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FAMILY HOLDING COMPANY: SUCCESSION PLANNING AND REDUCTION OF THE TAX BURDEN

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ABSTRACT

The objective of this work is to present the advantages of the constitution of the family holding company as a succession planning tool, compared to traditional methods. Through the study of the corporate, financial, tax and social aspects of this instrument, it is considered how the creation of a family holding company can be an effective tool in succession planning and tax savings. It is evaluated how the family holding company can help the patriarch organize and protect the assets, anticipating the succession and reducing the financial and emotional impact of probate processes. It should be noted that the holding company facilitates the management of family assets, preventing conflicts between heirs and reducing costs such as inheritance taxes and property transfers. In addition, it allows for centralized management of assets and greater protection against legal disputes and creditors. However, it is demonstrated that the asset shielding through the holding company needs to follow legal rules, as the attempt to hide assets or defraud creditors can lead to the piercing of the corporate veil. Another point addressed is tax avoidance, a practice that allows the tax burden to be reduced legally, taking advantage of incentives and loopholes in the legislation. With the support of specialists, the holding company enables advantages such as the simplification of sharing, continuity of family businesses and tax savings. It is concluded that the family holding company is a viable and advantageous alternative for business families, although its effectiveness depends on specialized advice for careful planning and alignment with family and succession objectives.

Keywords: Asset Shielding. Tax Avoidance. Succession Planning.

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INTRODUCTION

With succession planning carried out through a mechanism called family holding, it is sought to avoid emotional and financial wear at the time of distribution, where the donor will previously determine the future of his assets. Thus, the present work aims to demonstrate the benefits of using a family holding company as an effective succession planning tool and whether this tool guarantees tax savings.

Through the present study, we seek to identify an efficient and legitimate alternative to the traditional succession process, which is less onerous for the family, minimizing any conflicts inherent to succession, and still preserving its assets. The possibility of reducing the financial cost of the succession process in a lawful manner is examined, using the legal system itself as a tool, through tax avoidance.

Thus, through an analysis of traditional succession methods, it seeks to demonstrate the advantages of using the tool in succession planning, highlighting the asset shielding, as well as the financial and tax aspects of the family holding company, benefits of its constitution in relation to tax management and also the tax elements in kind involved in the process of its constitution, aiming to respond to the problem: What are the advantages of the family holding company in succession planning?

The expression holding originates from the English verb "to hold", which translates as "to hold", "to detain", "to sustain". Holding also translates as "domain". Law No. 6,404, of December 15, 1976, which provides for Corporations, presents the concept of holding company in its article 2, paragraph 3:

> Article 2 - Any for-profit company may be an object of the company, not contrary to the law, public order and good customs.
> Paragraph 3 - The company may have as its object to participate in other companies; Although not provided for in the bylaws, participation is allowed as a means of carrying out the corporate purpose, or to benefit from tax incentives.

In Brazil, the family holding company is still little used, although it is very common in other countries, such as the United States and many European countries, because inheritance taxes are very high, generating the need for planning that makes taxation more lenient. Here the challenges faced by entrepreneurs are numerous, from the complex tax legislation to the hostile environment for business.

For Valentin (2021, p. 110) "Holding companies have been used as a way of structuring family assets, ensuring, in theory, professionalization and rationality in the administration of assets". In this way, the concern of entrepreneurs with succession and protection of assets is extremely relevant, as Silva and Rossi (2023, p. 4) warn, who say that in the Family Holding Company "the intention is based on ensuring the maintenance of

the assets earned by its members, including the success of any companies belonging to the family".

According to Machado (2024, p. 392) succession "can bring negative consequences to people, either due to the complexity of the assets or difficulties in the equal sharing of assets". Thus, the Family Holding Company emerges as an interesting way to conduct and manage the family's assets and business activities. But it is necessary to be careful, because as Peixoto (2023, p. 61) points out, "setting up a holding company to be free of all its debts, hiding its assets, that is, a patrimonial shield, may constitute civil fraud and crime".

The need to expand studies in this segment is evident, as the Brazilian population is unaware of the tools of succession and most are not concerned with what will happen at the time of their death. It is at the time of the opening of the succession that the heirs begin to be aware of the bureaucracy and expenses involved with this type of process, expenses that may be even greater if there is any disagreement regarding the division of assets.

For the development of this work, exploratory research will be used where the themes will be addressed, using the technical procedures of bibliographic research and documentary research, through books and scientific articles.

As for the method of approach, the deductive method will be used, seeking in the Federal Constitution, Civil Code, specific legislation and doctrine, solutions to the needs studied.

INSTRUMENTS OF SUCCESSION PLANNING

Succession Law in Brazil is the branch of civil law that regulates the transfer of assets from a deceased person to their heirs and successors. It covers the rules that determine who is entitled to inherit, how the division of assets takes place and what are the legal procedures involved.

Succession can occur in two main ways: legitimate succession, which follows the order of kinship established by law, and testamentary succession, which occurs when the deceased leaves a will, respecting the limits imposed by legislation, especially with regard to the reservation of a part of the assets for the necessary heirs, such as descendants, ascendants, and spouses.

Thus, article 1829 of the Civil Code describes the hereditary order of legitimate succession:

> Article 1,829. Legitimate succession is granted in the following order: (See Extraordinary Appeal No. 646,721) (See Extraordinary Appeal No. 878,694)
> I - to the descendants, in competition with the surviving spouse, unless the latter is married to the deceased under the regime of universal communion, or under the

> regime of mandatory separation of property (article 1,640, sole paragraph); or if, under the regime of partial communion, the deceased has not left private assets;
> II - to ascendants, in competition with the spouse;
> III - to the surviving spouse;
> IV - collaterals.

The Civil Code of 2002 is the main source of regulation of Succession Law, providing for the provisions on inheritance, the right of necessary heirs, the role of probate and the rules for the administration and division of the deceased's assets. The probate process is mandatory to formalize the transmission of the inheritance, and can be carried out judicially or extrajudicially, depending on the existence of a will or conflicts between the heirs.

According to Gagliano and Pamplona Filho (2022, p. 1533), the Law of Succession refers to the set of legal mechanisms that regulate the transfer of assets, values, and debts from a deceased person to their heirs. In other words, it involves the transfer of assets (assets) and obligations (liabilities) to the heirs, either through probate and division of assets, carried out judicially or extrajudicially.

In the legal field, succession implies the entry of an individual into the ownership of a legal relationship that is transmitted to him by another person. This change is manifested in the succession as a result of death, as the content and object of the legal relationship in question remain unchanged.

For Silva and Rossi (2023, p. 40), Succession Law also deals with issues such as the renunciation of inheritance, the right of spouse or partner to share, and the rights of minor and incapable heirs. In addition, there is a concern to ensure the protection of heirs and the preservation of the interests of those who, by legal determination, have a portion of the inheritance reserved, such as children and spouse.

Thus, Succession Law in Brazil seeks to balance the will of the deceased, when expressed in a will, with the rights of the heirs provided for by law, ensuring a fair and orderly distribution of the estate.

Hence the importance of succession planning, which, according to Peixoto (2023, p. 173) "will be carried out in life, being fundamental for those who want the realization of their will after their death". It also consists of an instrument of family asset protection, aiming to prepare entrepreneurs and their successors to preserve the assets conquered and ensure the continuity of success, also obtaining tax benefits and advantages (Machado, 2024, p. 134).

Dias (2022, p. 544) points out that:

> Estate planning is a permanent asset organization. It is integrated by several areas of activity, such as fiscal and tax planning, with a view to also reducing heavy tax impacts on asset management. Succession planning is now called the adoption of a

> series of measures aimed at preserving the autonomy of the will and preventing future conflicts.

Succession planning is a key step in creating a Family Holding Company, as it allows for more effective strategic management of family assets. Silva and Rossi (2023, p. 17) teach us that:

> Succession planning is one of the pillars that involve the constitution of a family holding company because it enables the prior and careful organization of the transfer of assets to the heirs and, especially, provides an effective succession of the business of any company that is part of the set of assets, reserving to the patriarchs the responsibility of determining the destination of the assets during their lifetime. This planning is also fundamental in the protection of family assets to ensure their perpetuity, as it allows the patriarchs the means to protect the assets from unforeseen events, such as divorces and even the passing of heirs, which often end up compromising the family entity due to the dispute over assets.

It is worth noting that one of the main challenges faced by family businesses arises during the succession process. This is a sensitive period for the family and often generates conflicts between the heirs. In addition, a probate process can extend for many years, even decades, due to disagreements between the successors regarding the assets left by the deceased.

In this way, succession planning becomes indispensable for those who want to avoid problems in the management of the family business, in addition to avoiding high costs associated with succession.

On this point, de Silva and Rossi (2023, p. 19) point out that:

> Another inconvenience related to the probate process refers to the costs that are inherent to it. Although succession planning based on the constitution of a family holding company also entails costs of legal advice and ITCMD fees, in probate there is a need to pay legal costs, in addition to the aforementioned tax, inherent to any type of transfer.

In view of so many aspects that can negatively interfere in the succession process, Silva and Rossi (2023, p. 21) point out the advantages of succession planning:

> For all these problems, succession planning seems fundamental to us. From it, the patriarchs plan the future of the family patrimony, and the continuity of the business business, with the following advantages: protection of the patrimony against the interference of third parties; choosing the most qualified heir to continue the management of the family business; absence of conflicts at the time of succession, especially that resulting from the death of one of the patriarchs, and the costs arising from the probate process; planning of the payment of taxes arising from succession, and the non-need to carry out condominium of assets and disposal of a family asset for payment of taxes and procedural costs.

Therefore, according to Peixoto (2023, p. 176), succession planning will guarantee advantages such as avoiding litigation, as it will respect the legal limits of the freedom of the

author of the inheritance and the legitimate part of the succession; reduce the payment of taxes, which is one of the main points of planning, aiming at tax savings within legal limits; guarantee autonomy and respect for the will of the author of the inheritance.

INVENTORY AND PARTITION

When the death of a natural person with assets to be shared occurs, the period for opening the succession begins. From then on, there is a period of 2 (two) months to start the survey of the deceased's assets, which must be completed in a maximum of 12 (twelve) months, as provided for in article 611 of the Code of Civil Procedure:

> Article 611. The probate and partition process must be initiated within two (2) months from the opening of the succession, ending in the following twelve (12) months, and the judge may extend these deadlines, ex officio or at the request of a party.

For Dias (2022, p.741) "the inventory consists of an individualized and clear description of the assets of the inheritance", and can be processed in a judicial or extrajudicial manner.

Therefore, the inventory is the legal procedure that aims to identify and evaluate the assets left by the deceased, including movable and immovable property, rights and debts. This process aims to organize the patrimonial collection and establish the exact amount that will be transmitted to the heirs, respecting the will of the deceased (will, if any) and the legal rules of succession.

The inventory may be judicial or extrajudicial. The judicial is carried out in the Judiciary, and is mandatory when there are minor heirs, incapacitated or when there is litigation between the heirs Dias (2022, p. 742). This procedure tends to be more time-consuming and complex, due to the need for judicial intervention at each stage. Also, according to the aforementioned author, in the judicial inventory, the following phases are followed:

- Opening of the Inventory: generally must occur within 60 days of death, under penalty of a fine in some states;
- Appointment of the Executor: an executor is appointed, responsible for managing the estate and conducting the process;
- Listing of Assets and Debts: phase in which all assets and debts are raised, presenting the complete list to the judge;

- Calculation and Payment of Taxes: generally, the ITCMD (Tax on Causa Mortis Transmission and Donation) is due and needs to be paid before the conclusion of the distribution;
- Distribution: after the payment of debts and tax, the assets are divided among the heirs.

Extrajudicial inventory, on the other hand, according to Machado (2024, p. 44), is carried out in a notary's office, without the need for judicial intervention, and is allowed only in cases where all heirs are of age and capable, there is no litigation and everyone agrees on the division of assets. The presence of a lawyer is mandatory, and he signs the deed together with the heirs. This procedure is faster and less costly, allowing the immediate transfer of assets.

Partition, in turn, is the phase in which the inventoried estate is effectively divided among the heirs, following the rules of succession law. According to Silva and Rossi (2023, p. 40), this division must observe both the reserved portion — the part reserved for the necessary heirs (descendants, ascendants, and spouse) — and the testator's available portion, if any.

The legitimate part corresponds to 50% of the estate and must be allocated to the necessary heirs. The testator may dispose of the remaining part (50%) to whomever he wishes, including for the purposes of legacies, donations or other destinations during life or by will.

Silva and Rossi (2023, p. 42) teach us that:

> [...] The estate is divided into an available part and a legitimate part, and either by donations or even by the disposition of a last will through a will, the legitimate part cannot be affected.

The heirs and legatees are the beneficiaries of the inventory and distribution. For Dias (2022, p. 522) heirs are those who receive the inheritance by virtue of the law or will, while legatees are those who receive only certain assets or amounts expressed in a will.

Also, the probate and partition process involves the payment of the ITCMD, a state tax, which must be paid before the completion of the inventory. According to Dias (2022, p. 896), "the tax is levied on the entire inheritance collection, the entirety of the deceased's assets". In this way, although the debts are also transmitted to the heirs, they will not make up the tax calculation basis, leaving only the positive balance of the estate.

The process is completed after the division is carried out and the payment of the expenses and taxes due. Dias (2022, p. 904) describes that in the case of judicial inventory, the judgment approving the division is issued by the judge, and the heirs can register the

division of assets. In the case of extrajudicial inventory, the deed drawn up at the notary's office has immediate effect.

The inventory is essential for legal certainty, as it formalizes the transfer of assets, ensuring that each heir receives his or her share according to the law or the will.

SUCCESSION PLANNING

Succession planning is undoubtedly a valuable tool, as it not only offers legal and financial security, but also protects the assets of family members.

Silva and Rossi (2023, p. 19) clearly and objectively summarize the importance of succession planning, clarifying that the family assets, as well as the family's business businesses, have the opportunity to be preserved and to avoid the interference of third parties outside the family nucleus.

The authors also point out that such planning allows the patriarchs to choose the most qualified heir to manage the company and, finally, has the advantage of avoiding typical succession conflicts and minimizing the costs arising from the probate process through the planning of the payment of taxes, avoiding the eventual sale of an asset to settle procedural costs and taxes.

In the same sense, Mamede and Mamede (2024, p. 103) state that it is necessary to train successors, and that the absence of a succession plan and the unpreparedness of an organization for succession can constitute a "cursed legacy", which is left to successors, who in family businesses are loved ones. There are countless examples of family businesses that go bankrupt or face serious crises, due to an abrupt succession between generations.

In this way, the importance of succession planning is perceived, in order to ensure the protection of assets, absence and reduction of conflicts, continuity of companies, as well as the planning of the payment of taxes arising from succession. Among the main strategies used in succession planning, Valentin (2021, p. 48) highlights the will, donation, usufruct, holding, among others.

WILL

Testamentary succession is provided for in articles 1,857 to 1,939 of the Civil Code. Dias (2022, p. 463) teaches us that the will "is an act of last will by which testamentary succession occurs".

A will is a legal document in which a person (testator) expresses his or her will about the destination of his or her assets after his or her death. According to Peixoto (2023, p.

236) the will is a "relevant and traditional succession planning mechanism, making it one of the most efficient". Through the will, the individual can define how his or her estate will be divided among heirs or third parties, respecting the rules of the legitimate party.

Gagliano and Pamplona Filho (2020, p. 1.656) point out that the will is a very personal and unilateral act, with no participation of other subjects in the manifestation of will; revocable, because by virtue of private autonomy the testator is allowed to rewrite the terms of his will as much as he wishes; solemn, since it is covered with formalities that ensure the freedom of the testator and the veracity of its provisions; and finally free, insofar as the beneficiary is not required to pay consideration.

Thus, it is of full importance for the validity of the existing will to prove the manifestation of free will and good faith, the capacity of the agent, the possibility, lawfulness, and determinability of the object, and the appropriate form provided for by law (Gagliano and Pamplona Filho, 2022, p. 1.659).

DONATION AND USUFRUCT

Donation, defined by Peixoto (2023, p. 363), is the act by which a person transfers, out of liberality, part of his or her assets, assets, or advantages to another. It can be done during life, being an important instrument for anticipating succession and reducing inventory costs. The donation can be made with usufruct reservation, allowing the donor to continue enjoying the asset as long as he is alive. In addition, the donation in life allows for greater control over the destination of assets and can avoid possible disputes between heirs in the future.

Silva and Rossi (2023, p. 43) teach us that:

> One of the strategies used in succession planning is the constitution of a family holding company by the patriarchs and, as a continuous act, the donation of shares of the company created to the heirs.

In this way, it is sought to avoid that the division of assets occurs only with the death of the patriarchs and the inconveniences arising from the probate process.

Usufruct, on the other hand, is a right that allows a person (usufructuary) to use and enjoy an asset belonging to another person (bare-owner), without the transfer of ownership. This mechanism is widely used in cases of donation of assets to heirs, in which the donor maintains the right to use the asset while alive. It is, therefore, as defined by Valentin (2021, p. 55) a temporary real right that separates the right of use from property.

HOLDING

The holding company, as defined by Peixoto (2023, p.19) is a company incorporated with the purpose of maintaining participation in other companies. It is an interesting form of strategy for conducting and managing business activities, especially for specific profiles of people and assets. However, it is not a universal solution that benefits all types of businesses in the same way. It is essential to seek a personalized approach, taking into account the history and needs of each family.

In this way, a holding company presents itself as a company where the main objective is to control other companies or protect family assets, either through the possession of shares, quotas or equity interests. Unlike operating companies, which produce goods or provide services directly, the holding company focuses on the management and control of its assets, acting strategically to maximize results.

According to Valentin (2021, p. 110), the holding company is used to structure the family assets, in order to ensure greater security and rationality, implementing pre-established business rules for conflict resolution.

Thus, one of the main benefits of setting up a holding company is asset protection. For Silva and Rossi (2023, p. 13), the holding structure allows the separation of the business and the personal assets of the partners, making it difficult for any business debts to directly affect the family's personal assets. Another benefit is the ease of asset succession, especially in family businesses. The creation of a holding company can simplify the transmission of assets to heirs, reducing conflicts and tax burdens.

In addition, holding companies can offer tax advantages, resulting in a more efficient tax burden, especially in terms of Income Tax and the distribution of profits and taxes on the transfer of real estate.

However, the constitution of a holding company must be done carefully, taking into account the wealth profile, family and business objectives, and legal and tax implications. It is essential to have specialized legal and accounting advice to ensure that the holding company is configured in the most appropriate way for each case, maximizing its benefits.

Types of holding company

Doctrinally, there are several classifications of holding companies, as Peixoto (2023, p. 21) points out, namely: pure, control, participation, administration, mixed, patrimonial and real estate holdings.

For Silva and Rossi (2023, p. 12), although they admit that the doctrine mentions several types of holding companies, they classify it into only two groups: pure holding and

mixed holding, considering that the other classifications have a merely didactic objective, without any legal consequences.

The family holding company, the theme of this work, as Mamede and Mamede (2024, p. 12) clarify, is not a specific type of holding company, but a specific contextualization. According to the author, the characteristic point of the family holding company is that it is based in the family environment, with the objective of promoting the organization of assets, administration of assets, tax optimization and hereditary succession with a view to the best interest of its members.

When it comes to family holding companies, Mamede and Mamede (2024, p. 13 -14) point out that it can be a pure holding company or a mixed holding company, and furthermore, they state that other conceptualizations such as management, equity, or organization holding companies can also compose a family holding company.

As this study intends to discuss, above all, the family holding company as a succession planning tool, the dualistic classification is adopted.

In summary, according to the definition of Silva and Rossi (2023, p. 12), the pure holding company has as its social objective exclusively the participation in another company. Therefore, this type of holding company has the sole activity of maintaining quotas or shares of other companies. It is also known as a participation company because it participates in other companies.

The mixed holding company, on the other hand, adds, in addition to the corporate purpose of participation in another company, the exploration of some business activity.

HOLDING FAMILIAR

A family holding company is a company created with the objective of managing and protecting a family's assets, facilitating the management and succession of assets between generations. This type of holding company can control everything from financial assets, real estate, and stakes in other companies to family businesses, providing a more organized and efficient structure.

Regarding the objectives of a family asset holding company, its function of avoiding conflicts between heirs, reducing taxes and unnecessary costs and preventing the civil condominium of real estate stands out. It is a tool that the patriarch can use to anticipate possible conflicts generated by his death, ensuring that the company is preserved and that the heirs do not face so much wear and tear or expenses with the inventory after the succession.

For Machado (2024, p.47) the main benefit of a family holding company is asset protection. By concentrating the family's assets under a single legal entity, it is possible to shield personal assets against possible risks, such as debts or business litigation. This is because, in the structure of a holding company, the assets are separated from the individual from the family members, reducing the impact of legal or economic issues on personal finances.

Another important aspect is the facilitation of family succession. According to Silva and Rossi (2023, p. 19), the holding company allows the organization of the distribution of assets among the heirs in a planned and controlled manner, avoiding conflicts and, often, reducing the tax burden that would be applied in a direct transfer of assets. With this, succession can occur in a more efficient and less costly way, preserving family harmony and business continuity.

In addition, the family holding company offers advantages in unified wealth management, allowing family members to have greater control over their holdings, investments, and assets. This ensures that decisions are made centrally and strategically, often under the leadership of a professional management or more experienced family members.

However, it is essential that the constitution of a family holding company is carefully planned, taking into account the particularities of each family and the patrimonial objectives. Specialized legal and accounting advice is essential to ensure that the structure is efficient and safe, both from a legal and tax point of view.

Before creating a family asset holding, it is essential to observe some aspects, with the marriage regime being the first to be considered. According to the Brazilian Civil Code, there are the following marriage regimes:

- Universal community of property: all the spouses' property is shared, but the surviving spouse is only a sharecropper, not an heir;
- Partial community of property: only the assets acquired during the marriage are shared, with the surviving spouse being a sharecropper of the assets acquired after the marriage and heir to the private assets;
- Mandatory separation of property: according to the Federal Supreme Court, only assets acquired during the marriage are shared;
- Conventional separation of property: the surviving spouse is not a sharecropper, but inherits the acquired property;
- Stable union: follows the guidelines of partial community of property.

According to Silva and Rossi (2023, p. 22), the marriage regime reveals "the importance of the incommunicability clause when donating the company's shares". These issues related to the marriage regime have a great impact on the succession and must be carefully analyzed when creating a family asset holding company.

Thus, the family holding company emerges as a strategic tool for families who want to protect their assets, facilitate succession, and ensure the continuity of their assets and businesses over time.

ADVANTAGES OF USING THE FAMILY HOLDING COMPANY AS A TOOL IN SUCCESSION PLANNING

The family holding company has become a very interesting instrument by enabling the transfer of assets to the heirs in a prior and organized manner, resulting in an effective succession in the conduct of the business of any company that is part of the set of assets, as well as enabling the patriarchs to determine the destination of their assets during their lifetime, according to Silva and Rossi (2023, p. 17).

According to Peixoto (2023, p. 113), family conflicts are not uncommon in the succession process, mainly due to the lack of planning by the company's founder, often remaining in charge of the company until an advanced age and not giving successors the opportunity to lead. Another aspect to be considered is the economic factor. According to Silva and Rossi (2023, p. 250), the constitution of a family holding company is not free of costs, however, it has some advantageous peculiarities in the succession aspect in relation to probate.

It should be noted that in the inventory, in many cases, the family needs to dispose of an asset to pay the tax, which must be collected in advance. In this sense, Valentin (2021, p. 44) highlights that, in relation to the constitutional principles that support tax planning, by arguing that, although the individual cannot avoid paying taxes, he or she has the right, supported by the principles of tax legality, closed typicality, and private autonomy, to legitimately seek the reduction or postponement of the respective payments.

Another very attractive particularity of the family holding company as a tool in succession planning, as well elucidated by Mamede and Mamede (2024, p. 94), is the possibility of making a donation of quotas or shares engraved with a non-communicability clause in the constitutive act of the holding company, preventing them from being the target of division resulting from separation or divorce. Paying attention, however, to the fact that the donation is part of the reserved portion, it is also necessary to observe the limitation of

article 1,848 of the Civil Code (BRASIL, 2002), that is, there must be just cause to prevent the sale, seizure or communication of assets.

The national doctrine highlights several benefits arising from the use of the family holding company tool for the purpose of protecting the family's assets, through lawful and legal asset shielding, which will be studied in the next topic.

ASSET SHIELDING

Asset shielding in the family holding company is a strategy used to protect a family's assets against various risks, such as legal disputes, creditors, and succession problems. The main idea is to transfer personal assets to a legal entity, the holding company, which, in addition to centralizing the management of assets and investments, becomes responsible for managing these assets more efficiently and safely.

According to Valentin (2021, p. 124), one of the greatest advantages of setting up a family holding company is the possibility of, through a lawful and legal way, shielding the assets through tax avoidance, avoiding the generation of taxes as a result of tax planning.

One of the main advantages that is cited within the doctrine is that the assets within the holding company are separated from the personal assets of the partners. In this way, in case of personal debts or legal problems involving family members, it is intended to protect the assets so that they are not reached by litigation.

However, Machado (2024, p. 412) points out that the shielding described in this way is misunderstood and that the term asset shielding "gives the false impression that, once a holding company is established, the family's assets are free of any risk". Therefore, the shielding is at risk, so much so that the Code of Civil Procedure provides in its article 133, paragraph 2 for the piercing of the reverse corporate veil, aiming to affect the assets of the legal entity, when the individual acts in bad faith, diverting its assets to harm third parties.

Asset shielding through a holding company is not infallible. In situations of fraud or unlawful practices, the Judiciary may apply the reverse piercing of the corporate veil, allowing creditors or interested parties to overcome the protection of the holding company and reach its assets.

The shielding of assets is done through clauses, namely: unavailability clause, incommunicability clause and unseizability clause, provided for in the Civil Code.

As for the unavailability clause, Venosa (2013, p. 166) understands that unavailability and inalienability are synonymous:

> Inalienable goods are unavailable. They may not be disposed of in any form, either free of charge or for consideration. When the testator does not specify which assets will make up the inalienability, it is only embodied in the distribution. If they are

> capable, the choice of heirs will prevail. If an agreement is not reached, or if there are incapable heirs, it will be up to the judge to fix the assets that will make up the inalienable portion.

The inalienability clause is a faculty available to the testator to protect the assets left to a certain heir, preventing, for example, that a prodigal heir dissipates the inherited asset. Venosa (2013, p. 165) describes the intentions of the legislator in enabling the inalienability clause:

> The imposition of the clause prohibiting alienation by the testator may be imbued with excellent intentions: he feared that the heir would squander the assets, hindering his own subsistence or that of his family; he tried to prevent the successor from being, for example, deprived of an asset for housing or work. As the clause is usually accompanied by the restriction of incommunicability, the testator sought to prevent a disastrous marriage from reducing the heir's assets. These are, without a doubt, lofty reasons that, a priori, would only benefit the heir.

However, it should be noted that the inalienability clause is only valid if it is duly substantiated, that is, the testator must prove just cause for a certain asset to be recorded as inalienable, by virtue of the provisions of article 1,848 of the Civil Code.

The non-communicability clause, in turn, finds scope in article 1,668, item I of the Civil Code:

> Article 1,668. The following are excluded from communion:
> I - the assets donated or inherited with the non-communicability clause and the subrogated in its place.

Regarding the concept of a non-communicability clause, Venosa (2013, p. 172) teaches:

> The testator may fear for the marriage of the heir, either in a union that he already knows, already existing when the will is drawn up, or in a future union, unknown to the disponent. By the non-communicability clause, the assets thus recorded are not communicated to the spouse of the heir, regardless of the matrimonial property regime. Finally, fearing that his heir will consort with a "dowry hunter", the incommunicable asset belongs only to him.

In relation to the non-communicability clause, Silva and Rossi (2023, p. 55) highlight that:

> The gift recorded with this restriction is intended not to allow the communicability of the rights of the donated assets to third parties, specifically to the spouse of their heir.

Therefore, the holding company does offer some protection to family assets, but as Silva and Rossi (2023, p.140) say, "this corporate species cannot be raised to the condition of a panacea, a remedy for all sorts of private legal problems". In addition to asset

shielding, the creation of the holding company facilitates the management and administration of assets, in addition to allowing a more appropriate tax structuring.

TAX AVOIDANCE

Tax avoidance is a legal practice used by businesses and individuals to reduce the tax burden through tax planning strategies. It involves the use of loopholes, loopholes, and permissive interpretations of tax legislation to minimize the amount of taxes owed. Unlike tax evasion, which is illegal and involves non-payment of taxes or concealment of income, tax avoidance is within the limits of the law, taking advantage of tax incentives, deductions, exemptions, and special tax regimes.

The possibilities related to tax avoidance are diverse and numerous. It is said that tax planning resulting from succession planning may involve anticipation of taxes, reduction and even elimination of the tax burden, as Valentin (2021, p. 124) says.

The main objective of tax avoidance is to reduce the amount of taxes to be paid, and strategies may include reorganizing the corporate structure, choosing more advantageous tax regimes, exploring international treaties that avoid double taxation, and even transferring revenues and profits to jurisdictions with lower taxation, what is known as international tax planning.

For Peixoto (2023, p. 144) "tax avoidance is a legally authorized procedure, which helps the tax law to achieve its extrafiscal purpose, when present." In this way, tax avoidance is the correct tax planning, which aims to generate legal savings for the taxpayer.

However, although it is legal, tax avoidance raises ethical and fiscal debates, as it can harm the collection of resources necessary for the financing of public services and the reduction of inequalities. Tax authorities in many countries have sought to combat overly aggressive avoidance practices by creating rules that limit the use of certain abusive planning, such as the implementation of anti-avoidance rules and international cooperation to prevent the "race to the bottom" in tax matters.

Depending on the way it is structured, the holding company can provide tax benefits, such as reducing the tax burden on the sale of goods and optimizing the payment of taxes on income from investments and equity interests. However, it is essential to have specialized advice so that this structure is in accordance with current legislation and does not constitute abuse of form.

TAX AND ACCOUNTING ASPECTS OF THE FAMILY HOLDING COMPANY

One of the fundamental aspects for the constitution of a family holding company is the possibility of reducing the tax burden, especially with regard to the taxation of individuals, since a rate of up to 27.5% can be applied.

According to Silva and Rossi (2023, p.143), the taxpayer can organize its activities and assets seeking the best possible tax framework, however, the tax authorities intensely combat "simulated structures, in which the documentary legal form does not find support in economic reality".

Thus, Machado (2024, p. 123) highlights the need to understand the business challenges and the fiscal and tax impacts that affect the company, and must seek within the legal rules the possibility of correct tax planning that generates the desired savings.

The family holding company is a very simple and accessible tool for a large part of the Brazilian population. With several advantages, it allows the reduction of costs associated with a traditional succession process, all through good tax planning that must be carried out by a competent advisor. Silva and Rossi (2023, p.143) teach that:

> [...] Every tax study deserves a thorough evaluation, taking into account all the risks, costs and benefits involving the adoption of alternatives aimed at the legal reduction of the company's tax burden.

In order to have a correct tax planning, we need to consider issues related to the process of setting up a family holding company, deepening the understanding of the main taxes that can be reached by this instrument, such as ITCMD, ITBI and income tax.

ITCMD

The Tax on Causa Mortis Transmission and Donation of Any Goods or Rights (ITCMD) is a state tax levied in Brazil on the free transmission of assets and rights, whether in cases of inheritance (causa mortis) or donation. This tax is levied, therefore, in situations in which there is a transfer of assets without financial compensation, with rates and rules that vary according to the state.

The ITCMD is a state tax, provided for in article 155, item I of the Federal Constitution and is levied on the transfer of assets and rights in case of inheritance or donation:

> Article 155. It is incumbent upon the States and the Federal District to institute taxes on: (Text given by Constitutional Amendment No. 3, of 1993)
> I - causa mortis transmission and donation, of any assets or rights;

Its main function is to collect, but it also serves to promote a fairer distribution of assets, since it focuses on asset transfers made free of charge, such as inheritances and donations. It is seen as a way to compensate, albeit in a limited way, the accumulation of wealth over generations.

As Silva and Rossi (2023, p. 147) describe, each state and the Federal District have the autonomy to define the rates and conditions for the incidence of the ITCMD, respecting, however, the limit of 8% determined by Federal Senate Resolution No. 9, of 1992. In practice, the rate usually varies between 2% and 8%, depending on the state and the value of the transfer. In addition, state legislation defines the exemption ranges or conditions that allow the payment of the tax in a reduced amount.

The levy of the ITCMD occurs on the transfer of assets and rights from a deceased person to their heirs. The amount of the tax will be calculated on the market value of the assets and rights transmitted at the time of death.

It also applies to the free transfer of assets or rights between living persons, such as real estate, vehicles, money or company shares. State legislation also stipulates the procedure for payment of this tax, which is usually required in donations of high value or between non-family members.

The calculation of this tax is based on the market value of the goods or rights transferred. This amount is updated according to the guidelines of each state, and the corresponding rate is applied to the total calculated. For inheritances, the payment of the tax is made before the probate process or listing of the assets, a requirement for the transmission to be legalized.

In many cases, by transferring the assets to the holding company, family members are able to reduce the calculation basis of this tax, since the donation of shares of the holding company is usually less onerous than the direct donation of assets. This is due to the fact that the value of the holding company's shares may be lower than the market value of the assets it manages, especially if proper succession planning is carried out with usufruct and incommunicability clauses.

Machado (2024, p. 126) explains that:

> For a holding company, the taxation of the ITCMD occurs separately, with the first moment of payment in the event of the usufruct of quotas or shares, where the equivalent of 2/3 of the tax due must be collected, and the second moment occurs in the extinction of such usufruct, that is, in the event of the Causa Mortis, with 1/3 of the tax to be paid being collected.

In this way, the great advantage is in the fact that the first payment has the incidence of ITCMD on the value of quotas or shares, without any update from the State, and may even be represented by the payment of real estate.

ITBI

Another tax that deserves to be highlighted is the Tax on the Transfer of Real Estate (ITBI), provided for in article 156, item II of the Federal Constitution:

> Article 156. It is incumbent upon the Municipalities to institute taxes on:
> [...]
> II - inter vivos transfer, in any capacity, by onerous act, of real estate, by nature or physical accession, and of real rights over real estate, except those of guarantee, as well as assignment of rights to its acquisition;

The ITBI is a municipal tax in Brazil that is levied on the transfer of ownership of real estate between living persons, usually in purchase and sale transactions, being a relevant tax for municipalities, constituting an important source of revenue, and plays a fundamental role in real estate transactions, since it is required for the regularization of any real estate transaction.

Thus, the main objective of this tax is to raise funds for the municipalities, but it also fulfills the function of formalizing the transfers of real estate, contributing to legal certainty and the organization of the real estate system. The ITBI is due whenever there is a onerous transfer of real estate, which means that it is levied on purchase and sale transactions.

The ITBI is required in cases of acquisition of a property with payment, whether in cash or financed, generates the obligation to pay the ITBI. This is valid for residential, commercial and rural properties. In addition to buying and selling, the ITBI is levied on other forms of onerous transfer of real estate, such as exchanges, assignments of rights and private contracts that involve payment.

According to Silva and Rossi (2023, p. 165), the payment of the holding company's capital can be a taxable event for ITBI, since when the company's capital is paid in with real estate, ownership is transferred, leaving the property to belong to an individual and becoming part of a legal entity, while the transferor becomes the owner of quotas or shares of the company. The same rule applies in the case of a legal entity that pays its own assets in another legal entity.

However, the Federal Constitution provides in its article 156, paragraph 2, item I that the ITBI is not levied on this type of transaction, also highlighting an exception to this rule, as pointed out by Silva and Rossi (2023, p. 166):

> Paragraph 2 - The tax provided for in item II:
> I - it does not apply to the transfer of assets or rights incorporated into the assets of a legal entity in the realization of capital, nor to the transfer of assets or rights resulting from the merger, incorporation, spin-off or extinction of a legal entity, unless, in these cases, the predominant activity of the acquirer is the purchase and sale of these assets or rights, lease of real estate or commercial leasing;

However, Peixoto (2024, p. 160) points out that the ITBI exemption only reaches the holding company that does not carry out a predominantly real estate activity, that is, if the activity represents more than 50% of the company's revenue, there will be no ITBI exemption.

Therefore, Silva and Rossi (2024, p. 173) highlight the need for a detailed analysis of the specific case for the creation of the holding company, and the need to hire experienced professionals is clear, in order to avoid any undesirable tax liability.

INCOME TAX

The National Tax Code – CTN, provides in its article 43 and items regarding Income Tax:

> Article 43. The tax, under the competence of the Federal Government, on income and proceeds of any nature has as a taxable event the acquisition of economic or legal availability:
> I - income, understood as the product of capital, labor or a combination of both;
> II - proceeds of any nature, thus understood as equity increases not included in the previous item.

Peixoto (2023, p. 151) points out that the calculation basis is the amount of income earned in a given fact, with different taxation for individuals or legal entities. For the former, progressive rates are applied according to the increase in the base; the second may be taxed by the actual, presumed or arbitrated profit depending on the company's choice of taxation.

With regard to our analysis of the constitution of a holding company, the capital gain must have its analysis in a thorough way, taking into account the impact factors of income tax. The holding company allows planning to minimize the impact of capital gain. If the sale of an asset generates profit for the holding company, it is possible to restructure the equity, especially for real estate and equity interests, reducing the impact of the capital gain tax.

For individuals, Silva and Rossi (2023, p. 184) highlight that when the sale of assets and rights leaves a positive difference between the value of the sale and the cost of acquisition, the capital gain is confirmed, suffering the incidence of income tax at specific rates, ranging from 15% to 22.5%.

Family holding companies, on the other hand, according to Peixoto (2023, p. 151) generally use the presumed profit, arbitrated profit, or actual profit regime, which allows for a clearer and more simplified organization of the taxes to be paid. In addition, taxes on the gross income of the holding company may be lower than taxation on income from assets managed individually.

So what is the best form of taxation? Obviously, there is no ready answer, requiring a deep analysis on a case-by-case basis. Silva and Rossi (2023, p. 234) also point out that in the actual profit the company may deduct the necessary expenses, while in the presumed profit there will be the application of presumption percentages. They also point out that:

> [..] it is necessary to evaluate the type of Holding Company in question. In the case of a pure Holding Company, whose corporate purpose is solely the participation in other companies, the revenues will consist primarily of profits and dividends received, interest on equity and equity income.

In Brazil, the distribution of profits and dividends by companies is exempt from income tax for the shareholder. When transferring assets to a holding company, dividends paid by the holding company to shareholders are also exempt from income tax, which can represent a significant advantage over the taxation of income directly from assets such as real estate and financial investments.

ACCOUNTING

For a family holding company to function efficiently, proper accounting monitoring is essential. The holding company's accounting allows for clear control of family assets, in addition to being essential for the company to comply with legal and tax obligations.

The assets transferred to the holding company need to be recorded at market value in the company's accounting. According to Silva and Rossi (2023, p. 254) this process is crucial for the correct calculation of profits, as well as for the payment of taxes, as the recorded value also serves as a basis for possible future transactions, such as sales or reorganizations of assets.

It must also provide for the distribution of dividends and profits to the partners, with all the necessary entries to record the transfers. This process needs to be well documented to ensure the tax exemption on dividends, discussed in the previous topic.

For Machado (2024, p. 608) the accounting of the family holding company facilitates asset succession, since the assets are formally registered and documented. This is particularly relevant for the valuation and division of assets between heirs, ensuring that the transmission occurs quickly, transparently, and within the legal parameters, avoiding disputes and lengthy processes.

According to Mamede and Mamede (2024, p. 112), despite the advantages, it is essential that the creation of a family holding company is done with the support of professionals specialized in tax law and accounting, to avoid assessments and incorrect interpretations of the legislation. The Federal Revenue Service and the State Treasury Departments may consider the use of holding companies for exclusively tax purposes as abusive tax avoidance, which can lead to assessments and fines. Therefore, it is important that the holding company's objective is, in fact, the protection and management of assets, and not just the reduction of taxes.

Another important precaution is to periodically review the structure of the holding company and adapt the model according to changes in tax legislation. In addition, it is important to evaluate the costs involved in setting up and maintaining the holding company, as they can impact the cost-benefit of the structure.

CONCLUSION

The family holding company is a powerful tool for managing family wealth, providing tax benefits and facilitating succession. However, its effectiveness depends on proper planning and strict accounting monitoring. When establishing a family holding company, it is essential to consider all the tax and accounting aspects involved, ensuring that the structure complies with current legislation and that, in fact, it meets the interests of the family.

At the beginning of the study, we presented the existing provisions in Succession Law, detailing how the probate process can be complex and time-consuming and emphasizing the importance of succession planning.

It was found that the family holding company, although not so widespread in the country, in many cases, is an advantageous tool that, in addition to other benefits, has several fiscal and tax advantages and also proves to be an excellent means of protecting assets, through a series of prerogatives arising from the legislation.

As a response to the problem identified in this work, it is perceived that succession planning carried out through the family holding company is one of the best alternatives compared to traditional methods of succession. In this sense, the use of the holding company as a succession planning tool has gained prominence among companies, because, with proper planning, the guarantees of continuity of family businesses, asset protection and tax savings are increased.

It should be noted, however, that the creation of a holding company with the objective of shielding assets against creditors is not always effective. For this model to be

effective, an in-depth study of the specific objectives, the family profile and the stage of the company is necessary.

In this way, it is perceived that, as a way to mitigate any conflicts arising from the succession process between the heirs, and to designate the manager of the family business, whether a family member or a third party, in order to maintain the financial health and even the very survival of the company over the generations, the family holding company is an ideal and efficient mechanism.

It is worth mentioning that although throughout the study carried out, it is understood that the choice of the family holding company as an instrument of succession planning has numerous advantages in relation to traditional succession methods, it is essential that the family has a clarity in relation to the personal objectives of its entities, as well as the purposes of the company, whether it derives exclusively from the universality of assets, or the family business, so that the use of this tool results in an effective, beneficial and satisfactory decision.

Still, it can be seen that succession planning is indispensable for those who want to avoid problems in the management of the family business and reduce succession costs, and therefore a case-by-case analysis by specialists is necessary, so that the family's objectives are achieved in relation to taxes and simplification in the transition of ownership of the company.

It was possible to identify that succession planning can reduce the anxiety of the line of succession about the future division of assets. By transferring assets from the individual to the legal entity before death, the division into quotas becomes a fair and simplified form of transition. After the payment of the assets in the holding company, the patriarchs can maintain control and management over the company as usufructuaries and administrators.

In terms of succession, the donation of quotas is a process that requires care to organize the assets and define restrictive clauses. Understanding the legitimate part, half of the assets of the inheritance obligatorily destined to the necessary heirs, is fundamental.

Tax savings are a relevant point in succession planning, as the family holding company tends to reduce the tax burden, especially in the transfer of real estate and ITCMD, based on a detailed study of the ideal time and form for the process.

In this way, planning through quotas makes the inventory process more agile and less costly, essential in companies focused on profits. In an environment of fierce competition, every savings counts, avoiding significant losses that occur in operational details.

It is worth remembering that the creation of a family holding company is not always the solution to all problems. In situations of financial crisis or foreclosures, this option may not be suitable, as it increases the risk of fraud.

Despite the patrimonial, tax, succession, and corporate advantages, not all cases benefit from the creation of a holding company, especially in the absence of three fundamental attributes: equity in order, regularity of assets, and family harmony.

Planning focused on processes such as probate, usually painful and time-consuming, is of great importance today, facilitating a quick and less traumatic corporate restructuring for the protection of assets.

Thus, it is concluded that the family holding company must be carried out based on thorough planning, which considers not only the tax advantages, but also the long-term objectives for the family's assets.

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