



GMS Flash Alert

Global Compensation Edition

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Belgium - Compensating Taxes Due Where Stock Options Are under Water

Following the Law of 26 March 1999 ("Stock Option Law"), stock options offered in writing and accepted in writing within 60 days following the offer are taxable at grant.¹ However, if the options go "under water," the employee has no possibility to recover taxes paid at grant.

A recent ruling now allows that if the options are under water, the employer can compensate the employee for the income tax that was paid without any income tax consequences.²

WHY THIS MATTERS

In the past international groups have noticed that the rate of acceptance of stock options offered to employees in Belgium was significantly lower than the global average. This was in most cases caused by the fact that employees were not prepared to pay an up-front tax that they would not be able to recover in case the options went under water or could not exercise the options for any other reason. This ruling permits the employer to pay an amount to employees equal to the income tax paid at the time of grant, without adverse income tax consequences.

Background

The Stock Option Law provides a lump-sum valuation method in order to determine the taxable benefit-in-kind of stock options that are accepted in writing within 60 days following the offer. The taxable benefit-in-kind is 18 percent of the value of the underlying shares at the time of the offer if the life of the option is five years or less. For options having a lifetime in excess of five years, one percent is added for each additional year or part of a year. In practice, this means that if the stock options have a lifetime of 10 years, the taxable benefit will be $18\% + 5\% = 23\%$ of the value of the underlying shares at the time of the offer.

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These percentages can be reduced by half if certain conditions are met. In most cases, stock options granted on the shares of the employer or a parent company will meet the conditions.

The lump-sum valuation must be increased by the difference between the strike price and the value of the underlying share at grant if the options are “in the money” at that time.

Guaranteed Benefits

The Stock Option Law also provides that the beneficiary is taxed on any guaranteed benefit related to the stock option. A guaranteed benefit is an advantage that is related to the grant of the option but that in itself is unrelated to the value of the underlying shares. An example of such guaranteed benefit would be a commitment by the employer to buy any shares acquired through the exercise of an option at 10 percent above the strike price.

Guaranteed benefits are taxable only to the extent that the value exceeds the income already taxed according to the normal rules.

Compensation of Taxes Due

In the ruling, the tax authorities confirm that the reimbursement of tax due on the grant of stock options is a guaranteed benefit, but that since this amount is lower than the initial benefit (because the reimbursement would be the tax on the taxable benefit at grant), no income tax is due on the reimbursement.

The ruling also confirms that the reimbursement is deductible for corporate tax purposes and that the employer does not have a reporting obligation.

Anti-Abuse Rule

The ruling addresses whether the anti-abuse rules of the Belgian Income Tax Code can be applied. It concludes that the employer’s reason for the reimbursement is to increase the participation rate of the employees, which is a sufficient argument to not apply the anti-abuse rule.

Scope of the Ruling

A ruling is only binding for the party that applied for the ruling. Consequently, the ruling is not an enforceable precedent for others. However the Ruling Commission must treat taxpayers that are in a similar situation in a similar way. Consequently, the Ruling Commission should have to issue the same ruling for other applying companies operating under similar conditions. As stated above, the motives for applying for this new mechanism will be decisive in receiving a similar ruling.

FOOTNOTES:

1 Law of 26 March 1999 published in the Belgian Official Gazette (*Moniteur Belge/Belgisch Staatsblad*) on 1 April 1999. 26 maart 1999 – *Wet betreffende het Belgisch actieplan voor de werkgelegenheid 1998 en houdende diverse bepalingen*

2 Preliminary Ruling nr. 2017.805 of 12 December 2017.

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