

PRACTICAL ASPECTS COMING WITH THE AMENDMENT OF THE TAX REGIME FOR STOCK OPTION RIGHTS

The legislative proposal to amend the tax regime for employee stock option rights has recently been adopted by the House of Representatives and will most likely come into effect on January 1, 2023, after being considered by the Senate. In this newsletter, HVK Stevens will point out the practical aspects with regard to this bill.

THE CURRENT REGIME

When an employee receives a stock option right in his employer (withholding agent) or related entity (i.e. the employee stock options), there is no immediate taxable event. Under current legislation these stock options are subject to taxation when the options are converted into shares (also known as "exercising an option"). At that point in time, the shares cannot or may not (yet) already be sold immediately. As a result, the situation may arise that employees do not have (sufficient) cash to pay the taxes that are due.

Especially for startup and scaleup companies, this can be a problem, as they often do not have sufficient financial resources to offer their staff competitive salaries. In order to still attract and retain staff, they often use employee stock options as a reward tool.

EFFECT OF THE LEGISLATIVE PROPOSAL

In order to make it (slightly) more attractive for employers to use employee stock options as a remuneration, it has been proposed to make a change in the tax regime. As a result, the moment of taxation will, in principle, be shifted to the moment at which the shares obtained upon exercising the stock option right, become tradable. This occurs at the first moment the employee has the right to dispose of the shares acquired upon exercise of the stock option right. The rationale behind this proposal is that in that case, part of the acquired shares can be disposed of in order to pay the taxes due.

However, the employee can also opt to align the moment of taxation with the moment that the share option rights are exercised, in accordance with the current regulation.

PRACTICAL ASPECTS

Upon entry into force on January 1, 2023, the regulation will apply not only to employee options issued after that date, but

also to all option rights already held. For employees who currently hold employee options, it is therefore important to take into account that they are required to inform their employer which decision they will opt for, no later than the time of exercising the employee options. This must be done in writing. It is important for employers to actively inform their employees about this. In addition, the employer has the obligation to keep the choice of each employee within their payroll records.

If the choice is not, not timely or incorrectly disclosed, the time of taxation will automatically be when the shares become tradable.

For an employee, there may be a tax advantage in choosing to align taxation with the time of exercising the option, as taxes will be due on the fair market value of the shares. If the shares are expected to increase in value over time and the employee has sufficient cash to pay the taxes due, it is recommendable to align the time of taxation with the time of exercising the options.

CONCLUSION

The possibility of aligning the moment of taxation with the moment the shares become tradable makes it more attractive for employers to issue employee stock options. However, the question is whether the legislation takes it far enough. After all, it will not always be the desirable or advantageous option nor practically possible to dispose of shares immediately once permitted. Opportunities exist to design employee participations in such a way that a forced share sale to pay taxes due is not necessary and, moreover, a more favorable tax rate could be achieved. The specialists at HVK Stevens are happy to look at these possibilities with you.

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