 2004, whose provision maintains the consolidated taxation if the splitting corporation is the consolidating one. In other words, the mere fact that a consolidating corporation is divided into several parts doesn't modify the application of the CCCTB to the consolidating entity.

In this case, as far as income tax is concerned, the controlling relationship must be satisfied.

According to article 11, the rules provided in the decree are considered *numerus clausus* (closed number) in that such hypotheses are exclusively those that trigger the interruption of the consolidated taxation.

Therefore, the following transactions do not interrupt the consolidated taxation of the group because they do not modify the shareholder percentages or the controlling requirements:

- a merger between consolidated companies;
- a merger between the consolidating company and one or more consolidated corporations;
- a merger of a company outside the consolidated group into an entity within the group (for example, an incorporation);
- a split-off or spinoff of company within the consolidated group that does not modify the control requirements according to article 117 of the Italian Tax Code;
- a partial split-off, spinoff, or division of the consolidating company; and
- a liquidation of the consolidating company or consolidated company.

Conclusion

A spinoff is simply a readjustment of the shareholder's continuing interest in the corporation, and is no different than a reorganization.

Furthermore, if merging two corporations together allows the taxpayer to deduct losses deriving from both corporations, dividing a corporation into parts should allow the taxpayer to split losses between the two new companies in proportion to their net asset value.

From a general perspective, I think that the statement of the Italian tax authorities has pointed out a variety of tax planning opportunities in the implementation of the CCCTB.

In an EU context, developing and consolidating income taxation successfully depends on interpretation. Surely, in a group context, the transaction cannot be used as a device for the distribution of the earnings of any of the corporations involved, so there is no doubt about its fairness. ◆

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