

CAMPOS MELLO ADVOGADOS

Tax aspects of corporate reorganizations in Brazil

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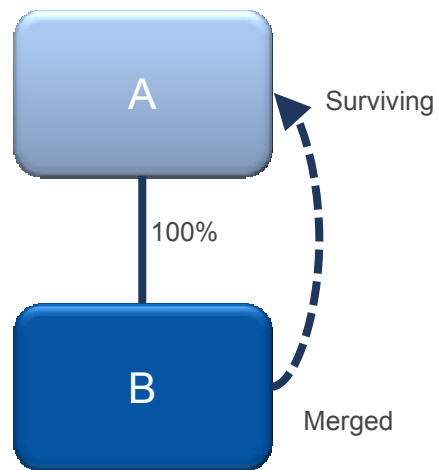
TTN Meeting – Buenos Aires

November 17, 2014

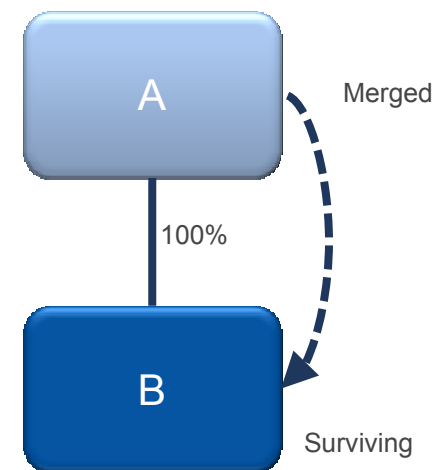
- **Merger**
- **Spin-off**
- **Fusion**
- **Merger of Shares**
- **Asset Sale v. Share Sale**
- **Other Relevant Topics**
 - **Goodwill Amortization**

- **Types of Merger Transactions in Brazil**

Upstream

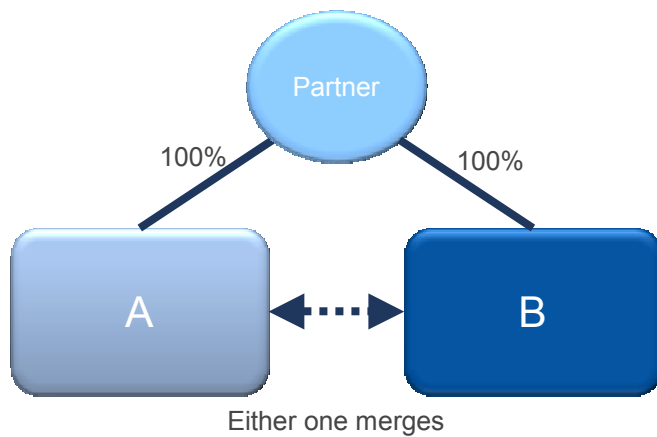


Downstream

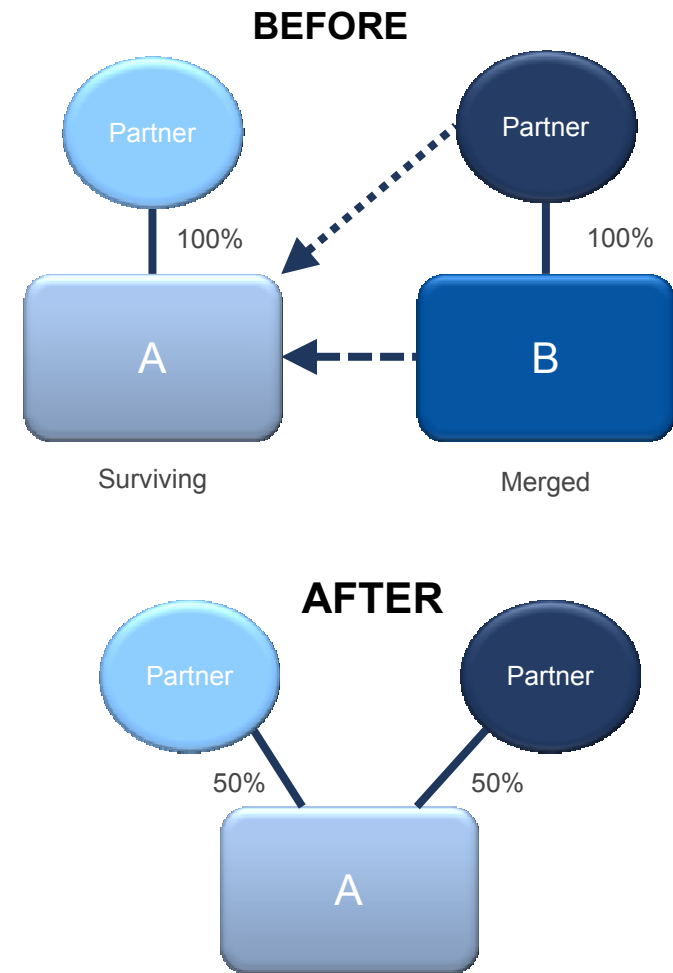


- Types of Merger Transactions in Brazil

Lateral Merger



Unrelated Party Merger

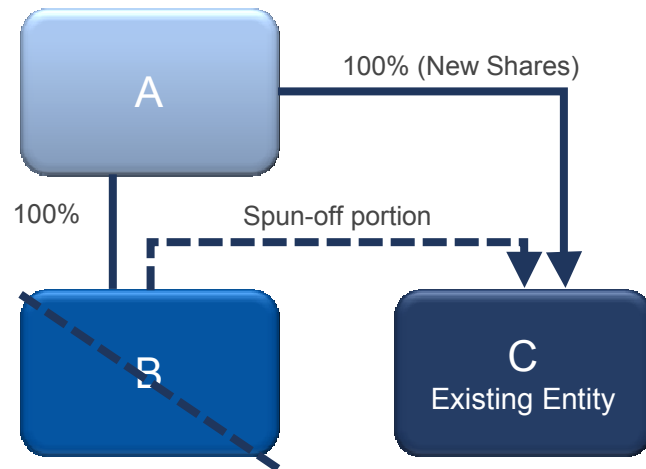


- It can be implemented at book value or market value
- Tax losses of liquidated company are lost, but they are maintained in the surviving entity under certain conditions
- Goodwill deduction for tax purposes
- General tax succession rules apply
- It does not trigger taxation/deduction of timing differences
 - Discussion on FX variations and other timing differences
- IOF-Credit
 - Risk of triggering IOF due to alleged novation (replacement of lender) (PLR 14, of May 13, 2010 – 1st circuit – Brazilian IRS)
- This is an efficient and commonly used structure as it brings tax efficiency and usually has economic and corporate reasons for implementation

- **Types of Spin-off under Brazilian Law (total or partial)**

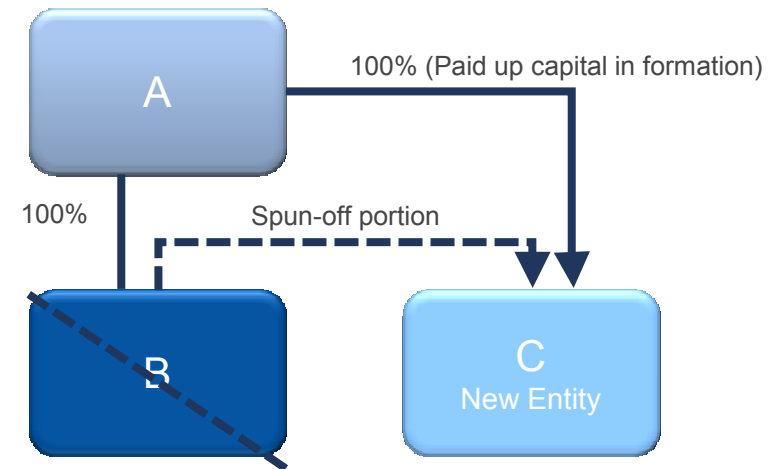
Assignment of spun off portion

Into an existent entity (spin-off + merger)

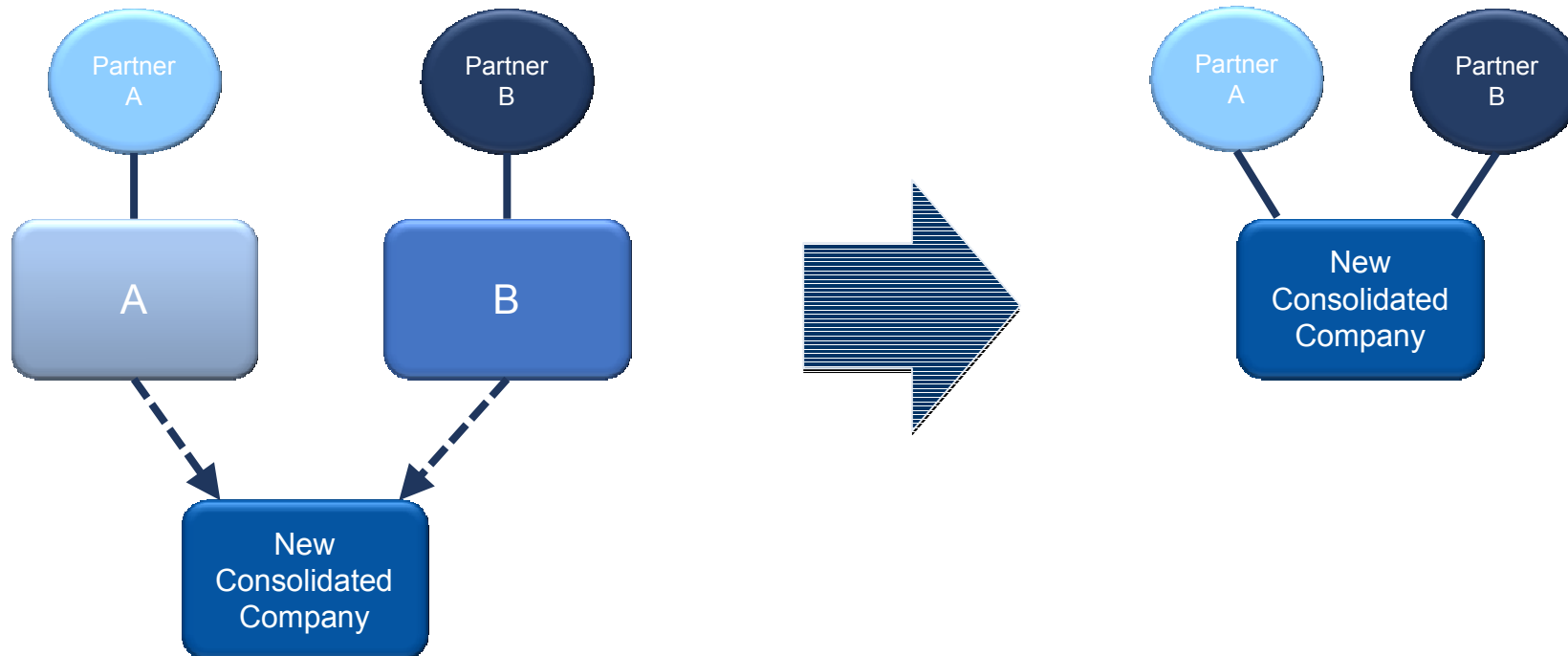


Assignment of spun off portion

Into an new entity (spin-off + incorporation)



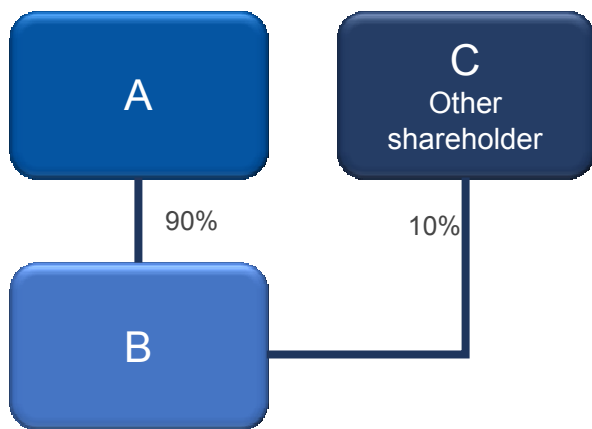
- It can be implemented at book value or market value
- Tax losses of the spun-off equity are lost, proportionally to the equity transferred
- Brazilian IRS may deny the transfer of other tax credits (e.g., PIS and COFINS) if found lack of economic purpose – Brazilian IRS Ruling COSIT No. 119, of May 22, 2014
- Universal or partial tax succession, depending on the amount of the net equity transferred
- Secondary liability applies, even if contrary to the Spin-off Protocol
- Same timing differences issues as a merger
- This is an recommended structure if a company intends to sell/assign certain lines of business



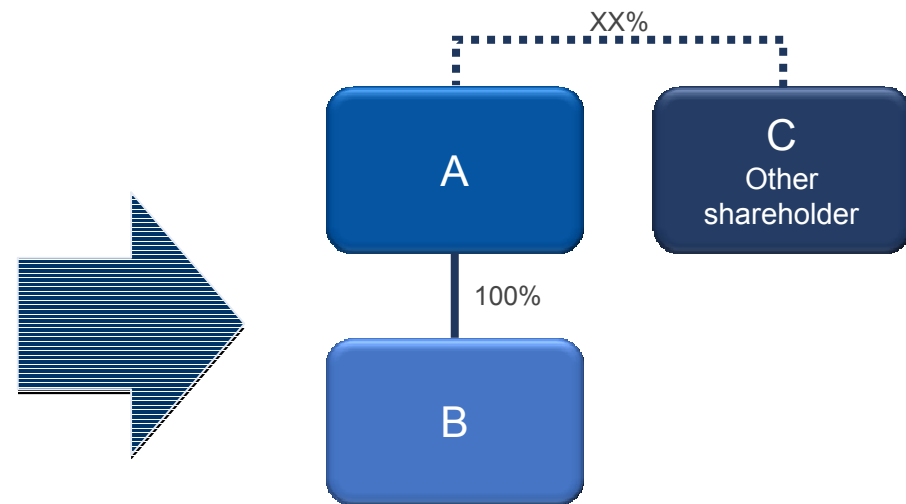
- Not commonly used – necessity of new tax ID (state, federal and local), unification of property titles, licenses and more formalities when compared to a merger – may be justified if both groups do not agree on being controlled by the other

Merger of Shares (1/2)

Before



After Merger of Shares



- It can be implemented at book value or market value
- Discussion re. tax treatment on the exchange of shares
 - Brazilian Superior Tax Court (“CSRF”) - Decision 9202-00662: merger of shares is equivalent to a disposal and therefore the capital gains should be taxable
 - Opinion 454-92 of the Federal Public Prosecutor regarding like-kind exchanges of shares in the context of the National Privatization Program
 - Supreme Court (“STF”) - Extraordinary Appeal 95905 PR – capital contribution is not a taxable event.
 - Superior Court of Justice (“STJ”) - Special Appeal – 1027799 – distinguishes individuals from companies
- Companies should be able to adopt the old asset re-evaluation proceeding and the current Fair Value Adjustment mechanism
- No tax impacts – the basis of the shares should be maintained

- **Share Deal**

- Goodwill amortization under certain conditions (details on next slide)
- Under current rules, goodwill can be amortized straight line for at least 5 years at 34% income tax rate and it should take place until December 2017
- Tax attributes are maintained
- If the transaction is carried out in the Brazilian Stock Exchange – zero percent capital gains for non-resident investors (located outside low or nil tax jurisdictions)
- Legal succession
- No risk of VAT issues

- **Asset Deal**

- Purchase price will normally allow depreciation/amortization deductions
- Premium paid in excess of net book value could be allocated to the assets which can be depreciated or amortized for tax purposes (similar or better tax benefits can be achieved if compared to goodwill amortization)
- No tax attributes transferred
- Legal succession will depend on the transfer of the “going concern” (*fundo de comércio*)
- VAT issues may come into play (if a physical transfer of the assets take place)

- Under the new rules (valid for post-2014 reorganizations), introduced by provisional measure No. 627 of 2013, converted into Law 12,973/2014, the cost of acquisition of the equity should be separated into:
 - the net equity value at the time of acquisition (according to the accounting rules in force in Brazil, which follows IFRS);
 - the “surplus” or “deficit”, which replaces the goodwill booked by the asset value and other economic reasons (intangible); and
 - the goodwill, which is equivalent to the goodwill booked as future profitability in the previous rules.
- Similarly to the previous rules, the goodwill shall be amortized in a minimum period of five years. The goodwill should be supported by an appraisal which now shall be filed in the Brazilian Revenue Service (RFB) or recorded in a public registry office.

Thank You!

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