

Transformation of Foreign Companies' Branches into Subsidiaries in Albania

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Abstract

The transformation of foreign companies' branches into subsidiaries in Albania does not have a clear legal arrangement. The mergers and divisions of commercial companies are regulated under the Albanian Company Law but this law does not include provisions concerning the so-called spin-off transaction which is the most important form of division in most countries. It provides only the possibility of a partial spin-off, described as transfer of assets of a company in the form of contribution of capital in kind to a newly established or existing joint stock company, without defining clear procedures for this transaction. Meanwhile, the Albanian Bank Law, (amended in 2011) provides the establishment of a new bank through the transformation of a foreign bank's branch exercising activity in Albania into its subsidiary. Following these amendments, until now two foreign banks have transformed their branches in Albania into subsidiaries. However, the situation of foreign companies with branches in Albania (not performing banking activities) is different due to the lack of clear legal provisions concerning the partial spin-off transactions. The aim of this paper is to analyze the legal possibilities for transformation of foreign companies' branches into subsidiaries under Albanian legislation. The analysis will focus on company law, tax law and labour law, and it will also include a brief summary of the situation in other countries. First, it will analyze the legal possibilities of transformation of foreign companies' branches into subsidiaries. Then the study will focus on the ways of transformation, legal procedures and legal consequences.

Keywords: company, branches, subsidiaries, spin-off, partial spin-off.

1. Introduction

One of the most company transactions that have become increasingly popular, because many investors, boards and managers believe that certain businesses may command higher valuations if owned and managed separately, rather than as part of the same enterprise, is spin-off. A spin-off involves the separation of a company's businesses through the creation of one or more separate, publicly traded companies. There are two types of spin-off transactions that may be performed between the company transferring its assets and the other company acquiring such assets, namely full and partial spin-offs.

Full spin-off is the transfer of all assets, receivables and undertakings of a fully fledged corporate taxpayer company to two or more "existing" or "to be incorporated" fully fledged tax payer companies through dissolution without liquidation process over such assets, receivables and undertakings' book values in return for the acquisition of the transferee company's shares by the existing shareholders of such transferor company.

Partial spin-off is the transfer of real properties included in the balance sheet or shares in other entities held for at least two years and included in the balance sheet or production or service businesses of a fully fledged tax payer company to an "existing" or "to be incorporated" fully fledged tax payer company as capital in kind over their book values in return for the acquisition of the transferee company's shares either by such transferor company or its existing shareholders.

The main difference between full spin-off and partial spin-off is that in the full spin-off the transferor company is subject to dissolution process without liquidation and loses its legal personality whereas in the partial spin-off, the transferor company does not go through a dissolution process and maintains its legal personality.

Under Albanian law, the issues in relation to companies and commercial transactions are regulated by law "On Entrepreneurs and Companies"¹ (Albanian Company Law or ACL hereinafter).

¹ Law No. 9901, dated 14.04.2008 "On entrepreneurs and companies".

Even though the Albanian Company Law regulates the mergers and divisions of the companies, it does not provide expressly for division, where the company to be divided remains in existence. This means, that the so-called *spin-off* which is the most important form of division in most country, is not explicitly provided for by the text of this law.

Nevertheless, what is most important to note is that ACL has provided the possibility of a *partial spin-off*, described as transfer of assets of a company that has been registered for at least 2 years in the form of contribution of capital in kind to a newly established or existing joint stock company in return for the acquisition of the latter's shares by such transferor company.

2. Converting the Branch into a New Subsidiary Company

A company's branch of activity can be transformed, without going into liquidation, into a new subsidiary company by way of transferring **all the assets and liabilities** of the branch to the new company in exchange for the transfer of securities representing the capital of the company receiving the transfer. This is a well known international practice in many countries called *partial spin-off*. However, in order to practically realize a partial spin-off transaction it is necessary for this transaction to be provided as a possibility by the legislation of the country where it will be performed. In different countries this transaction takes different forms². For example:

Belgium: Contribution or Transfer of universality (i.e. all assets and liabilities) or the transfer of a branch of activity);

France: Contribution of a non-French assets and liabilities to the benefit of French Company. This transaction is often used where a foreign company wishes to "convert" its French branches into a subsidiary;

Germany: Transfer of assets and liabilities. A German company may transfer or contribute some or all assets and liabilities to a foreign company, and receive consideration (of cash or shares).

Greece: Transfer of business. According to Greek Civil law, article 479 of the Greek Civil Code "in case of a transfer of a business, the transferor is liable against the creditors of the business for an amount equal to the value of the business transferred to him...". Article 479 of the Greek Civil Code may also apply in the case where the object of transfer is not the business in its totality, but one or more elements of it, which constitute the core of the transferor's business activity.

Buy - out. The Greek law on joint stock companies (A.E) provides that one A.E may transfer, without a subsequent liquidation, to another company the total of their property (assets and liabilities). It is necessary however that the laws of the other country involved authorize such a transfer. Statute 2515/1997, regulates mergers between Greek banks, the contribution of a Greek branch to a bank resident in an EU Member State and the transformation of a Greek branch of a foreign bank into a Greek bank.

Italy: Contribution of assets, business concerns or all assets and liabilities. Italian law allows Italian companies to both contribute into and/or or sell their assets to either foreign companies or their Italian branches as well. They can also receive or purchase from the latter any assets or business concerns or even all of their assets and liabilities.

Luxembourg: Contribution of assets, of a branch of activity, of all assets and liabilities. Luxembourg law on commercial companies authorizes Luxembourg companies to contribute some of their assets, a branch of activity, all its assets and liabilities, to a foreign company, provided that the law applicable to the transferee allows such contribution.

Romania: Transfer of business. As per legal requirements in force, there is no impediment for a Romanian company to transfer totally or partially its activity to a foreign country, without entering into a dissolution process.

Spin off. In addition to the total spin-off, Romanian law also regulates the partial spin-off. As such, a Romanian company, without being dissolved, may transfer one or several activities towards one or several existing and/or newly incorporated companies, in exchange of a pro-rata distribution of shares issued by the latter;

Spain: Cross-border global assignment of assets and liabilities. Spanish Law 3/2009 expressly allows the cross-border global assignment of assets and liabilities.

Switzerland: Demerger and Transfer of Assets (and Liabilities). Art. 163d of the Swiss Federal Code on Private International Law allows the Demerger as well as the Transfer of Assets and Liabilities under condition of reciprocity. This regulation allows a cross border transfer of various assets and liabilities or an entire business *uno actu* ("in one act").

² Ernst & Young corporate legal group (July 2010). *Cross-Border Mergers, 10 questions regarding mergers between EU companies (EU Mergers) and mergers between EU and non EU companies ("International Mergers")*. Practical Law Publishing Limited 2010.

3. Transformation of Foreign Companies' Branches into Subsidiaries in Albania

Technically, a foreign company can *spin off* its Albanian branch transferring all the assets and liabilities of the latter to a existing or newly Albanian-incorporated company that will be its subsidiary.

To make it possible, it is necessary that the law of the country where is situated the foreign company provides for the possibility of a company to undertake a partial spin-off, involving the transfer of a branch of activity situated in Albania (without going to liquidation) to a newly incorporated foreign company, in exchange for shares and from the other side the Albanian law should provide the possibility that all assets and liabilities of a branch of activity of a foreign company can be transferred into a subsidiary company.

3.1 Domestic law of the foreign company

If the country where is situated the foreign company is an EU member the conversion of a branch into a subsidiary falls within the scope of Directive 90/434 and Directive 2005/19 amending Directive 90/434 which applies to mergers, demergers, partial demergers (transfers of one or more branches of activity), contribution of assets and exchange of shares between companies established in different EU member states.

The aforementioned directives are also applicable in the case of the conversion of branches into subsidiaries. Directive 2005/19/EC (amending directive 90/434) introduces specific provisions providing relief on the conversion of branches into subsidiaries (Article 10).

For the non EU countries it is important that its domestic law to provide for the possibility of a company to undertake a partial spin-off, involving the transfer of a branch of activity situated in a foreign country. For example, under Turkish law, this transaction is well regulated. Previously, company spin-offs and share exchange rules of companies were briefly defined and several tax incentives were created for such transactions under Articles 38 and 39 of the Corporate Tax Law No. 5422. In accordance with Article 38 of the Law No. 5422, the Ministry of Finance and the Ministry of Industry and Trade have issued the Communiqué Regarding Principles and Procedures for Partial Spin-off Transactions of Joint Stock and Limited Liability Companies No. 25231 dated 16 September 2003 to regulate the principles and procedures concerning the partial spin-offs. In the year 2006, the new Corporate Tax Law No. 5520 (the "CTL") has been adopted by the Turkish Parliament and published in the Official Gazette on 21 June 2006 and accordingly, the General Communiqué on Corporate Tax Serial No. 1 (the "General Communiqué") has been issued by the Ministry of Finance and published in the Official Gazette on 3 April 2007. Although the CTL has repealed the Law No. 5422 with all its annexes and amendments, it was not clear whether the Communiqué was still in effect. For this purpose, the spin-off process was included in the new draft of the Turkish Commercial Code which was implemented in 2009.³

3.1.1 Directive 90/434/EC and 2005/19/EC

On 23 July 1990 the Council adopted Directive 90/434/EEC on a common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (the Merger Directive). The objective of the Merger Directive is to remove fiscal obstacles to cross-border reorganization involving companies situated in two or more Member States.

In the case of mergers and divisions, the transferring company transfers assets and liabilities to one or more receiving companies. The Merger Directive provides for deferral of the taxes that could be charged on the difference between the real value of such assets and liabilities and their value for tax purposes. The deferral is granted providing that the receiving company continues with their tax values and effectively connects them to its own permanent establishment in the Member State of the transferring company. These rules apply to transfer of assets where the assets transferred form a branch of activity.

For purposes of this Directive:

"Transfer of assets" shall mean an operation whereby a company transfers without being dissolved all or one or more branches of its activity to another company in exchange for the transfer of securities representing the capital of the company receiving the transfer;

"Transferring company" shall mean the company transferring its assets and liabilities or transferring all or one or

³ Taboğlu & Demirhan (2007), *Spin-Off Under Turkish Law*, [Online] Available: www.tabglu.av.tr (May 17, 2007).

more branches of its activity;

'Receiving company' shall mean the company receiving the assets and liabilities or all or one or more branches of the activity of the transferring company;

'Branch of activity' shall mean all the assets and liabilities of a division of a company which from an organizational point of view constitute an independent business, that is to say an entity capable of functioning by its own means.⁴ Please note that this conception of the branch is adopted by the New Albanian Commercial Law (ACL). As per article 9 of ACL the branch is defined: "Branches are places of business, and have the same legal personality as that of the company. They operate in a sustainable manner, have their own organization and management, and conduct business with third parties on behalf of the company".

On 17 February 2005 the Council adopted Directive 2005/19/EC amending directive 90/434/EEC. One of the main amendments introduced by this Directive is the introduction of specific provisions providing relief on the conversion of branches into subsidiaries (Article 10).

The 2005 amendments made it clear that the Merger Directive covers situations where the assets connected to a permanent establishment (and constituting a 'branch of activity') are transferred to a newly set up company – a subsidiary of the same company whose permanent establishment transfers the assets (Amendments to: Article 10(1), subparagraph 3 inserted). On the preface of the Directive 2005/19/EC is provided that: "(14) some doubts exist as to the application of Directive 90/434/EEC to the conversion of branches into subsidiaries. In these operations, the assets connected to a permanent establishment and constituting a 'branch of activity', as defined in Article 2(i) of Directive 90/434/EEC, are transferred to a newly set up company which will be a subsidiary of the transferring company and it should be made clear that this transaction, being the transfer of assets from a company of a Member State of a permanent establishment located in a different Member State to a company of the latter Member State, is covered by the Directive".

3.2 Albanian Law

3.2.1 Company Law

According to article 112, paragraph 3 of the Albanian Company Law:

"The assets or shares of an existing company may be brought in as a contribution in a joint stock company, only if the transferring company has been registered for at least 2 years..."

This means that a *partial spin off* can be possible through the contribution of capital in kind of assets of an existing company i.e. a part of its assets and liabilities or all or one or more branches of its activity (all the assets and liabilities of a division of a company which from an organizational point of view constitute an independent business) to a newly established or existing joint stock company.

Interpreting this article in the light of the Merger Directive we can conclude that it provides the possibility to convert a branch into a subsidiary.

This interpretation is fully consistent even with others foreign laws. For example, under Turkish law *"a partial spin-off is the transfer of real properties included in the balance sheet or shares in other entities held for at least two years and included in the balance sheet or production or service businesses of a full fledged tax payer company to an existing or to be incorporated fully fledged tax payer company as capital in kind over their book values in return for the acquisition of the transferee company's shares either by such transferor company or its existing shareholders."*⁵

Also, an Opinion of the European Central Bank requested from the Polish Minister for Finance on a new draft law amending Polish Law on Banking and certain others laws has stated that a conversion of a branch into subsidiary can be possible through contribution in kind by the foreign credit institution of the business of the branch to the newly established domestic bank, in exchange for the bank's shares. The main purpose of the draft law is to enable the transformation of a Polish branch of a credit institution established in another Member State and conducting its business in Poland under the single passport into a subsidiary of the same credit institution. Such a subsidiary would be established in Poland and

⁴ Council Directive 90/434/EEC (July, 23 1990). *On a common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (the Merger Directive)*. [Online] Available: http://ec.europa.eu/internal_market/company/official/index_en.htm

⁵ Taboğlu & Demirhan (2007), *Spin-Off Under Turkish Law*, [Online] Available: www.tabglu.av.tr (May 17, 2007).

operate as a domestic bank. The draft law sets out the procedure to be followed when conducting the transformation, which comprises the following steps: (a) application by the foreign credit institution concerned for an authorization to establish, on the basis of an existing branch, a domestic bank in the form of a joint stock company; (b) audit by the KNF of the branch to be transformed, verifying its current financial condition; (c) grant by the KNF of authorization to establish a domestic bank on the basis of the branch; (d) contribution in kind by the foreign credit institution of the business of the branch to the newly established domestic bank, in exchange for the bank's shares; (e) registration of the new domestic bank in, and deletion of the transformed branch from, the register of entrepreneurs. The following main consequences occur on registration of a new domestic bank in the register of entrepreneurs: (a) the new bank assumes all the foreign credit institution's rights and obligations stemming from the operation of the transformed branch (universal succession); (b) the KNF assumes responsibility for supervision of the operations of the new domestic bank; (c) deposits accumulated via operations of the transformed branch, and transferred to the new domestic bank, become covered by the Polish deposit-guarantee scheme in the form of a joint-stock company⁶.

3.2.2 Banking Laws

As concerning the conversion of foreign bank's branches into subsidiaries the Law "On Banks in the Republic of Albania"⁷ (Law on Banks hereinafter), before its 2011 amendments, does not provided express provisions about this transaction. In 2011, based on the requests of some foreign banks operating in Albania through their branches to convert these branches into subsidiary, the Albanian Parliament has adopted the law No 10481, dated 17.11.2011 "On Amendments to Law No 9662, Dated. 18.02.2006 'On Banks in the Republic of Albania", through which in Chapter II, after Article 29, were added articles 29/1, 29/2, and 29/3 which provides a special method to establish a local bank through transforming a foreign bank branch operating in the Republic of Albania, the transformation procedure and the legal effects of the transformation. Namely, article 29/1 provides that:

- 1. The foreign bank, which conducts banking and financial activity through a branch in the territory of the Republic of Albania, in compliance with the license granted by the Bank of Albania, may transform its branch into a subsidiary in the form of a joint stock company through registering the donated capital in shares underwritten by the foreign bank.*
- 2. Transformation as described above of a foreign branch into a subsidiary/local bank takes place upon request by the foreign bank, or when the Bank of Albania considers it as necessary for systemic risk management reasons. When transformation is requested by a foreign bank, the request shall be subject to approval by the Bank of Albania, which may refuse approval when it deems that the transformation harms the national economy or state interests and deteriorates the financial situation or compliance with supervisory norms.*
- 3. The transformation process as described above of the foreign branch into a subsidiary/local bank is compulsory when determined to be necessary by a decision of the Bank of Albania for systemic risk management purposes...*
- 7. The process of transforming the foreign bank branch into a bank/subsidiary by request of the bank itself enters into force upon registration, at the National Registration Centre, of the transformation decision taken by the general assembly or any other competent body of the parent bank, together with the decision of the Bank of Albania on the transformation approval..."*

It is important to note here the provisions of article 29/3 on the legal effects of this transformation. It provides that the transformation does not bring consequences on the claims and liabilities of the foreign bank branch to third parties. The foreign bank subsidiary inherits all the claims and liabilities stemming from the operations of the foreign bank branch undergoing transformation, including the total deposits. All claims and liabilities to third parties of the foreign bank branch undergoing transformation before the transformation process enters into force, remain in force for the subsidiary according to the arrangements defined in the acts or agreements with these parties. Claims and liabilities, when transformation is deemed as necessary by the Bank of Albania, may be transferred without prior consent from depositors, other creditors, shareholders with special rights, or other third parties. Upon entry into force of transformation, all financial and physical assets owned or administered by the foreign bank branch that is transformed continue to be owned or administered by the established subsidiary. For tax registration purposes, the established subsidiary maintains the same tax ID code (NIPT code in the Albanian case) as the foreign bank branch that is transformed. The subsidiary established

⁶ European Central Bank (2011). *Opinion on the conversion of foreign credit institutions' branches into subsidiaries*. CON/2011/57 (5 July 2011).

⁷ Law No 9662, dated 18.12.2006 "On Banks in the Republic of Albania". *Official Gazette No. 149, December 20, 2006, page 6013*.

as a result of the transformation of the foreign bank branch shall not be subject to a new licensing procedure by the Bank of Albania, however, the Bank of Albania verifies the legal and sublegal conditions approving or refusing the transformation of the foreign bank branch into a subsidiary. If the Bank of Albania approves the transformation, the subsidiary inherits the license of the transformed foreign bank branch. In this case, the Bank of Albania delivers the new license to the subsidiary reflecting the change of designation from foreign bank branch to subsidiary.

3.2.3 Labor Law

The Labor Code of Albania provides for a section titled "Transfer of Undertaking" which contains provisions relating to the safeguard of employees' rights in the event of transfers of undertakings or parts of undertakings. Article 138 of Labor Code provides that:

"1. In case of transferring an undertaking or a part of it, all the rights and obligations arising from it, under an employment contract which remains valid until the moment of transferring, shall be passing on to the person subject to the transferring of these rights..."

The branch of activity (a division of a company which from an organizational point of view constitutes an independent business, that is to say an entity capable of functioning by its own means) falls within the meaning of "part of undertaking". Therefore, in terms of article 138 of Labor Code, by transfer of part of undertaking shall be meant even the transfer of branch of activity.

This interpretation is fully consistent with the spirit of the Transfer of Undertaking Directive⁸ which provides that:

*"There is a transfer (transfer of an undertaking, business, or part of an undertaking or business) within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity"*⁹.

Moreover, this interpretation is fully consistent with the interpretation that other countries have made to their laws which contain similar provisions. For example, the Italian Court of Cassation interpreting the article 2112 of Italian Civil Code, which provides: *"In the case of an undertaking transfer, the employment relationship continues with the transferee and the employee retains all the rights that stemming from it...The provisions of this Article shall also apply to the transfer of the part of undertaking, understood as the articulation of an economic activity organized functionally autonomous, identified as such by the transferor and transferee at the time of his transfer"* (very similar with article 138 of Albanian Labor Code), has stated that by "transfer of part of undertaking" shall be meant "transfer of branch of activity"¹⁰.

As a consequence, the provisions of the Labor Code relating to the transfer of undertaking shall apply to the *partial spin off* transaction of foreign company branch situated in Albania. In addition, it is important to note that even the Labor Code provides as possible a *partial spin off transactions* or otherwise a transfer of a part of undertaking.

3.2.4 Tax Law

As a matter of fact, the *partial spin off* or otherwise the conversion of a branch into a subsidiary is a transfer of assets which in itself is a transfer of movable and immovable properties. This transaction generates incomes or added values to which taxes are applied. Within the meaning of the law "On value added tax"¹¹(VAT Law hereinafter), the transfer of the right of movable and immovable properties, is considered supply of goods and on this, as general rule, should be paid the value added tax. However, the VAT law, exceptionally, provides that the transfer of a branch as transfer of the economic activity is not considered supply of goods for the purposes of this law and it is not taxable. Article 12 of the VAT law, entitled "Transfer of economic activity" provides that:

⁸ Council Directive 2001/23/EC (12 March 2001). *On the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.* [Online] Available: http://ec.europa.eu/internal_market/company/official/index_en.htm

⁹ Article 1 of Council Directive 2001/23/EC.

¹⁰ Decision No 6296/2006 of Italian Court of Cassation.

¹¹ Law No 7928, dated 27.4.1995 "On Value Added Tax". Official Gazette No. 12, May 5, 1995, page 469.

“The transfer by a taxpayer to another person of an economic activity or a part of it, in relation to which he is taxable, is not a supply of goods or services, if the recipient is or will be registered under this law, in connection with the economic activity or its part that is being transferred”.

The question that arises here is whether even the *partial spin off* transaction in question i.e. conversion of a branch into a subsidiary falls within the meaning of this article. Using the same logic reasoning as in the preceding article 138 of Labor Code we can say that the “transfer of partial economic activity” includes even the transfer of assets of a company's branch to a newly or existing subsidiary. This interpretation is also reinforced by the provisions of VAT Instruction of the Minister of Finance, which requires that the economic activity should have economic autonomy i.e. it should function independently. In accordance with the VAT law the Minister of Finance has issued the instruction ‘On value added tax’¹² (VAT instruction hereinafter). As regards the “transfer of economic activity” provided by article 12 of VAT law the VAT instruction contains more specific provisions. Article 4 of this instruction provides for as it follows:

“4. The transfer of economic activity

If a taxable person transfers all or part of its activity to another person who is or becomes taxable in connection with this activity, by continuing it, and this transaction meets the economic and legal condition, the transfer is considered transfer of economic activity and is not taxable.

Meeting the economic condition requires the transferred activity to have economic autonomy, thus being able to function independently at the recipient. The economic autonomy presupposes the existence of all conditions for production such as premises, raw materials, machinery, etc and providing services. Selling only one of them (raw materials, machinery or facilities, etc.) is not considered a transfer of economic activity, but only a normal supply of goods to which VAT applies.

Meeting the legal condition requires in all cases to be verified the balance sheet of the person transferring the activity, to be verified how many and what assets were used to manufacture the product and how many of them are transferred and the same for the passive, how many income are realized because of this transfer. The same verifications will be made to the balance sheet of the person to whom is transferred the activity, how many assets have entered, the actions performed in passive. Between two person (transferor and transferee) should be signed a transfer contract, based on Civil Code.

If the taxable person provides goods that are part of the assets of his economic activity, e.g. sells, donates or uses privately, this is a taxable supply and on the taxable value of these supplies is calculated VAT”.

In summary, business assets transactions will be exempted from VAT if the transaction falls under the category of ‘transfer of economic activity’, defined as a transaction where the taxable person transfers entirely or partially its activity to another person who is already or becomes a taxable person by continuing to conduct such activity, and when the following economic and legal conditions are fulfilled: (i) the transferred activity must have economic autonomy, that is, continue to be conducted independently after the transfer. Economic autonomy requires the presence of all conditions necessary for the realization of the activity (such as the premises, raw materials, equipment, etc). If the transfer consists only of one of these elements (e.g. raw materials only), the transfer will be considered as supply of goods and thus be subject to VAT; and (ii) the legal requirement consists of conclusion of a written agreement before a notary public and verification of the balance sheet of the transferor, especially the identification of the assets used for the transferred activity and income realized from the said transfer. The same verifications will apply to the balance sheet of the transferee.

Taking into consideration the provisions of others tax laws, such as law “On incomes tax”, law “On national taxes” and law “On local tax system”, we can say that the acquisition of business assets (transfer of economic activity) will trigger application of national and local taxes depending on the nature of the assets acquired. If the assets constitute immoveable properties, a tax for transfer of ownership title over the immoveable properties shall apply (such tax is 2,000 Albanian leke/m² for commercial buildings located in Tirana, the capital city (the tax is lower in other districts); furthermore, the tax is 2 per cent of the sale price for all immovable properties other than buildings). The tax on transfer of ownership over cars (if any) becomes due (this tax is calculated based on the car's engine power, years of use and type of oil). However, the above considerations are not conclusive and specific tax advice shall be necessary on this matter, and this opinion addresses such issue only to the purpose of provision related to spin off in the Albanian legislation.

Taking into account the above mentioned legal framework (i.e. article 112 of company law, article 138 of Labor Code, article 12 of VAT law and banking laws), we can conclude that under Albanian legislation there is the possibility to convert a branch into a subsidiary without liquidating the former entity especially when these entities are banks or

¹² Instruction No 17, dated 13.05.2008 “On value added tax”. Official Gazette No. 64, May 17, 2008, page 2811.

branches of banks.

This transaction (partial spin-off) shall be performed by way of transferring all the assets and liabilities of the branch, in the form of contribution of capital in kind, to the subsidiary, which may be an existing or newly incorporated joint stock company. Accordingly, such assets shall be injected as capital to the transferee company (subsidiary) over their book value through partial spin-off. The contributions of capital in kind by the transferor company in the transferee company (subsidiary) shall be equal to the total value of the transferred assets shown in the accounting records of the transferor company.

3.3 Ways of transformation

The above mentioned transaction can be accomplished in two ways. The assets and liabilities of Albanian branch can be brought as contribution of capital in kind to a newly incorporated subsidiary of foreign company in Albania (as contribution in kind in the initial capital of subsidiary) or to an existing subsidiary joint stock company of the foreign company, then such company shall increase its share capital accordingly.

The difference between them is that in the first case, the transfer of assets and the incorporation of the subsidiary will be made at the same time, while in the latter case it will initially be done the incorporation of the subsidiary in form of joint stock company, meeting all the legal requirements provided by the Albanian legislation then the transfer of assets of the branch as contribution of capital in kind by increasing the capital of the subsidiary.

In case the contribution is exercised in a newly incorporated company, the provisions of the ACL and related legislation regarding the incorporation of a company shall apply. On the other hand, if the contribution is exercised in an existing company, then such company shall increase its share capital accordingly.

In return for the capital contribution realized in the transferee company (subsidiary) the transferor company will obtain the shares of the transferee company. The capital of the transferor company is required to be adjusted to reflect such transaction. Therefore, a capital decrease in the transferor company equaling to the amount of the values of the assets transferred to the subsidiary.

4. Concluding Remarks

As analyzed above in this paper, we can conclude that under Albanian legislation there is the possibility to convert a branch into a subsidiary without liquidating the former entity especially when these entities are banks or branches of banks. In order for this transaction to be feasible even for non-bank companies, the legislator should intervene as in the case of banking law, either through legal amendments or through specific bylaws. Especially the legal intervention should include, *inter alia*, the principles, procedures, auditing and validity conditions for the realization of a partial spin-off transaction by and between/among the joint stock or limited liability companies.

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