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Tax Consolidation Regime for Corporate Groups

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Abstract

The Algerian legislator has granted companies that are members of a corporate group a set of tax privileges aimed at encouraging the formation of groups, which seek to protect member companies from external competition in domestic markets. However, these privileges are subject to strict conditions that have narrowed the concept of a corporate group in tax law compared to its definition in commercial law and competition law, thereby depriving the latter of the benefits of the tax consolidation regime.In contrast, these conditions are considerably more flexible in French legislation, with the objective of subjecting the largest possible number of corporate groups to the tax consolidation regime.

Keywords: *Tax Consolidation, Consolidated Balance Sheet, Double Taxation, Corporate Group, Unified Accounting.*

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Introduction

The corporate group represents the most significant form of economic concentration, as it consists of a set of legally independent companies that are linked by economic ties enabling one of them—referred to as the parent company—to exercise control over the others, known as subsidiary companies.

The control exercised by the parent company over its subsidiaries aims to unify decision-making at the head of the group, to pool the resources of these companies in order to confront competitive challenges, and to provide the possibility of rescuing struggling companies through the resources of the group's head.

Consequently, the legislator has encouraged the formation of such groups by granting a range of privileges. In commercial law, this takes the form of consolidated accounting techniques, whereby the financial statements of the group are prepared by presenting the balance sheets of the constituent companies as if they formed a single economic unit, through the creation of a single set of accounts for the entire group of companies, in order to provide a more accurate picture of its economic reality.

In line with this approach, the legislator has established a special tax regime for corporate groups known as the consolidated balance sheet regime (or tax consolidation regime), which permits the aggregation of the results of subsidiary companies at the group level, with the parent company becoming liable for tax on the various profits generated by the group as a whole, without the subsidiaries themselves being subject to taxation. The purpose is to avoid the problem of double (or multiple) taxation that would otherwise arise under general rules, since the profits of subsidiaries are taxed at the level of their own company, after which these companies distribute those profits to their shareholders and ultimately to the parent company.

Thus, these profits become subject to tax on distributed profits under the corporate income tax regime. Subsequently, the parent company, in turn, distributes profits to its shareholders (who may be individuals subject to personal income tax). The same profit is therefore taxed three times simultaneously.

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Despite the advantages and incentives established by the legislator under the tax consolidation regime for corporate groups, the enjoyment of these benefits is made conditional upon strict requirements. Failure to satisfy any of these conditions in respect of even one member company results in all member companies being deprived of the tax privileges afforded by the regime.

This raises the question of the relationship between these conditions and the tax privileges of consolidation? and the extent to which the Algerian legislator has succeeded in imposing them appropriately?

To answer this question, an analytical method is adopted in order to examine the legal provisions governing the tax consolidation regime and to comment on them in light of doctrinal opinions and judicial precedents.

To provide comprehensive coverage of the subject, the study is divided into two main parts:

- Part One: Conditions for benefiting from the application of the tax consolidation regime
- Part Two: The tax privilege of the corporate group

1. *Part One: Conditions for Benefiting from the Application of the Tax Consolidation Regime*

The Algerian legislator addressed the tax consolidation regime (referred to as the "consolidated balance sheet") through Article 138 bis of the Direct Taxes and Similar Duties Code, as amended by Article 14 of the 1997 Finance Act, which provides:

"A corporate group is an economic entity composed of two or more companies with legally independent share capital, one of which is called the parent company, which controls the others—referred to as members—by directly holding 90% or more of the share capital of these member companies, provided that the share capital of the parent company is not held, in whole or in part, directly or indirectly, by another company that could itself assume the status of parent company.

The relations between the member companies of the group, within the meaning of tax law, shall be governed primarily by the provisions of commercial law."

Through this provision, it becomes clear that the application of the tax consolidation regime depends on a set of conditions, some relating to the legal form of the member companies, others to the percentage of capital ownership, others to the nature of the activity, and still others to registration duties.

Conditions Relating to the Legal Form of the Member Companies

The Algerian legislator has restricted the scope of application of the special tax regime for groups to a single legal form—namely, the public limited company (société par actions), whether listed or unlisted. This is evidenced by the fact that the tax definition of the group states that it is "an economic entity composed of two or more companies with legally independent share capital."

This interpretation is confirmed by the administrative instruction issued by the Directorate General of Taxes dated 13 April 1997, which states: "Only public limited companies are eligible to be subject to the corporate group regime; consequently, companies organised under other forms—such as limited liability companies, general partnerships, and others—are excluded."

There is no logical justification for the restriction imposed by the Algerian tax legislator concerning the legal form of the company,[4] especially given that corporate groups frequently include members organised under various legal forms, as recognised by the Algerian commercial legislator in Article 730, which defines

[4] Ben Zeraa Rabah, "Conditions for the Application of the Special Tax Regime for Corporate Groups," Revue de la Communication en Administration, Économie et Droit 38 (2014): 253.

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a corporate group as a situation in which a set of companies is subject to the control of another company through the acquisition of the majority of voting rights, by agreement, or through de facto control.

In contrast to the position adopted by the Algerian legislator, the French legislator has expressly provided that companies belonging to a group are subject to tax consolidation regardless of their legal form. This means that the French legislator does not limit the regime to public limited companies alone,[5] but extends it equally to civil companies carrying on an industrial or commercial activity as defined in French tax law,[6] as well as to limited liability companies, general partnerships, and others.[7]

The French tax administration has gone further by drawing up a detailed list of the types of entities eligible for the tax consolidation regime. In general, it accepts all legal persons whose overall results are subject to the corporate income tax regime,[8] including not-for-profit associations that pursue a profit-making objective and whose organisation and management are similar to those of commercial undertakings, as well as cooperatives that distribute a portion of their profits to members in proportion to transactions carried out with them, thereby reducing their taxable income accordingly.[9]

Conditions Relating to the Percentage of Capital Ownership

Article 138 bis of the Direct Taxes Code provides that "the controlling company must hold at least 90% of the share capital of the subsidiary companies directly."

This means that the Algerian legislator excludes cases in which this percentage is held indirectly. Consequently, a company whose capital is held 85% directly and 5% indirectly (through another company) is not eligible for this tax regime.[10] In this respect, the Algerian position differs from that of the French legislator[11], who makes no distinction between direct and indirect holding of the required percentage.[12]

Criticism has been directed at the requirement of such a high percentage of capital ownership, as it fails to broaden the scope of application of the special tax regime for corporate groups compared with certain other countries that have adopted lower thresholds—for example, Germany (50%), the United Kingdom (75%), and the United States (80%).[13]

The Algerian legislator is also criticised for failing to specify the nature of the rights that may be held in the share capital, in contrast to the French legislator, who considers participation by reference to the aggregate of rights to profits on the one hand and voting rights on the other, including investment certificates and preferred dividend shares without voting rights. Consequently, usufructuary shares are disregarded; only shares conferring full ownership of the company are taken into account.

In addition, both the Algerian[14] and French[15] legislators require that the share capital of the parent company must not be held, directly or indirectly, in whole or in part, by member companies, since reciprocal

[5] Charlot (N.), Le Fiscal des Groupes de Sociétés, Thèse de Doctorat, Aix-en-Provence, 1955, p. 327.

[6] Articles 34 and 35 of the French General Tax Code.

[7] Article 206-2 of the French General Tax Code.

[8] Charlot (N.), op. cit., p. 327 et seq.

[9] Article 99 of Law 91-1322 of 30 December 1991 (French Finance Act 1992); French administrative instruction dated 23 July 1997.

[10] Administrative Instruction No. 07 issued by the Directorate General of Taxes, 13 April 1997.

[11] The Algerian legislator requires ownership of 90% of the subsidiary's share capital, whereas the French legislator requires 95%.

[12] Article 223 A of the French General Tax Code.

[13] Charlot (N.), op. cit., p. 350.

[14] Article 138 of the Direct Taxes and Similar Duties Code.

[15] Article 223 A of the French General Tax Code, as established by the French Finance Act 1988.

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shareholdings would confer membership status on the company concerned and disqualify it from eligibility for the corporate group tax regime.[16]

Furthermore, the French legislator requires that the share capital of the subsidiary be held on a permanent basis throughout the duration of the activity subject to the tax consolidation regime,[17] even if the capital is modified during the year. The purpose is to ensure the stability of share ownership and to prevent the use of capital solely for the purpose of bringing a company within the scope of tax consolidation.[18]

Conditions Relating to the Nature of the Activity

The first paragraph of Article 138 bis of the Direct Taxes and Similar Duties Code provides: "Corporate groups as defined in this article may opt for the consolidated balance sheet regime, with the exception of petroleum companies…"

Based on this text, the Algerian legislator has excluded petroleum companies from the tax consolidation regime.

It appears that the legislator attaches particular importance to these companies because they operate in sectors that are vital to the country. Consequently, it has established a special tax regime for them.[19] At the same time, the legislator has not laid down any condition relating to the nature of the activity carried out by the legal person that is a member of the tax group. According to the legislator, the determining factor is not the nature of the activity, but rather the tax regime applicable to the results obtained.

Conditions Relating to the Law Governing the Management of the Company

Article 138 bis of the Direct Taxes and Similar Duties Code stipulates that "the relations between the member companies of the group, within the meaning of tax law, must be governed primarily by the provisions of commercial law."

Furthermore, Administrative Instruction No. 97/07 issued by the Directorate General of Taxes concerning the tax regime of corporate groups clarified that this provision serves to exclude public holding companies and public economic establishments whose share capital is held by such public holding companies from the corporate group tax regime. This exclusion is justified because their relations are governed by Law No. 95-25 relating to the management of state capital.

However, this special rule concerning public holding companies does not apply to public economic establishments and private companies whose share capital is held by the public holding company at a rate of 90% or more. These establishments may benefit from the tax consolidation regime for corporate groups in their capacity as parent companies, together with their subsidiaries, provided that the holding of 90% of the share capital has been acquired directly.[20]

Part Two: The Tax Privileges of the Corporate Group

The legislator has introduced a set of tax incentives aimed at encouraging the application of the tax consolidation regime and the formation of corporate groups. These incentives consist of advantages

[16] Administrative Instruction No. 07 dated 13 April 1997, issued by the Directorate General of Taxes.

[17] Article 223 A of the French General Tax Code.

[18] Charlot (N.), op. cit., p. 352.

[19] Ben Zeraa Rabah, op. cit., p. 253.

[20] Administrative Instruction 97/07 dated 13 April 1997 issued by the Directorate General of Taxes concerning the tax regime of corporate groups.

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specific to the corporate income tax (IBS), advantages specific to value added tax (TVA), advantages specific to the tax on professional activity (TAP), and special incentives relating to registration duties.

Advantages Specific to Corporate Income Tax

The advantages specific to corporate income tax include: consolidation of the balance sheet, exemption of distributed profits between member companies, exemption of capital gains arising from the transfer of fixed assets, and exemption of profits reinvested within the group.

- ***Consolidation of the balance sheet:*** Pursuant to Article 138 of the Direct Taxes and Similar Duties Code, as supplemented by Article 14 of the 1997 Finance Act, a corporate group may opt for the consolidated balance sheet regime. This option is exercised by the parent company and must be agreed to by all member companies. Once exercised, it remains in force for a period of four years, renewable.

- This is achieved through the submission of a single document summarising all operations of the group within the meaning of tax law.[21]

- ***Exemption of distributed profits received by the parent company from its subsidiaries:*** Pursuant to the provisions of Article 13 of the 1997 Finance Act, profit distributions received by companies as a result of their participation in the capital of other member companies of the same group are exempt from corporate income tax.

- This exemption concerns only profit distributions made by member companies to the parent company. Since reciprocal shareholdings are not permitted by law, no profits are distributed by the parent company to its subsidiaries.

- ***Exemption of capital gains arising from the transfer of fixed assets:*** Capital gains arising from transfers carried out within the framework of asset exchanges between member companies of the same group are exempt from corporate income tax, pursuant to the provisions of Article 173 of the Direct Taxes and Similar Duties Code, as amended by Article 19 of the 1997 Finance Act.

- ***Incentives specific to the tax on professional activity (TAP):*** Operations carried out between member companies of the same group are exempt from the tax on professional activity, pursuant to Article 220 of the Direct Taxes and Similar Duties Code, as amended by Article 17 of the 2007 Finance Act, and corresponding to Article 09 of the Turnover Tax Code.

Incentives Specific to Registration Duties

Exemption from registration duties is granted, pursuant to Article 347 bis 4 of the Registration Code as amended by Article 36 of the 1997 Finance Act, in respect of the following operations carried out within the framework of corporate groups:

- Contracts evidencing the transfer of assets between members of the group;

- Contracts evidencing the conversion of companies into public limited companies for the purpose of joining the group, provided that these companies satisfy all the legal conditions for tax consolidation.

It should be noted that the exemption from registration duties does not eliminate the requirement of registration itself;[22] it merely exempts the operations and contracts involving a change in the legal form of

[21] Brou Kheir Eddine, *Consolidated Accounting and Tax Consolidation of Corporate Groups*, PhD thesis in Financial and Accounting Sciences, Faculty of Economic, Commercial and Management Sciences, University of Batna 1, 2024, p. 117.

[22] Administrative Instruction No. 07 issued by the Directorate General of Taxes on 13 April 1997.

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the company, as well as the transfer of ownership of its shares among member companies of the group, from payment of registration fees.

- ***Advantages specific to value added tax (TVA):*** Operations carried out between member companies are exempt from value added tax pursuant to Article 27 of the 2007 Finance Act, [23] supplementing Article 08 of the Turnover Tax Code.

In addition, corporate groups within the meaning of tax law that have opted for the consolidated profit regime are permitted — under the same conditions — to deduct the value added tax charged on goods and services acquired by or on behalf of member companies of the group, in accordance with Article 18 of the 2009 Supplementary Finance Act.

Tax Reduction for Companies Listed on the Stock Exchange

Article 66 of the 2014 Finance Act provides that companies listed on the stock exchange benefit from a reduction in corporate income tax equal to the percentage of their capital opened to the public, for a period of five years starting from 2014.[24] Following the adoption of the 2021 Finance Act, this period was reduced to three years starting from January 2021,[25] with the tax reduction set at 20% of the profits achieved.

- ***Reinvested profits:*** A reduced rate of up to 15% applies to the corporate income tax on profits that are reinvested for the purpose of acquiring shares or participations in order to raise the parent company's holding to 90% or more of the share capital of subsidiary companies.

These shares must remain in the company's possession for five years. In the event of disposal before the expiry of this period, the difference between the reduced rate and the standard rate becomes taxable, together with the application of a surcharge of 5% on the duties that become due, pursuant to Article 142-2 of the Direct Taxes and Similar Duties Code.

Abolition of the requirement to achieve positive results during the last two years in order to benefit from the corporate group regime

Pursuant to Article 06 of the 2008 Finance Act, this requirement was abolished in order to encourage the formation of corporate groups, with the aim of enabling them to confront market fluctuations and offset the harm caused by competition.

Abolition of the exclusion of loss-making companies from tax consolidation

Pursuant to Article 06 of the 2012 Finance Act,[26] companies that incur two consecutive years of losses during the application of the corporate group regime are no longer excluded from the scope of tax consolidation, thereby benefiting loss-making companies within the framework of corporate groups.

Conclusion

The tax consolidation regime constitutes an incentive mechanism for enterprises due to the tax advantages it offers compared with the general rules. In order to ensure the success of this regime, the Algerian legislator has established a set of conditions aimed at limiting its application to genuine corporate groups that respond to genuine economic purposes, and not to those formed merely to obtain tax advantages.

[23] Law No. 06-24 of 26 December 2006 containing the 2007 Finance Act, J.O.R.A. No. 85 of 27 December 2006.

[24] Law No. 13-08 of 30 December 2013 containing the 2014 Finance Act (J.O. No. 68 of 31 December 2013), p. 20.

[25] Law No. 20-16 of 31 December 2020 containing the 2021 Finance Act (J.O. No. 83 of 31 December 2020), p. 46.

[26] Law No. 07-12 of 30 December 2007 containing the 2008 Finance Act, J.O.R.A. No. 82 of 31 December 2007.

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The study arrives at the following findings and recommendations:

- The conditions governing the tax consolidation regime in Algerian legislation are extremely restrictive and do not reflect the economic reality of the corporate group as defined in commercial law. They cover only direct financial control resulting from the acquisition of 90% of the subsidiary's share capital, thereby excluding all other forms of control — such as control through acquisition of the majority of voting rights in the general meeting without majority capital ownership, control by agreement, or de facto control resulting from effective influence over the subsidiary's decisions — in addition to limiting the regime to public limited companies only, to the exclusion of all other legal forms. Moreover, this regime applies exclusively to groups organised in accordance with the provisions of commercial law.

- The tax privileges of the corporate group consist of:

  - Exemption of distributed profits received by the parent company from its subsidiaries;

  - Exemption of capital gains arising from the transfer of fixed assets;

  - Exemption of operations carried out between member companies of the same group from the tax on professional activity;

  - Exemption of operations carried out between member companies from value added tax;

  - Tax reduction for companies listed on the stock exchange.

- The tax incentives for corporate groups include:

  - Abolition of the requirement to achieve positive results during the last two years in order to benefit from the corporate group regime;

  - Abolition of the exclusion of loss-making companies from tax consolidation.

Recommendations

- Extend the application of the tax consolidation regime to encompass all types of groups, including groupings for economic interest (groupements d'intérêt économique) and economic groupings organised under competition law.

- Reduce the required percentage of control by the parent company over the subsidiary's share capital from 90% to 50%, following the example of German legislation and certain other European countries.

- Broaden the scope of application of the tax consolidation regime to include groups formed under various forms of control — contractual control, de facto control, indirect control, or control through acquisition of the majority of voting rights.

- Apply the tax consolidation regime to member companies regardless of their legal form, following the approach adopted in French legislation.

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