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RESTRUCTURING OF A LEGAL ENTITY BY SPIN-OFF AND CREATION OF SUBSIDIARY ENTERPRISES AS BUSINESS DEVELOPMENT

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The article considers the problem of business restructuring through reorganization of commercial corporate organizations in the form of spin-off and creation of subsidiary economic companies. The analysis showed that the choice and appropriateness of restructuring methods is not obvious (in some cases it is preferable to reorganize the legal body in the form of a spin-off, and in some to establish a subsidiary). We have discussed the issues of the authorized capital formed by the legal entity, the fair distribution of assets and liabilities between the reorganized and newly created entities. These issues are considered for the main organizational and legal forms of entrepreneurial activity that are commercial corporate organizations, primarily for the most common of them, limited liability companies (LLCs). The advantages and disadvantages of each of the mechanisms were discussed. These mechanisms or their elements are often confused in practice and even in publications, so we have deemed it necessary to understand what the spin-off of a company means in reorganization, and what is the creation of a subsidiary economic company, and also to compare them and give recommendations on their application. The article systematizes the goals of restructuring, provides a comparative description of these methods of restructuring and recommendations for their application. One of the most urgent problems of reorganization of companies in the form of spin-off is considered, i.e., the formation of authorized capital of the newly created company. The issue of forming authorized capital during spin-off reorganization is the most common organizational and legal form for limited liability companies (LLCs), which by various estimates account for more than 90 % of all commercial organizations in Russia. The main focus was on the difference in restructuring of an LLC by creating subsidiaries and spin-off reorganization, options for forming the authorized capital of the newly created companies, the distribution of rights and obligations between the reorganized and established companies. The results obtained in this study will allow entrepreneurs to understand the problem, make the right decision when choosing the method of restructuring, avoid mistakes in the reorganization primarily when forming authorized capital and distributing the rights and obligations that may affect taxation and relationships with counterparties and founders. Tax officers and auditors can use the recommendations in the paper to understand what to focus on during inspections of reorganized and established economic societies.

Keywords: business restructuring; reorganization by spin-off; subsidiary enterprise; authorized capital

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РЕОРГАНИЗАЦИЯ ЮРИДИЧЕСКИХ ЛИЦ В ФОРМЕ ВЫДЕЛЕНИЯ И СОЗДАНИЕ ДОЧЕРНИХ ПРЕДПРИЯТИЙ КАК СПОСОБЫ РАЗВИТИЯ БИЗНЕСА

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Рассматривается проблема реструктуризации бизнеса путем реорганизации коммерческих корпоративных организаций в форме выделения и создания дочерних хозяйственных обществ. Анализ показал неочевидность вопросов выбора способа рест-

руктуризации бизнеса (т. е. когда лучше реорганизация юридического лица в форме выделения, а когда учреждение дочернего предприятия), их целесообразность. Рассмотрены дискуссионные вопросы формирования уставного капитала создаваемых юридических лиц, справедливого распределения активов и пассивов между реорганизуемым и вновь создаваемыми юридическими лицами. Эти вопросы рассмотрены для основных организационно-правовых форм предпринимательской деятельности – коммерческих корпоративных организаций, в первую очередь, для наиболее распространенных из них – обществ с ограниченной ответственностью. Рассмотрены преимущества и недостатки каждого из механизмов. На практике и в публикациях часто эти механизмы или их элементы путают, поэтому возникла необходимость разобраться, что такое выделение хозяйственного общества при реорганизации, а что – создание дочернего хозяйственного общества, сравнить их и дать рекомендации по применению. Систематизированы цели реструктуризации, даны сравнительная характеристика указанных способов реструктуризации и рекомендации по их применению. Рассмотрена одна из наиболее актуальных проблем реорганизации хозяйственных обществ в форме выделения – формирование уставного капитала создаваемого общества. Вопрос его формирования при реорганизации в форме выделения рассмотрен для наиболее распространенной организационно – правовой формы корпоративных коммерческих организаций – для обществ с ограниченной ответственностью, которые по различным оценкам составляют в России свыше 90 % всех коммерческих организаций. Главное внимание уделено различию реструктуризации таких обществ путем создания дочерних предприятий и реорганизации в форме выделения, а также вариантам формирования уставного капитала вновь созданных обществ, распределения прав и обязанностей между реорганизуемым и создаваемыми хозяйственными обществами. Полученные результаты позволят предпринимателям понять проблему, принять правильное решение при выборе способа реструктуризации, избежать ошибок при реорганизации, в первую очередь, при формировании уставного капитала и распределении прав и обязанностей, которые могут сказаться на налогообложении и взаимоотношениях с контрагентами и учредителями; налоговикам и аудиторам подскажут, на что надо обратить внимание при проверках реорганизованных и созданных хозяйственных обществ.

Ключевые слова: реструктуризация бизнеса; реорганизация в форме выделения; дочернее предприятие; уставный капитал

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Introduction. Nowadays, especially in the current financial and economic crisis, many legal entities (LEs) use various methods of restructuring the business, including by reorganizing the LE in the form of spin-off or establishing subsidiaries in order to develop and improve their performance.

This problem has been given much attention in legislation, judiciary decisions, in publications of researchers [1–3] such as Vertakova, Baranova, Fertseva, Isaeva, Sozinova and many others. Their analysis shows that the choice of the way to restructure the business and its appropriateness is not obvious. There is also much discussion around the issues of forming authorized capital of the newly created LEs.

Goal of the study. The goal of this article is to analyze restructuring methods (reorganization by spin-off and creation of subsidiary enterprises), determine the best way of restructuring for limited

liability companies as the most popular commercial structure. We have also analyzed the methods of creating authorized capital of new enterprises (for limited liability companies) and distributing assets and liabilities between the participants of restructuring.

Methodology of the study. The main goal of any business restructuring is improving the efficiency, which is achieved by business development, strengthening the company's positions on the market, cost cutting, reallocation of corporate control, etc. It is sometimes necessary to break up the corporation into smaller units at a certain level of its development [4].

The general goals of business restructuring by spin-off or creating subsidiary enterprises are:

promotion to other markets under a new name (promotion of a new brand);

elimination of secondary activities in order to increase the specialization of the LE;

rapid adaptation to the changing conditions of local markets, the possibility to influence them quickly;

creation of a group of LEs from one company, each acting independently, the failures of one LE may be compensated by the successes of others;

optimization of management and financial and economic activities by transforming the structural divisions of the reorganized LE into independent ones, strengthening the responsibility and motivation of their management and the entire team in improving their performance;

reduction of tax payments through various taxation systems (simplified taxation, uniform tax on imputed income, unified agricultural tax) for different types of established LEs, as well as through registration of the LEs in regions with preferential taxation;

tendency towards independence among the participants of the LE;

distribution of business between disagreeing or even mutually hostile participants of the LE;

withdrawal of assets from the LE in the interests of the main participants or top managers seeking independence;

creation of LEs unburdened with debts of the LE being reorganized;

protection from hostile takeover: a business distributed between LEs which engage in different types of activities is much more difficult to take over than one LE.

Sometimes unethical entrepreneurs use business restructuring for default on commitments by [5]:

withdrawal of the most liquid assets or disproportionate distribution of assets and liabilities in the course of reorganization, transfer of liabilities provided only by illiquid assets and accounts receivable to the newly created LEs;

transfer of liabilities and illiquid assets to which the bankruptcy procedure will be applied in the future to the newly created LE, in order to avoid the bankruptcy of the entire LE;

allocation of liquid assets of the LE for subsequently selling them through selling the newly established LEs;

tax evasion or unjustified reduction of taxes.

There are two ways of creating a new company: during restructuring of a legal entity by spin-off and by creating subsidiary enterprises. The latter is not restructuring because the

subsidiary company does not obtain any rights and obligations of the main enterprise.

Both of these methods have their advantages and disadvantages. These mechanisms or their elements are often confused in practice, and in publications, so we consider it necessary to understand what is the spinoff of a company in reorganization, and what is the creation of a subsidiary company; we are also going to compare these methods and give recommendations on their application.

1. The common trait of both restructuring methods is that they result in the emergence of two or more new independent companies which have their own property and management bodies, are liable for debts by their property, have rights and duties, etc. Subsidiary enterprises are not liable for debt of the parent company like enterprises created during reorganization by spin-off are not liable for debt of the reorganized company.

There are also some differences between these methods. A reorganized company is not liable for debt of the enterprises created during reorganization by spin-off [6], but the parent company is liable for debt of subsidiary enterprises together with them, if these debts appear in the line of duty, or if the subsidiary enterprise is out of business by fault of the parent one. The parent company is also liable for debt of subsidiary enterprises if it took part in making the decision (item 2 section 67/3 of the Civil Code of the Russian Federation as amended by the Federal Law no. 99 of 05.05.2014).

The reorganized company can give up its liability to the new company created by spin-off. In this case a new company is liable to former creditors of the reorganized company [7]. Both of these companies are also liable to former creditors of the reorganized company if the creditors demanded to accelerate the fulfilment of obligations or discharge of obligation and payment of damages but their demand was not satisfied (item 3 section 60 of the Civil Code of the Russian Federation). This applies to the case when it is impossible to identify the liability cessionary or when assets and liabilities were shared in bad faith and it lead to violation of the creditors' interests (item 5 section 60 of the Civil Code of the Russian Federation).

Summarizing the above, creating subsidiary enterprises is more advantageous than reorganization

by spin-off from the standpoint of transfer of rights and obligations.

2. The next common point is the transfer of assets by the restructured company to new companies in both methods [8].

The parent company is the unique founder of the subsidiary and creates its authorized capital with own property, getting liability rights in return. In this case the net value of assets and liabilities of the founder is permanent.

The parent company transfers a part of its assets to its subsidiary company and accounts for it as financial investment in authorized capital [9]. In case of reorganization by spin-off the balance sheet accounts of the reorganized company are cut by the transfer deed. This can spoil the image of the reorganized entity and cause suspicion among contractors about the deterioration of its financial situation.

Summarizing the above, creating subsidiary enterprises is more advantageous than reorganization by spin-off from the standpoint of investment potential and capitalization growth [10].

3. A subsidiary company is not liable for the debts of the parent company. The latter does not cut its debts, and this impairs the financial stability of the company. In the other method, the reorganized company transfers both rights and liabilities, including a part of receivables and payables, to the new company by the transfer deed.

There are no requirements and recommendations regarding the value of the transferred to the new company. However, the debts to the state budget and non-budgetary foundations of taxation and revenue are not transferred (item 8 section 50 of the Tax Code of the Russian Federation).

From the standpoint of allocation of receivables and payables, reorganization by spin-off is more advantageous than creating subsidiary enterprises.

4. Companies created by spin-off are connected to each other and, as a rule, have no interest in offering assistance to each other [11]. The parent and the subsidiary companies are a group of connected legal entities which help each other in different legal, economic and investment issues, which increases the stability of all companies in the corporate group.

Summarizing the above, creation of subsidiary enterprises is more advantageous than reorganization by spin-off.

5. The decision to reorganize the company by spin-off is made by its participants who have both common and preference stocks. In a limited company, the decision is made by a general shareholder meeting where s voters made such a decision. In a limited liability company, this decision is made by all participants unanimously.

In the reorganization process, it is necessary to inform the Federal Tax Service, which makes a note in the National Register of Legal Entities, and the creditors, make an announcement in mass media and on the Internet, send the data on the activities of legal entities to the unified federal register of information . It is not necessary in case of creation of a subsidiary company [12].

Creation of a subsidiary company is a unilateral contract and can be made by the decision of executive office or board of management, except for the case when the deal is very large. There is no transfer act in the process. The parent company does not transfer any rights and liabilities to its subsidiary.

Summarizing the above, creation of subsidiary enterprises is more simple and less expensive than reorganization by spin-off.

6. Shareholders who voted against the reorganization of the public company or did not vote at all can demand that the company buy out their shares by real cost or be shareholders of each of the new companies [13]. In a limited liability company, the decision about reorganization must be made unanimously.

Restructuring by spin-off is simpler, as shareholders of the parent company cannot demand for their stocks to be bought out. Majoritarian participants keep their influence in the subsidiary through the main company.

7. Shareholders of a subsidiary are participants of the parent company. Therefore, when distributing the net profit of a subsidiary, only the parent company will receive dividends, and its participants receive only dividends of the parent company, if such dividends are generated. In case of spin-off, participants of the reorganized company can have shares in authorized capital of the new company. That is why reorganization by spin-off is more advantageous than creation of subsidiary enterprises, especially for minority participants. While a parent company can sale its shares of authorized capital of the subsidiary to any parties, including its participants, but the

participants of the parent company do not have any preferential rights in buying the shares.

8. Participants of a company organized by spin-off can keep their rights to run the new companies only if the company charter, approved by the shareholders' general meeting of the reorganized company, allows it. Participants of the parent company can keep controlling the subsidiary companies through introducing their own representatives into their management bodies.

From the standpoint of conflict resolution between business partners, reorganization by spin-off is better than the creation of subsidiary enterprises. It is really difficult to solve some problems in a corporation with parent and subsidiaries companies [14].

In general, the method or restructuring depends on the specific situation.

There are several types of reorganization, they are split-up, spin-off, takeover, merger and reformation. Many specialists we agree with consider that spin-off is the most complicated form, especially forming the authorized capital, distribution of assets and liabilities between reorganized and new companies. There are some variants of forming authorized capital of a new company created by spin-off. The same cannot be said for other form of reorganization.

Let us consider the formation of authorized capital for a limited liability company created by spin-off. Limited liability companies make up about 90 % level of all commercial companies. The result of reorganization of a limited liability company by spin-off is the creation of one or several new companies which gain some rights and liabilities according the transfer deed. The reorganized company continues to operate (item 4 of section 58 of the Civil Code of the Russian Federation, item 1 of section 55 of Federal Law about the Limited Liability Company).

There are some legal restrictions about the creation of authorized capital. Its value cannot be less than 10,000 rubles, net assets of the company must be more than its authorized capital.

Authorized capital of a new company is paid by the founders. Asset holdings of the company created by spin-off are formed from the assets of the reorganized company according to the transfer deed [15]. There is no connection between the transfer of assets by way of

succession and forming the authorized capital of the company created by spin-off [16].

The current legislation forbids any pays for the shares in authorized capital in case of reorganization. It is incorrect to say that the authorized capital of the company created by spin-off is paid by the participants of the reorganized company. The result of spin-off is the creation of a new independent company without any assets of the reorganized company [17]. If the founder decides to form authorized capital of the subsidiary using the property of the reorganized company and this property is transferred as payment for this capital without any changes in the authorized capital of the reorganized company, this transfer of property is a financial investment of the reorganized company and share capital payment of a new company (item 39 of Practice Advisory of formation of financial statements during reorganization (approved by the Order of the Ministry of Finance of the Russian Federation No. 44n of 20.05.2003)).

The main options of forming the authorized capital of a limited liability company created by spin-off are:

1. Authorized capital of the company created by spin-off is formed by reducing the capital of the reorganized company. The value of participants' shares in the capital of the reorganized company stays the same but its nominal cost is changed. In this case it is possible to convert the shares from the capital of the reorganized company to the capital of new company proportional or in a different way according to the decision about reorganization.

2. Authorized capital of the new company is created from the capital share of a specific participant. The other part of the capital is divided between other participants. It leads to a reduction in the capital of the reorganized company. This way is suitable for business separation between partners, for example, when one of the participants of the reorganized company converts their share to the share of the new company and stops being a participant of the reorganized company.

3. One part of capital of the new company is assigned to the reorganized company and other parts are shared between its participants. It is possible to assigned the whole authorized capital to the reorganized company.

4. Authorized capital of the new company is created by an internal fund without the capital of the reorganized company, that is, retained earnings and added capital. This way, the participants of the reorganized company become the participants of the new company. The reorganized company can take a stake in the new company.

The process of forming the authorized capital in such a way is the following. Firstly, the capital of the reorganized company is expanded by retained earnings and/or added capital, which increases the nominal share cost of the reorganized company by its own capital. After that, the additional share of capital of the reorganized company is added to the capital of the new company and shared between the participants of the reorganized company. As a result, they keep their shares in the reorganized company and get additional shares in the new company. Participants of the new company do not make any contributions and get shares free of charge.

In case of a limited liability company, this process is simpler without the stage of increasing the authorized capital by adding the company's equity. A part of the capital of the reorganized company is turned over to the new company by the transfer deed and moved to its authorized capital. The results of these two variants are the same but the second way does not include the time-consuming and costly procedures of making the decision about changing the authorized capital at a general meeting, notarization, posting the news in mass media, making the changes to the articles of association and the Uniform State Register of Legal Entities, etc.

Shares of the company reorganized by spin-off which are converted to the shares of the new company are not transferred to the new company and compensated immediately upon conversion. It leads to capital reduction of the reorganized company at the moment of creation of the new company. The equity capital of the company created by spin-off is formed by reduction of the capital of the reorganized company.

It is often necessary to reevaluate the assets for making the additional capital before the reorganization [18].

The authorized capital of the company created by spin-off is made up not of the costs of the property the company obtained by the transfer deed but of the part of the own assets of the reorganized company which was transferred

to the new company [19, 20]. For this reason, if the net asset value of the new company is more than its authorized capital, this difference is retained earnings (accumulated losses) in the opening balance.

It is recommended to form a transfer deed in the end of the financial reference period (year) or at the date of interim accounting reports (quarter, month) on estimation of the property and liabilities transferred by the reorganized company.

According to the Letter of The Ministry of Economic Development and Trade D28i-2105 of 21.07.2015, in case of reorganization of a legal entity in the form of separation, the work experience and the goodwill that can be used for public procurement purposes cannot be transferred to a legal entity created as a result of such reorganization.

Making the decision about reorganization of a limited liability company by spin-off, its general meeting approves the conditions for it, the composition of the founding members of the new company which can include some or all participants of the reorganized company, the value of the authorized capital, the share size of the participants, the procedure for forming the authorized capital, the changes in the charter of the reorganized company (its new edition), the charter of the new company, its collegial and executive body, auditing committee, the transfer deed with the distribution of property, rights and liabilities between the reorganized and new companies, etc.

It is necessary to inform the registration agency about the reorganization, reduction of the capital, changes in the charter, publish the decision in mass media, etc.

Incorporation of a legal entity created by spin-off is possible no sooner than the period of appeal of the decision about reorganization expires, which is 3 months after the note about reorganization has been submitted to the Uniform State Register of Legal Entities (i.4 a.57, i.1 a.60 of the Civil Code of the Russian Federation).

Reorganization by spin-off is considered to be carried out after the last new company created by this reorganization is incorporated (i.4 a.16 of Federal Law no. 129 of 08.08.2001).

Findings of the study.

1. We have performed comparative analysis of such restructuring methods as reorganization by spin-off and creation of subsidiary enterprises.

2. We have determined the criteria of suitability of each method.

3. We have analyzed the main methods of forming the authorized capital for limited liability companies.

Conclusion. We have studied reorganization of companies by spin-off (mainly limited liability companies) and creation of subsidiary companies according to the last changes in legislation. We have focused on the differences between restructurization of LLCs by creation of subsidiaries and reorganization by spinoff. We have determined and analyzed several criteria, such as investment potential and capitalization growth, allocation of receivables and payables, transfer of rights and obligations, conflict resolution between business partners. In general, the method of restructuring depends on the case.

We have also studied some variants of forming authorized capital, distribution of rights and liabilities between reorganized and new companies.

Our findings can help entrepreneurs to understand the problem, make the right decision about the method of reorganization, to avoid some problems when forming the capital and distributing the rights and liabilities which can have an adverse effect on taxation and relationships with contractors and founders; tax officers and auditors can use this information to understand what to focus on during inspections of reorganized and new companies.

Directions for future research. Directions for future research are issues connected with forming the authorized capital of a new legal entity created by all kinds of reorganization, distributing assets during separation, share conversion during all kinds of reorganization apart from reconstruction.

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