


HOLDING IN THE ORGANIZATION OF FAMILY ASSETS: REFLECTIONS ON BRAZILIAN SUCCESSION LAW

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ABSTRACT

This article aims to demonstrate the importance of the use of the Holding Company in the organization of the family assets, with an initial analysis of the corporate nature of the holding company, since its birth, molds and the positions of the family figures in the process of formation of the company. Soon after, the work is dedicated to the issues contained in the contractual clauses, as well as demonstrates the process of payment of assets and donation of social quotas. The study is based on scientific articles, legislation and bibliographies. It also highlights the advantages of setting up a family holding company, as well as the better organization of the family assets due to the provisions of the contract and its subsequent amendments, which provide the family group with greater security and organization throughout the life of the company, avoiding discussions in the opening of the succession.

Keywords: *Family holding company.* Family assets. Constitution. Taxes. Exemption. Succession.

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INTRODUCTION

The family *holding company* is a type of company intended for family groups that own a considerable amount of assets, this type of company provides greater security at the time of succession, as well as in the structuring of the deliberations of the company's dispositions, since, in the act before the incorporation, the legal professional has and demonstrates the possibilities of protection to the patriarch/matriarch, thus validating the preferences and wills of the partners in the constitution of the company, remaining clear the order and distribution of the quotas paid in the company, as well as who is or will be responsible for its management.

Many families choose to set up a family holding company due to the great reduction in the tax burden in the transmission of the assets they have, in addition to the succession and patrimonial organization being treated with greater delicacy and caution, given the difficulty of approaching the subject of "succession", which is avoided by so many other families.

The choice of the constitution of this type of company is based on a large equity study, which, as will be demonstrated, is carried out by analyzing and comparing the amounts spent and invested in a potential probate process, as well as the investment granted for the birth of the holding company, its development and maintenance of the clauses that provide for the articles of association that are changed at the appropriate time with the movement of the assets.

Therefore, it is important to immediately mention that not every family group that owns a reasonable amount of assets can benefit from the reduction of taxes that will be exposed here, since it is up to the legal professional to offer an effective preventive service so that the family is informed about the best path to be traced for succession.

The subject addressed in this work is of great value, because succession is, in general, an event that reaches everyone, considering that, with the death of one of the figures in the family sphere, the process of dividing the reserved portion begins, and, with the planning and constitution of the family holding company, this process is already ready due to the patrimonial organization carried out within it.

The procedure used for the preparation of this work will be the analysis of bibliographies and articles that address the types of companies existing in Brazil, as well as deal in more detail with the relationship of the holding company with the famous term "asset shielding".

It will also bring the analysis of the birth of the holding company until the sequence of its changes with the payment of the family group's assets, addressing the taxes levied

throughout the development of the company, as well as the requests for exemption directed to the competent bodies based on the Federal Constitution and local Municipal Laws.

STAGES OF SETTING UP THE FAMILY HOLDING COMPANY

Before analyzing the context present in the constitution and maintenance of the family holding company, it is necessary to understand that this type of company is usually constituted for the administrative control of the family assets of a group of people from the same family, and it may be the company used to carry out the management of participations, or for the administration of a group of companies, its main objective being to manage.

It is important to note that articles 997 to 1038 of the Civil Code bring the guidelines for the birth of the simple partnership, showing that with the company's articles of association, whether private or public, the company acquires legal personality, and the business activity will be performed by any of the partners.

Thus, article 997 of the Civil Code, specifically, proposes the requirements for the constitution:

Article 997. The company is constituted using a written contract, private or public, which, in addition to clauses stipulated by the parties, will mention:

- I- name, nationality, marital status, profession and residence of the partners, if natural persons, and the company name or denomination, nationality and headquarters of the partners, if legal;
- II – name, object, headquarters and term of the company;
- III – capital of the company, expressed in currency, which may include any type of assets, susceptible to pecuniary evaluation;
- IV – the share of each partner in the capital stock, and the manner of realizing it;
- V – the services to which the member is obligated, whose contribution consists of services;
- VI – the natural persons in charge of the management of the company, and their powers and attributions;
- VII – the participation of each partner in the profits and losses;
- VIII – whether or not the partners are subsidiarily liable for the social obligations.

Sole Paragraph. Any separate agreement contrary to the provisions of the contract instrument is ineffective about third parties.

The Law that regulated Holding Companies in Brazil (Law 6.404 of 1976) provides that this type of company has as its object of activity the participation in others, which is not normally used in the Constitution of Family Holdings, which usually have as their objective the effective management of the assets of the constituent family, thus ensuring the organization of assets and resources available in the family environment.

A very common term addressed when the subject is holding is the term "asset shielding", considering that the company, in the course of its corporate development, distributes quotas among the partners, in this case, of the same family. This donation

naturally arises from the donation of shares made by the patriarch or matriarch to each of his heirs, each of whom receives a fraction of the company's share. It is important to say that these quotas arise from the payment of assets into the company, and the term referred to above relates to the legal protection offered due to the transfer of assets from the individual to the legal entity.

CONTRACTUAL CLAUSES OF THE FAMILY HOLDING COMPANY

It is important to note that, at the time of the Incorporation, the qualification of the partners is carried out, as well as the name of the Company is determined, that is, the name that will be used in the legal world, which will be chosen preferably by the family, or according to the availability of business names.

Soon after, there is still a contractual clause that determines the corporate purpose of the company, which is nothing more than the activity developed by the company. It is imperative to highlight that, if the family objective is limited only to the organization of assets, the object used will be: "corporate participation in other companies, companies and/or enterprises", and this determination is one of the maneuvers used to reduce the tax burden. In addition, if the incorporated company intends to carry out any profitable activity, the family will be guided by the legal professional to define another type of corporate purpose.

It is important to mention that, in the contract, one of the most important steps is the evidence of the subscribed share capital, and how this capital will be distributed among the partners. Normally, in the family holding company, the patriarch/matriarch subscribes the share capital and distributes a small portion of quotas to his heirs. Soon after the distribution, the clause that guides the liability of the partners is added, based on the terms of article 1,052 of Law No. 10,406/2002 (BRASIL, 2002).

During the donation process, certain bureaucratic issues are resolved that will establish how the company will be governed in the business universe and how it will be managed by the family, since, during the incorporation procedure, administrators and representatives of the company are elected who can answer for it as well as represent it in its acts.

With the Constitution of the Family Holding Company, future problems that normally occur in the probate process, or cases of will, are avoided, since, in addition to the donation of quotas, the donor performs, as previously mentioned, the payment of capital through the donation of his assets, as well as, in most cases, reserves for himself the lifetime usufruct of the assets, which means that when carrying out the capital increase through the delivery of

assets, whether movable or immovable, and soon after donating to the heirs within the scope of the company, he reserves for himself and his spouse (if he has a marriage regime in the universal communion, or by his preference) the lifetime usufruct of the quotas.

In other words, it is to say that, even if the quotas are distributed and donated, the patriarch/matriarch remains in possession of the assets, granting the beneficiaries only bare ownership, and the donation does not annul their current property, which ceases only with their death, a factor that is also provided for in the contractual clauses of the company.

In this vein, the agreement also provides for the hypotheses of withdrawal or exclusion of the partners, as well as determines how the corporate resolutions will be carried out, usually taken at a meeting of partners that will be called by the company's managers, who will indicate the matters to be dealt with therein.

The articles of incorporation tacitly express the quorum for such resolutions to be approved, such as the merger with another company, spin-off, incorporation, merger, exclusion of a partner, sale of quotas, extinction of the company, or even the realization of loans or financing made by it.

The management of the Company is also predetermined in the constitution, in which the partners appoint the director or directors in the act (in the family holding company the patriarch/matriarch of the family is usually appointed) so that they can always practice jointly, if more than one director is elected, on all the acts of the company and behalf of it. The clause that determines the direction of the company is very important, since, when drafted, it considers the peculiarities of each family, being analyzed whether the donor of the assets has the conditions to exercise it in the long term, or, in another hypothesis, a very common situation of some families, the current civil capacity of the patriarch/matriarch is considered, which on some occasions is already interdicted, and the appointment of another administrator is required.

In addition, it is determined, preventively, in the event of death, absence or judicially declared impediment of one of the Executive Officers, to which partner the management will be assigned, since he will assume all the powers stipulated by the contract, as well as bear all obligations and responsibilities through a term of office filed with the Board of Trade (body that registers the Contracts of the Companies).

The stipulation of the fiscal year, general balance sheet and profits of the company is also carried out at the time of the Constitution, in which the start and end day of the year is determined, as well as provides whether or not the partners will receive payments that originate from the company, which usually does not occur, since the main objective is the organization of assets.

Finally, the Constitution elects the forum that will resolve any pending issues arising from the contract, being signed through the signature of all partners, administrators and consenting intervening parties. After the Constitution, a series of Contractual Changes are initiated, which are carried out at the appropriate times, thus seeking tax exemptions. With this, the analysis of the conference of assets, capital increase and donation can begin, acts that are signed in the Amendment instruments.

DEVELOPMENT OF THE SOCIAL CONTRACT

The conference of assets is nothing more than the act of making the assets of the individual, the assets of the legal entity, in this case, the family holding company. The assets are gradually paid into the company, always respecting the possibilities of tax benefits, as well as the payment of taxes charged for the act of payment of the goods in the company, and this, in turn, occurs to reduce the scope of debts and obligations that may originate from the individual.

The payment of assets is done through the capital increase that requires payment of taxes such as, for example, the ITBI (Real Estate Transfer Tax), which has as its main objective the obtaining of exemption, considering that the Brazilian Federal Constitution, in its article 156, provides that it is up to the Municipalities to exempt the transfer of assets or rights that are incorporated into the assets of a legal entity for the realization of capital.

With this, companies have this Constitutional guarantee, as stated by Harada, (2004):

"The CF instituted tax immunity about this tax, making transfers resulting from capital conference, merger, incorporation, spin-off or extinction of legal entities untaxable, unless the predominant activity of the acquirer is the purchase and sale of these assets or rights, the leasing of real estate or commercial leasing."

In this vein, it is verified that the ITBI is the tax taxed on the assets that are transmitted during life, leaving such assets from the owner's estate to the estate of the heirs, and the taxation is destined to the municipalities where the real estate is located. This is to say that the indicator of payment of said tax is the location of the asset. With the constitutional provision demonstrated above, it is common for incorporated companies to make requests to the municipalities for the location of the assets, with the request for exemption.

In addition, the request for exemption is entirely based on the provision of the Magna Carta and the municipal tax legislation of the property, since immunity from the tax is guaranteed about transfers arising from the capital conference, unless the main activity of

the company is real estate, which again leads us to the detailed choice of the company's corporate purpose.

For Mamede (2018, p. 123):

[...] There is an avalanche of norms, including laws, decrees, regulations, tax instructions, etc. This implies constant study and improvement, both by specialists and organizations. The proposed solution for one fiscal year may simply not work for the following fiscal year(s).

To better understand how the exemptions granted initially by the City Halls and later by the respective Notaries occur in the Registration of the properties, it is necessary to understand the branches of activity of a holding company that has not only the family classification.

Therefore, it is important to continue with the explanation of the branches of activities carried out by this type of company: a) Administrative Holding: it is the one that is intended to carry out the management of other companies, carrying out their structuring, as well as defining the planning of its operation; b) Participation Holding Company: it has a great similarity with the original holding company, in which only minority interests are involved, that is, it does not exercise corporate control; c) Asset Holding: very similar to the family holding company, it is characterized by the possibility of participation of other companies in its body, which may include shares and quotas of other companies, protecting the assets and resources of families with the transformation of assets from the individual to the legal entity; d) Mixed Holdings: are those that do not explore only a single activity, participating in shares, being a shareholder in other companies, thus mixing the corporate purpose of the holding company, such as, for example, commercialization, provision of services or even industrialization of commercial products.

And yet, it is necessary to demonstrate that the family holding company is similar to that of the patrimonial branch, since its objective is to organize the assets conquered during the life of a family, in addition to organizing the distribution and guaranteeing the rights of the heirs in advance.

Family companies are usually formed by two or more people who make up the same family with the objective of managing the family business. The division of quotas guarantees the succession organization, but on the other hand provides a consequent change in the family dynamics in relation to the inherited assets.

According to Bornholt (2005, p. 182), family businesses can be defined in the following sense:

The one that was born from a single person, an entrepreneur. He founded it, developed it, and, in time, composed it with family members so that, in his absence,

the family would take charge. It is the one that has the shareholding control in the hands of a family, which, due to this power, maintains control of the management or its strategic direction.

The large portion of family businesses in Brazil has become increasingly evident, which, in a way, demonstrates the interest of families with large assets in managing their assets, which, over time, if not planned, may provide financial conflicts, or even conflicts of interest for the future of the family assets.

Manãs (2017) expresses the importance of family companies, even if common situations do not occur in non-family businesses, because, even if exclusively intended for the management of family assets, they end up generating jobs, since, for financial, tax, and administrative solutions, they require a well-prepared team to face everyday situations.

As stated above, the Law that regulated holding companies in Brazil, in its paragraph 3, determines that it is possible to have as an object of activity the participation in other companies, which does not become mandatory, and the choice of partners or managers is open after a long financial and tax analysis.

The motives and purposes of setting up a holding company, according to Lodi and Lodi (2004), may be based on: a) concentration of control of a group of companies through majority shares; b) the holding of shares in international companies; c) solution of administrative problems, through the preparation of heirs and employees to achieve a possible tenure of administration; d) have greater power of control of shares and quotas than the other partners of a given company, which allows for a greater field in decision-making; e) possibility of being an administrator of interests of a group of companies; f) solution of matters related to family inheritance, etc.

Based on the study of the contracts for the constitution of the family holding company and amendments, it is noted the evident tax benefit offered in the legal provisions, as well as the guarantee of security to the family assets that remain safe when they are paid into the company.

The execution of the articles of incorporation and amendments requires the agreement of all partners, as well as has the guarantee of their meeting, with all the rights and duties of the corporate structure being provided, and also provides for the positions of their respective spouses in the company and what are their guarantees or not about the assets and values paid to the partners that make up the company.

The liability in this type of company is limited to the participation of the partner, that is, the liability is considered from the restrictive value of the quotas, however, all are jointly and severally liable for the payment of the capital stock, as determined by article 1,052 of the Civil Code of 2002 (BRASIL, 2002):

Art. 1.052. In the limited liability company, the liability of each partner is restricted to the value of their quotas, but all are jointly and severally liable for the payment of the capital stock.

Thus, it can be seen that the aforementioned provision deals with the tax incentive for the company's quotaholders who are only responsible for the value of their quotas, not occurring, in this sense, the patrimonial confusion feared by so many other enterprises.

ADVANTAGES OF SUCCESSION PLANNING

When it comes to succession planning, there are certainly several tax benefits found in the constitution of the family business, such as the choice of the tax regime, in addition to the alternatives for the payment of assets in the capital stock, which can be checked and paid based on the value of the owners' income tax return, or by the market value.

However, as already mentioned in previous chapters, the importance of succession planning is noted, because, in addition to the protection of the family's assets, it offers financial and legal guarantee, since the provisions of the company's clauses also provide for the entry of new members into the family nucleus, in addition to the provision on the rights of those who were already inserted in this environment.

In addition, the liability of the partners in this corporate type is limited to the value of the quotas they hold, that is, even if they are jointly and severally liable for the paid-in share capital, if there is any divergence between their financial lives, there will be no confusion of assets, that is, the legal entity will not be liable for the debts or obligations of the individual.

Another important benefit, and perhaps the most evident, is the savings with taxes about the processing of probate lawsuits or even the extrajudicial inventory deed, a situation in which the taxes collected by the States must be collected, which is the ITCMD, in which it has a rate standardized by State law, which is calculated under the market value of the assets, which ends up being higher than the constant value of the owners' income tax, which already considerably increases the amount paid as tax.

However, the dynamics of taxes should certainly be studied by specialized professionals, so that a detailed study is presented as to the advantages and disadvantages for each case specifically analyzed. This is because there are situations in which the family owns properties in different states, and in this case, the professional must analyze the laws where each property that will be paid into the company is located.

Thus, with the help of a specialized professional, a comparison is made between the taxes levied in the probate process and those levied in the process of constitution of the

family holding company, so that the family understands the benefits included in the succession planning, because the savings must occur not only in the constitution, but in the contractual changes, so that the assets are paid in such a way that the expected savings are provided to the family.

On some occasions, precisely because they are unaware of the benefits of estate planning, some of these families transfer the assets during their lifetime, with the purchase and sale, for example, or donating to the heirs, which causes the net worth a great burden due to the excessive payments of these taxes.

It should also be noted that, with the constitution of the holding company, the family has the opportunity to dispose of its desires about the organization of the assets, as well as to include in the clauses of the articles of association all the events that may occur in the unraveling of the company's life, with each act of change remaining registered with the Board of Trade.

However, the organization of the family assets, depends on the will of the donors, and with the family holding company, many benefits are possible, such as avoiding the dilapidation of the assets, or discussions in cases of separations, divorces and death, because with it the issue of family assets will be resolved and there will be endless disagreements between family members with the processing of legal proceedings.

In addition, because the family *holding company* is a company, whose objective is to manage family assets, those involved must know with the management of companies, taking into account the importance of succession planning, aiming at the lowest tax burden and the reduction of expenses in operations carried out in the movement of assets, which can last for years with the existence of legal processes of partition, because if this is not observed, the family *holding company* may not be the best option.

CONCLUSION

According to all the above, it is verified that the process of setting up a family business involves major aspects to be observed by the specialized professional, such as the existing family relationship about the assets that will be donated, the main factor being the attention to the desires and dispositions that are exposed to it by the donor(s), since the constitution of this type of business, Despite being more beneficial, it is still treated with strangeness by some families.

The disclosure of the economic benefits granted by the *holding company* remains very limited, given the impossibility of offering this service freely, in consideration of the activities of the legal profession, or even, as previously mentioned, the lack of openness

and the fear of families to deal calmly with matters related to their assets, which makes it difficult for professionals to introduce the subject.

In addition, many of these families remain in the limbo of the inventory, even ceasing to constitute this type of business for fear of dealing with the subject of "succession" or for internal issues of the family itself.

In this scenario, the organization of the family's assets is at the mercy of the will of the donors, which, in a way, is not wrong, but it limits the family to wait for the de facto succession, as well as conditions an exorbitant expense about the costs of the inventory, given the high tax burden for the transmission of the entire estate.

Thus, the present work sought to demonstrate not only the tax benefit granted with the constitution of the family *holding company*, but also to clarify the importance of succession planning, always seeking the lowest tax burden, whose objective is to reduce expenses in the operations carried out in the movement of family assets, as well as the reduction of the costs of a judicial or extrajudicial inventory.

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