Tax optimisation via a holding demerger

The Federal Tax Administration published a revised version of Circular Letter No. 5, "Reorganizations" (now CL 5a) in February 2022. The original version of the Circular Letter was dated 1 June 2004 and was no longer up to date. The revision introduced changes relating to holding demergers. Depending on the situation, this can lead to considerable tax savings. By optimising the restructuring process, a tax-free capital gain can be realised under certain circumstances. Previously, this was not always possible.

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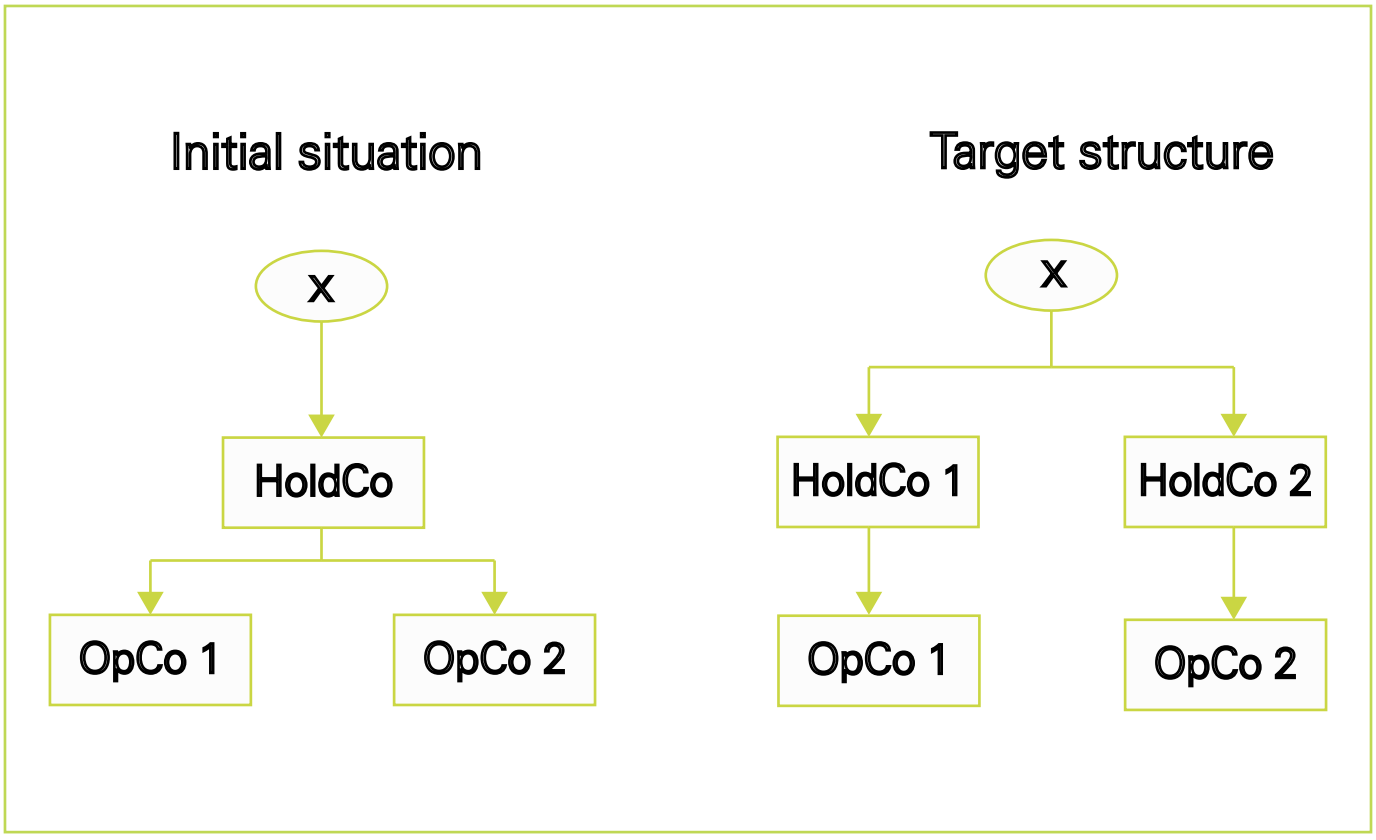
Initial situation

Shareholder X holds 100% of HoldCo, which in turn holds 100% each in operating company 1 (OpCo 1) and operating company 2 (OpCo 2). The shareholder now has the opportunity to sell OpCo 2. If HoldCo sells OpCo 2 directly, HoldCo is in principle subject to taxation on the capital gain but can claim the participation exemption. Consequently, the tax burden from the sale will be almost zero for HoldCo.

The shareholder can benefit from the distribution of profit by means of a dividend and will be subject to taxation on this dividend. The taxation will be at a privileged rate, but income tax will still be due.



Initial situation and target holding structure

Solution
The aim is for the shareholder to be able to sell the shareholding in OpCo 2 directly in order to realise a tax-free capital gain. One way to achieve this is to split HoldCo into HoldCo 1 and HoldCo 2 (a holding demerger). Shareholder X can then sell HoldCo 2, which holds OpCo 2, and realise a tax-free capital gain (assuming that there is no transposition or indirect partial liquidation).

The main advantage of a demerger is that there is no lock-up period, so the shares can be sold immediately after the demerger. Of course, HoldCo 2 should not be merged directly with OpCo 2 once the demerger has been completed.

Prerequisites for a tax-neutral holding demerger
According to Circular Letter No. 5a, when carrying out a holding demerger, the operating requirement can be met either at the holding company level (the holding operation) or at the level of the active companies in which the holding company holds an interest (the operative business).
A holding operation exists if the following requirements are cumulatively met:

- In terms of value, the shareholdings are predominantly shareholdings in active companies.
- The majority of the shareholdings account for at least 20% of the share capital or nominal capital of the other companies or enable significant control to be exercised in some other way (e.g. through a shareholders' agreement).
- The holding companies that exist after the demerger actually perform a holding function with their own employees or via specially appointed persons (coordination of the business activities of several subsidiaries; strategic management).
- The holding companies that exist after the demerger remain in place.

For an entity to be considered as an operative business, the shareholding must represent more than 50% of the votes in an active company. In application of the transparency principle, a single such holding satisfies the operating requirement through the business managed by the active company.

The above-mentioned requirements should be met and, in the present case, a tax-neutral holding demerger could be implemented. HoldCo 2 could then be sold and a tax-free capital gain realised.

CONCLUSION
The provisions on tax-neutral holding demergers in CL 5a allow a holding with two operating companies to be split in a tax-neutral manner. This option can be implemented not only in the case of an intended sale, but also earlier, e.g. when planning a succession. These new possibilities will put you in an even better position for the future.