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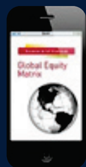

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Belgium

New Supreme Court Case Likely to Impact Social Tax Liability on Equity Awards

On May 20, 2019, the Belgian Supreme Court rejected the appeal of the taxpayer and confirmed the Belgian National Social Security Office's (NSSO's) position in the so-called Sisley case. Although the Sisley case did not involve equity awards granted by a non-Belgian parent company to employees of a Belgian subsidiary, it likely has implications for such awards.

The Sisley Case

Briefly, the Sisley case involved cash premiums paid by a third-party company (Sisley) to employees of a Belgian company (Planet Parfum) to reward them for the sale of Sisley products. Both the Court of Appeal and the Supreme Court ruled that the cash premiums were in the case at hand subject to employee and employer social security contributions, because they were paid as remuneration for work performed under an employment agreement (with Planet Parfum). In the Sisley case, the respective contributions were due by Sisley.

As a reminder, employer social security contributions are currently due at a rate of approx. 25% and employee social security contributions are currently due at a rate of 13.07%. The employee contributions have to be withheld by the employer.

Impact on Equity Awards?

It is almost certain that the NSSO will lean on the Sisley case to impose social security contributions on equity award income, because the decision essentially confirms the NSSO's position announced in September 2018 (as described in our October 2018 Clients & Friends newsletter). There is a risk that the NSSO will try to impose social security contributions retroactively (i.e., on equity award income realized in the past), because it could argue the Supreme Court case confirmed legislation that has been effect for several years. At least, it could try to impose social security contributions going back to September 2018 (i.e., back to its announcement). If companies did not withhold/pay social security contributions on equity award income in the past, but are challenged successfully by the NSSO to pay such contributions retroactively, they will be obliged to pay both employer and employee social security contributions. Interest and penalties may be imposed.

What Now?

Companies that have not paid and withheld social security contributions on equity award income face a difficult decision and should carefully evaluate the facts of the Sisley case (as they are known). One important point is that the Court focused on

Please contact your Compensation attorney to determine the best approach for your company in dealing with these issues.

We would like to thank Luc Meeus and Maura Nachtergaele in our Brussels office for their help with assessing the impact of the Sisley case and the above write-up.

the issue of whether the award income was paid as "remuneration for work performed under an employment contract". If a company can show that awards were granted for reasons other than to remunerate the employee for work performed under the employment agreement with the Belgian employer, this should enable the company to distinguish its fact from the Sisley case and argue that social taxes are not due. Further, please note another case is pending before a Court of Appeals (so-called Esko case) which does squarely address the application of social security contributions on equity awards granted by a non-Belgian parent company. This case is expected to be ruled on by October 2019. Although uncertain at this stage, there is a chance that this ruling will be more favorable to companies and/or provide more guidance on when it could be argued that awards are not granted as remuneration for work performed under an employment contract.

On the other hand, as noted, the NSSO will likely feel emboldened by the Sisley case to more aggressively assert that social security contributions should be paid on equity awards granted by a non-Belgian parent company. Therefore, some companies may wish to consider starting to pay and withhold social security contributions at least going forward and explore whether they may be able to reserve their right to claim a refund if the Esko case provides a basis for arguing that social security contributions are not due.

Denmark

Further Update on Amended Danish Stock Option Act

Please contact your Compensation attorney to discuss the application of the amended Act to your company.

As reported in our October 2018 and February 2019 Clients & Friends Newsletters, effective January 1, 2019, the Danish Stock Option Act (the "Act") was amended such that it is now possible to enforce any "good/bad leaver" provisions in award agreements, at least with respect to awards granted under a plan established on or after January 1, 2019. As we noted, it remains somewhat uncertain whether companies that grant awards to employees in Denmark under a plan that was adopted prior to January 1, 2019 and under which awards have been granted to employees in Denmark prior to this date can rely on the amended Act.

Further, we wanted to note one new restriction imposed under the amended Act which likely affects only privately held companies. According to the amended Act, it is impermissible for the employer and employee to agree that, upon termination of employment, the employer can buy back shares previously issued to the employee at a price below the market value of the shares at the time of the buy back.

Even though it seems inappropriate for different rules to apply to shares acquired by an employee under a plan subject to the amended Act as opposed to shares acquired outside the scope of the amended Act (e.g., pursuant to an employee's direct investment in the shares), companies will need to take heed of this new restriction, and may have to specifically negotiate the price of any shares to be repurchased upon termination with Danish employees.

Germany

German Court of Appeals Renders Favorable Decision on Equity Award Entitlement Claim

In a ruling issued in December 2018, a German appellate court upheld a trial court's dismissal of an employee's lawsuit alleging entitlement to unvested RSUs that were forfeited upon termination of employment. The courts' dismissals were based on the lack of jurisdiction of a German court as a result of a provision in the award agreement stipulating that venue for any disputes related to the RSUs was in the United States (where the parent company granting the RSUs was based).

Further, the appellate court indicated that, if it had heard the case, it would have applied US law, as also required by the terms of the award agreement.

This case provides added support for inclusion of a venue provision in the award agreement between the employee and the issuer, stipulating for venue to be in the jurisdiction of the issuer, especially if the issuer is a US company. Further, it is important that the awards not be mentioned in local employment documents, to avoid that an employee could successfully argue that, despite the venue provision, any dispute should be heard in the employee's country, as a result of the award being part of the employment relationship.

If it is time to review your company's existing award agreements for currency with the latest legal developments within and outside the US, please contact your Compensation attorney.

We would like to thank Katja Haeferer in our Munich office for bringing the case discussed above to our attention.

Greece

New Tax Reporting Requirement

Pursuant to a circular issued in March 2019, employers must now report employee income on a monthly basis. This new tax reporting requirement applies with retroactive effect as of January 1, 2019.

However, the Greek tax authorities recently clarified that, with respect to equity award income, employers can wait to report all equity award income realized during the calendar year, in the aggregate, in the December monthly emolument certificate.

It remains unclear at this time whether the new monthly reporting requirement will replace annual tax reporting obligation.

Serbia

New Tax Rules for Employee Share Awards

Please update any tax supplements provided to employees to reflect the new tax rules. If you need assistance, please contact your Compensation attorney.

Historically, employees in Serbia were subject to salary tax when they acquired shares pursuant to an award (e.g., at vesting of RSUs) and to capital gains tax (at a flat rate) when they later sold the shares at a gain.

As of January 1, 2019, new tax rules apply which change the tax treatment of share-based awards. Under the new tax rules, employees are no longer subject to tax when they acquire shares pursuant to an award. However, employees can become subject to salary tax at a later time, if:

- employees sell the shares within two years of acquisition;
- employees terminate employment within two years of acquisition (other than in certain limited circumstances such as termination due to disability); or
- the employer or an affiliated company of the employer repurchases the shares from the employees (regardless of when the shares are repurchased).

If tax is due, the taxable amount will be the market value of the shares at the time of the taxable event (i.e., sale or termination within two years of acquisition, or repurchase of shares by the company) and any price paid by the employee to acquire the shares. The taxable amount will be treated as salary income and taxed accordingly.

If the employee is not subject to the special tax treatment described above, the employee will be subject to tax when he/she sells the shares, and any gain realized will be taxed at a flat capital gains tax rate.

Singapore

Singapore Employment Act Amendments Passed Effective April 1, 2019

Please contact your Compensation attorney to obtain further information regarding the effect of the amended law on your ESPP in Singapore.

As reported in our October 2018 Clients & Friends Newsletter, the Singapore government introduced a proposal that would eliminate the need to seek Singapore Ministry of Manpower ("MOM") approval to collect ESPP contributions through payroll deductions if certain requirements are met. This change has now been passed into law, effective as of April 1, 2019. The practical effect of such change is that MOM approval is no longer required, provided that:

- the employee's written consent to payroll deductions is obtained;
- the employee may withdraw his or her consent by giving notice of the withdrawal at any time before the deduction is made; and
- the employee will not be penalized for withdrawing such consent.

Spain

Tax Ruling Strengthens Argument for Local Corporate Tax Deduction in the Absence of Recharge

Historically, in order to obtain a tax deduction for the cost of equity awards granted by a foreign parent company to employees in Spain, the local employer had to reimburse the parent company for such cost. In the absence of a reimbursement arrangement, the cost of equity awards generally was not deductible for local corporate tax purposes.

Pursuant to a ruling issued by the Spanish General Directorate of Taxes (dated July 24, 2018), it was confirmed that the local employer can take a corporate tax deduction even if no reimbursement arrangement is implemented between the parent company and the Spanish employer. The ruling also clarified that, even if there is an accounting expense at grant, the corporate tax deduction is not available until the issuance of shares.

This tax ruling provides a strong argument for taking a corporate tax deduction for the equity award cost even in the absence of a reimbursement arrangement. However, note that Spanish courts have yet to align their position with the tax ruling. Therefore, companies with more conservative tax views should consider continuing to have the local employer reimburse the parent company for the cost of equity awards to ensure the availability of a local corporate tax deduction.

Ukraine

Further Liberalization of Ukrainian Exchange Controls But Hurdles for ESPP Remain

We would like to thank our colleagues Yuriy Tsvetkov, Bohdana Zatorska and Hennadiy Voytsitskyi in our Kiev office for contributing to this write-up.

The Ukrainian government ushered in a new foreign currency law as part of the final phase of exchange control relaxation. The law "On Currency and Currency Transactions" took effect on February 7, 2019 and resulted in further liberalization of foreign exchange controls in Ukraine.

Background

Previously, Ukrainian residents had to obtain a placement license from the National Bank of Ukraine (NBU) in order to hold shares in a foreign company abroad. Further, an investment license was required for residents to remit funds out of Ukraine to acquire shares (e.g., remittance of an option exercise price or purchase price under an ESPP). In practice, it was virtually impossible to obtain either license.

In early 2017, the Ukrainian government and National Bank of Ukraine relaxed exchange controls somewhat and eliminated the requirement for a placement license. This made the grant of not-for-consideration equity awards (e.g., RSUs) feasible. As explained in our September 2017 Clients & Friends Quarterly Newsletter [hyperlink], a cap still applied to outward remittances made in connection with foreign investment, and certain licenses were required to be obtained from the NBU.

Update

Pursuant to the new legislation, individuals are no longer required to obtain a license for the outward remittance of funds to acquire shares in a foreign company, provided that an individual annual limit of EUR 50,000 on foreign investment is not exceeded. This should enable employees to pay the option exercise price by remitting funds from Ukraine (provided the EUR 50,000 limit is not exceeded).

However, a number of legal restrictions continue to hinder a company's ability to offer an ESPP in Ukraine. From a labor law perspective, payroll deductions to fund contributions to an ESPP are not permitted, even if expressly authorized by the employee. Further, employees likely cannot contribute funds to the local employing entity by other means (e.g., cash, direct deposit, etc.) because the entity would face legal complications related to licensing, tax and accounting issues. Employees potentially could remit ESPP contributions directly to the parent company issuer (e.g., by wire transfer). However, this creates administrative complexity for the issuer and presents an additional burden on the employees.

United States

Updates to the Rule 701 Financial Statement Disclosure Requirements

US privately-held companies and other non-reporting companies offering equity awards to employees in reliance on Rule 701 of the Securities Act of 1933 (the "Securities Act") should be aware that changes to SEC Form 1-A (Regulation A Offering Statement) impact the financial statements required to be provided to employees in a Rule 701 offering when the offering value exceeds USD $10 million in a 12-month period (see SEC Release No. 33-10532; 34-83875 for a full description of these changes). As discussed in our June/July 2018 Clients & Friends Newsletter, when such offering value is exceeded, companies relying on Rule 701 must provide certain information to employees in the Rule 701 offering, including financial statements that comply with Part F/S of Form 1-A.

Generally, Part F/S of Form 1-A requires a balance sheet for two fiscal years (the date of which varies depending on how soon after fiscal year-end the Rule 701 disclosures are provided) and statements of income, cash flows, and stockholders' equity for each of the two fiscal years preceding the date of the balance sheet provided. Such financial statements are required to be prepared in accordance with US GAAP; however, foreign private issuers (as defined in Rule 405 of the Securities Act) may provide financial statements prepared in accordance with International Financial Reporting Standards. The financial statements for both US and foreign issuers must be as of a date not more than 180 days before the sale of the securities (i.e., exercise of options or grant of RSUs), which means that interim financial statements often also need to be made available.

Under the amendments to Part F/S of Form 1-A, where interim financial statements are required to be provided to comply with Rule 701, such interim financial statements must include a note or separate statement reconciling the changes in stockholder's equity from the beginning balance to the ending balance for each period for which a statement of comprehensive income is required to be provided, with all significant reconciling items described by appropriate captions and contributions from and distributions to owners shown separately. An analysis of dividends per share for each class of share must also be provided.

In view of these changes, companies providing interim financial statements as part of their Rule 701 disclosure packets should make sure that such financial statements conform with the new requirements of Part F/S of Form 1-A.

DOL's Proposed Rule on Overtime Payment Calculations could have Implications for RSUs and Other Equity Awards

For additional background on the DOL proposed rule and the overtime payment calculation requirements applicable to equity awards, please see our recent blog post.

The US Department of Labor (DOL) issued a proposed rule on March 28, 2019 that, if approved, would amend and update the regular rate requirements under the Fair Labor Standards Act (FLSA). The FLSA regular rate requirements define the types of compensation and benefits that are required to be included when calculating overtime wages for non-exempt employees covered by the FLSA. The FLSA generally requires overtime pay of at least one and one-half times (1.5x) the regular rate of pay for hours worked in excess of 40 hours per workweek. An employee's regular rate is generally intended to include "all remuneration for employment," but the DOL may exclude certain types of compensation and benefits from the "time and one-half" calculation when determining an employee's overtime rates.

The proposed rule is intended to clarify whether certain kinds of perks, benefits, other miscellaneous items and discretionary bonuses that were not addressed in the existing guidance must be included in an employee's regular rate.

Under current FLSA guidance, income derived from a stock option, stock appreciation right (SAR), or an employee stock purchase plan (ESPP) is excluded from the calculation of an employee's regular rate, if (among other requirements applicable to performance-based options): (i) the awards have a minimum vesting period of 6 months; (ii) the purchase price discount is not greater than 15% and (iii) the employee's exercise of the right is voluntary.

However, the existing guidance does not address the treatment of other equity awards, including restricted stock units (RSUs), restricted stock and phantom stock rights and, unfortunately, the DOL did not take the opportunity to address the treatment of these equity awards under the proposed rule. This could mean that income derived from these types of full-value awards may need to be included when determining a nonexempt employee's regular rate.

The comment period for the proposed rule closed on June 12, 2019, so it is possible that the DOL could issue additional guidance before the proposed rule is finalized. However, unless the DOL clarifies that RSUs and other similar full value stock-denominated awards may be excluded from an employee's regular rate, employers should consider the impact on overtime payments of granting equity awards to non-exempt employees. Employers may also wish to consider limiting the type of equity awards that are granted to non-exempt employees to options, SARs and ESPPs meeting the requirements of the exclusion from overtime payments under the FLSA guidance in order to minimize overtime payments they may be required to pay and the administrative challenges of calculating such payments.

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