SOME ASPECTS REGARDING THE RESTRUCTURING OPERATIONS OF THE ECONOMICAL ENTITIES IN ROMANIA

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Summary

The aim of this paper is the studying of the restructuring operations of the economical entities in Romania. Based on scientific observation, analysis and synthesis, the research starts with a presentation of the juridical frame of the restructuring operations in Romania, focusing further on analyzing of the two types of operations: the fusion between companies with negative capitals, and the operations made during the retroactivity period. Using the case study method, the study accomplishes a presentation of the main aspects of the restructuring operations of five economical entities in Romania: SC Astral Telecom SA, SC Romania Data Systems SA, SC Romconstruct Holding Grup SA, SC Artima Retail Investment Company SA and SC UPC Romania SA. The results of the research wish to underline the main aspects of the restructuring operations of the trading companies in Romania.

Keywords: restructuring operations, winding up, fusion

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1. Introduction

The accounting regulations drawn up in the field of the restructuring operations of the economical entities in our country have evolved along with the general process of accounting norming in Romania, and are a part of the institution’s preoccupation, i.e the Ministry of Public Finances, to regulate a category of operations of an increasing importance in an economical environment in a continuous evolution and transformation.

The restructuring operations (in the accounting legislation in our country ‘reorganizing operations’ concept is being used, being similar to the concept of ‘restructuring operations’) of the economical entities regulated by the accounting legislation in our country are the fusion, the division, dissolving and winding up of the companies, being juridically regulated by the Law no.31/1990 regarding the trading companies.

The operations to be carried out in the case of dissolving and winding up of the companies consist of the following stages, according to the law:
- inventorying and assessment of the assets, debts and own capitals of the trading companies to be winded up, and registering of the inventorying and assessments results;
- drawing up of the annual financial situation upon winding up in the form regulated by the applicable accounting rule in force;
- agreement on the type of operations to be carried out by the liquidator on behalf of the trading company according to the law;
- turning to account of the assets (the sale of the real estates and of the shares, the cashing in of the debts and of the short term financial investments, a.s.o);
- paying off of the debts of the company to the state budget, to the state social insurance budget, together with other social obligations to other funds, to employees and other third parties;
- establishing of the winding up result (profit or loss), the profit or loss account being drawn up, in the form stipulated by the applicable accounting regulations.
- drawing up of the balance as a result of the winding up, according to the form stipulated by the applicable accounting regulations. This balance will form the basis of performing the partition and of the calculation of income and dividends tax;
- the performing, with regard to the law, of the partition of own capital (net assets) resulting from winding up of the trading company, according to: the provisions of the status and/or the company contract, the decision of the shareholders/associates general meeting, registered in the general meeting’s registry and the participating quota at the social capital;
- the calculation, holding back and transferring of the profit/income tax and of the tax on dividends resulted as following dissolving/winding up.

2. The juridical frame of the restructuring operations in Romania
Considering the frequency of the fusion, division, winding up operations of the trading companies and taking into account the complexity and fiscal incidence of the operations, an accounting regulating process was needed in our country.

Thus, in accordance with the juridical frame, with the provisions of the Accounting Law and with the applied accounting regulations, OMFP no.1223/1998 was drawn up, which regulated aspects regarding the types of restructuring operations, the main accounting operations to be performed as well as the practical aspects of these operations.

Damping of the Romanian accounting regulations by the International Standards in Accounting and the European Directives by OMFP no. 94/2001 and OMFP no.306/2002 led to the necessity of modifying the regulations regarding the restructuring, OMFP no.1078/ 2003 being issued. In accordance with the evolution of the juridical frame, as well as the applicable accounting regulations, the evolution caused by Romania’s obligation of aligning to the Community aquis, the methodological norms for reflecting in the accounting of the main fusion, division, dissolving and winding up operations, as well as withdrawal or exclusion of some associates were issued in 2004 by MFP. (OMFP no.1376/2004).

In accordance with the legal obligations of the accounting law, each trading company binds itself to drafting up of the annual financial situation upon fusion, division or winding up, according to the law. According to the provisions of the trading companies law ( art.268(1)), at the end of the liquidation, liquidators will draft the fiscal financial situation. The accounting will reflect all the performed operations and the check balance will be drafted.

The administrators of the trading companies , which are going to be part of the fusion/division shall mention the date from which the transactions of the absorbed or divided companies are counted, from an accounting point of view, as belonging to the absorbing company or to any of the beneficiary companies.

In the case of division, the administrators will set up the description and exact allocation of the actives, debts and own capitals, which will be transferred to each beneficiary companies.

In 2008 MFP benefitted from French assistance to perfect the accounting and fiscal regulations applicable to restructuring operations of the economical entities in our country. This contact with the legislation in the field , applicable to another European state, together with the evolution of the business environment in our country, correlated to the necessity of adapting to the new Community requirements led the regulatory body in accounting in our country to make the necessary arrangements for perfecting the legislation applicable in Romania. In order to achieve this the OMFP no. 1376/2004 has been updated.

3. The fusion of the companies with negative capitals

Along with the classic cases in the accounting of the fusions, there are situations when these take place between entities which at least one of them has own negative capitals. The most frequent case is the one in which the absorbing company has own positive capitals, and the absorbed company has own negative capitals, case which will be further analyzed.

Also, in the case of fusion operations, between the date of drafting of the financial situation on which the fusion project is being edited and the date of its effecting implementing, some accounting operations are carried out, the accounting treatment of these being further presented.

The fusion between companies where at least one of them has own negative capitals has certain peculiarities. The most frequent case, that in which the absorbing company has own positive capitals, and the absorbed company has own negative capitals, is characterized by the fact that the absorbing one takes over the actives and debts of the absorbed one without issuing new shares, because the net contribution of the latter is negative. With regard to the reflecting in the accounting of this situation, the transfer of the actives and debts of the absorbed to the absorbant are registered, and the difference between the actives and the debts of the absorbed one at the moment of the taking over in the accounting of the absorbing will be reflected in the reported result (account 117).

Certain authors (Râchişan, 2007) claim that a situation like this is possible when there are some previous relations between the absorbing and the absorbed, the absorbed being owned by the absorbing or both having a common major shareholder, or presenting the same structure from a shareholder point of view. This way the absorbant agrees to receive a negative contribution if this will lead to performance increase after the fusion. One problem that might occur in the case of negative net contribution is a decrease of own capitals to less than half of the value of the subscribed social capitals. In this situation the shareholders general meeting will be convoked to decide on whether dissolving of the company or on finding a remedy for the problem.

If the fusion takes place between an absorbing company with own negative capitals and an absorbed one with own positive capitals, as shown in the practical example offered by OMFP no.1376/2004, for determining the exchange ratio and the number of shares to be issued for the contribution, the nominal value of a share will be considered in the case of the absorbing company. This situation doesn’t influence the way the fusion is being reflected in the accounting, except for the financial calculations carried out before. In such cases the shareholders of the absorbed company are...
disadvantaged by the value of the exchange ratio established. The literature presents the idea of simplifying this situation by making use of reverse operation, so that the absorbing company would have positive capitals, and for the exchange to be fair the parity should be established by negotiation between the parts (Răchișan, 2008).

Another situation, much seldom encountered, is that in which both companies have own negative capitals. In this case, the operation is based on negotiation between the parts participating in the transaction, making the calculation of an exchange contribution impossible. Virtually a union of the patrimonies of the fusing companies takes place, which fuses under a conventional exchange ratio or without the issuing of shares by the absorbing company.

Ultimately, the fusion of the companies, where at least one of them has own negative capitals, can be problematic. The most relevant being that of deteriorating of own capitals, which can influence the financial situation of the entity. In this case, the benefits of the fusion must be evaluated and these should counterbalance the shortcomings of such operations.

4. Operations performed during the retroactivity period

Taking into account that the fusion operations are performed over a long period of time, the date of the closing of the accounts and drafting of the financial situation on the basis of which the fusion project is made, differs from the date of the very performing of it, which corresponds to the date when the shareholders’ general meeting have approved the fusion project. Between the two dates the companies participating at the fusion continue their activity, whereas changes of the value of the actives, debts and own capitals can occur, comparing to those presented in the fusion balance. These changes can influence the value of the absorbed company’s contribution, of the titles to be issued for enumeration of the contribution and of the change ratio. For the purpose of simplifying of the situation there is the practice of inserting in the fusion project of a retroactivity clause by which the fusing operation has an accounting effect from the date of the closing of the accounts prior to this operation.

The trading companies, especially in European practice, prefer to chose as the retroactive date of the fusion the first day of the financial year which coincides with the closing of the annual financial situation, the reason for it being that at that time all the actives, debts and own capitals of the company involved in the fusion are known. In Romania the majority of the trading companies still chose as the actual date of fusion that of registration in the trade register to avoid the risks of implementing, due to legislation’s obscurities.

From an accounting point of view, the period between the closing date of the accounts and the approval of the fusion operation, also called retroactivity period, has some special features for both the absorbed and the absorbing company. During this period the absorbed company registers the operations resulting from the fusion project, while the operations registered in the check up balance drafted during the retroactivity period are being stored and further taken over by the absorbing company, the accounts of the absorption being this way cleared out.

In the case of the absorbing company, this one has to take over all the operations performed by the absorbed company during the intermediate period, in addition to registration of the elements subscribed in the fusion project, and to eliminate the reciprocal operations between itself and the absorbed one. As a consequence, the result of the retroactivity period goes to the company which benefits of the contribution, regardless whether this should be profit or loss.

During the retroactivity period certain problems may occur related to the loss registered by the absorbed company. The literature (Nisulesc, 1999) mentions a distinction between losses as a result of the absorbant’s decision to modify the structure in the retroactivity period, and the losses resulted from the absorbed financial administration. In conclusion, in Romania, although the Law of the trading companies stipulates the possibility of choosing of a retroactive date for the fusion, there has been little practice in the matter. The reticence of the companies is understandable considering that implementing this, and the outcomes of such a choice are not correlated in the juridical and fiscal legislation, after a period of five years since the introducing of such a possibility in the legislation.

Considering this, the provisions of the Trading companies’ Law should be backed up by accounting and fiscally relevant regulations. This thing is also benefactory due to a complex legislation which regulates different situations which might occur during the intermediate period such as the distribution of the dividends done by the absorbed company, or the increase of the latter’s social capital.

5. Case study

Next, the main aspects of the restructuring operations of some economical entities in Romania will be presented.

SC Astral Telecom SA
During a period of six months SC Astral Telecom SA performed the following economical merging operations:

- purchasing of shares from FX Communications SRL patrimony and from FX Internet SRL
- at the date of transaction the social capital of FX Internet SRL was owned 99% by the FX Communications SRL and 1% by Cable and Broadband Romanian Holdings Limited (Cyprus), and FX Communications was controlled 100% by the company in Cyprus.
Gaining of control took part in two stages:
• closing of a sale-purchase contract
• the notification form and the acquisition and division plan are mentioning buyer's intention of purchasing of the same shares for further dividing of the companies which will stop its existence by dividing the patrimony to SC Astral Telecom SA and SC Romania Cable Systems SA
• Gaining of the control over SC Euronet Group SRL Bacau through the divestment contract closed on 23.10.2003
• On 5.04.2004, SC Astral Telecom SA in the position of buyer binds itself to purchase all the shares gaining the sole control. The purchase will take place after the transfer of the assets to SC Communication Service SRL by the SC Pellin SRL and SC Pellin Holding SRL.
• Gaining control of SC SATLINE CO SRL Calarasi through the shares' sale-purchase contract closed on 28.05.2004.

SC Romania Data Systems SA
During the period 2001-2004 the following merging operations took place, getting control over:
• Dart Impex SRL Arad through shares purchasing
• Webedge SRL Craiova by purchasing of shares
• Integrasoft SRL Sibiu by purchasing of shares
• Opsynet SRL Iasi by purchasing of shares
• Surfer SA Baia Mare by purchasing of shares
• Internet ABC SRL BY purchasing of shares
• Cybernet Conect SRL Bacau by purchasing of shares
• Elecropsuls SRL Ploiesti by purchasing of shares. In 2003 SC Romania Data Systems SA decided that SC Elecropsuls SRL Ploiesti to stop delivering data transmission and CATV service due to high costs. These services were integrated under the quality standard and the trademark RDS.
• Purchasing of the Internet service provider activity of SC Deuromedia SRL Brasov by shares purchasing
• Totalnet SA Bucharest by shares purchasing
• RDSNET SRL Drobeta Turnu Severin by share purchasing
• Due to the fact that the turnover of the group RCS& RDS during 2000-2001 exceeded the foreseen treshold, and the fact that the Competition Council was not notified about it led to imposing a fine of 100 million lei.

SC Romconstruct Holding Group SA
In 2002, SC Romconstruct Grup SA, controlled by SC Romconstruct Impex SRL, purchased from A.P.A.P.S 69.829% of SC ROMVIAL SA's shares. In 2003 Mr.V.T together with Romconstruct Holding SA and Romconstruct Impex SRL gained 63.01% of SC IMM Media Grup SA's shares, this offering them the control. For the omission of notification of the merging, the following has been taken into account: the fact that the notification was submitted at the request of the Competition council, the financial problems that SC IMM Media Grup SA was having, the time interval between the signing of the juridical act which offered them control, and the date of lodging of the notification form at the Council. The fine was imposed indirectly on Mr.V.T who owned solely the control by the amount of 30.000.000 lei, the merging being authorized, the tax being 5.505.616 lei.

SC Artima Retail Investment Company SA
In 2002 SEAF Trans-Balkan Romania Fund, LLC purchased shares at SC Artima, being implemented the transition from sole control exercised by F.B to shared control of the two parts. In 2003 SEAF Central and Eastern Europe Growth Fund, LLC purchased shares, which led to the gaining of shared control over SC Artima by CEECF, TBRF and F.B.
In 2004 the company Deutsche Investititons und Entwicklungssellschaft mbH purchased shares at SC Artima Retail Investment Company SA , which leads to increasing of the number of shareholders which exercise control in this company, the shared control being maintained, having taken place a transition from shared control by the CEE, CEEGF,TBRF, and F.B to shared control exercised by DEG, CEEGF, TBRF and F.B All these operations led to a change in the controlling form resulting in the qualitative modifying of the exercised control upon this company.

SC UPC Romania SA
In 2004 SC UPC Romania SA gained solely unique control over SC SATBA CATV SRL through share purchasing making up 100% of this company's shares. UPC is controlled by the following economic operators:
• UPC Romania Holding BV- 29,36%
• UPC Slovakia Holding BV-28,04%
Paruse BV 27,62%
• UPC Romania Inc-0,91%
• UIH Romania Ventures Inc- 14,04%
• UPC gained control over other economic operator as well.

For determining the generated turnover for the purpose of comparing it against the minimal treshhold, the following data were considered: the adjusted turnover generated in 2003 by the companies groups where UPC also belongs, including the turnover of UPC, only in Romania was of 697.104.983.000 and the adjusted turnover generated in 2003 by SATBA was 19.839.126.000 lei.

6. Conclusions

Accounting standardization and harmonization makes a continuous preoccupation in a constantly changing economy influenced by a multitude of factors, which demand for a continuous perfectioning of the national norms .

Within this dynamic economical environment, the accountant occupation plays an essential role in development of the practice strategies and policies in accounting appropriate for the specific performed operations.

Own contribution to this study consisted in identifying and analyzing of some peculiarities regarding the working out of some accounting practices for the companies benefitting of the contribution out of a fusion or division, which would account for the particular aspect of these operations, for in the case of fusion, division or separation operations, either a harmonization of the existing accounting policies or working out of some new accounting policies can occur.

7. References

[8] The Law of the trading companies no.31/1990, republished ,with subsequent modifications and amendments
[10] The Law no.571/2003 regarding the Tax Code, republished, with subsequent modifications and amendments
[11] OMFP no.1376/2004 for the approval of the methodology norms regarding the reflecting in the accounting of the main operations of fusion, division and winding up of the trading companies