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Global Equity Services

CLIENTS & FRIENDS

Quarterly Newsletter | September 2017

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In this issue

Belgium

Increase in Belgian Income Tax Audits

In recent months, the Belgian tax authorities have started to target Belgian subsidiaries of US multinationals for purposes of reviewing their tax withholding and reporting practices for equity awards granted to employees in Belgium.

As reported in our October 2016 Clients & Friends Newsletter, the Belgian Social Security Administration recently took the position that where equity remuneration is "borne" by the local Belgian employer simply due to the fact that the local Belgian employer makes (non-binding) recommendations as to who should receive certain awards and for how many shares, social insurance is due on the equity awards.

The Belgian tax authorities may be considering a similar approach and as a result, companies should review their grant processes and procedures, and reconsider any involvement by the Belgian entity in the decision-making process to avoid any risk that the Belgian tax authorities or Social Security Administration claim that income tax/social security contribution withholding and reporting is required for any income realized from equity compensation awards.

For additional information on best practices for tax withholding and reporting on equity awards in Belgium, please contact your Global Equity Services attorney.

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European Union

New EU Prospectus Regulation Becomes Effective July 21, 2019

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As previously reported in our June 2017 Clients & Friends Newsletter, the EU adopted a new EU Prospectus Regulation in replacement of the EU Prospectus Directive in late 2016. In brief, the new EU Prospectus Regulation will eliminate the need for issuers making equity compensation-related offerings to employees in Europe from the need of preparing an EU prospectus for the approval of the securities authorities in the issuer's home-member state; provided, the issuer provides employees with an abbreviated offering document containing basic information about the issuer and the offering.

The final EU Prospectus Regulation was published in the official journal of the EU on June 30, 2017 and as a result, will become effective on July 21, 2019. Thus, for equity compensation offerings commencing on or after the effective date (e.g. ESPP enrollment periods starting on, or after, July 21, 2019), issuers finally will be able to forego the onerous EU Prospectus obligations.

Until then, companies making stock plan offerings in Europe that currently trigger the requirements under the EU Prospectus Directive should continue to comply with those requirements.

France

Implementation of Income Tax Withholding Regime Postponed

On June 7, 2017, Prime Minister Édouard Philippe announced the postponement of the new income tax withholding regime from January 1, 2018 until January 1, 2019. The postponement of this new regime previously had been promised by President Macron during last year's presidential campaign in France.

The French government intends to use the additional year to test, review and potentially revise the contemplated income tax withholding procedures through the cooperation of a small number of companies that will volunteer to test the regime. The French government previously indicated that the new income withholding tax system is a "good reform" but it could nevertheless recast the terms of this system. In particular, the role of employers as tax collectors has been extensively debated and critiqued as being unduly burdensome for their payroll and finance departments. In any case, employers should continue their withholding tax implementation projects, monitor the outcome of the additional year and be on the watch for subsequent government announcements.

It should be noted at this stage that there are no changes to the payment of the 2017 French income tax due to be paid in 2018. The formal steps to modify the entry into force of the withholding tax system have started but will not be effective prior to sometime during the Fall of 2017.

We thank Agnès Charpenet of our Paris office for her contribution to this new development.

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Netherlands

Tax-Preferential Stock Options for Start-Up Companies

Effective January 1, 2018, the Dutch parliament amended the Dutch Wage Tax Act to provide beneficial tax treatment for stock options awarded by start-up companies that have a specific Research and Development statement ("S&O verklaring") in the calendar year the stock option was granted.

In general, 25% of the taxable amount realized from stock option exercises (up to EUR 50,000 per employee) will be exempt from taxation in any given year, provided certain conditions are met. Further, the benefit only is applicable if at least 12 months (and 5 year at a maximum) have passed since the stock option was granted.

For additional information regarding this beneficial tax treatment, please contact your Global Equity Services attorney.

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New Zealand

New Employee Share Scheme (ESS) Reporting Obligations For Equity Awards

As previously reported in our January 2017 Clients & Friends Newsletter, effective April 1, 2017, employers in New Zealand must now report taxable income derived from equity awards via their PAYE (pay as you earn) Employer Monthly Schedules (EMS) that are submitted to the New Zealand Inland Revenue.

Unlike reporting, which is mandatory, income tax withholding is elective and entirely discretionary on the part of employers. Following the enactment of these new rules, the tax authorities in New Zealand provided a number of important clarifications. First, the employer's election to withhold is **revocable**. Second, the employer's election can be made on an employee-by-employee basis (and does **not** apply to all employees on a uniform basis). Should employer elects not to withhold income taxes on taxable income derived from equity awards, the employee personally will be responsible for reporting the taxable income and directly paying the applicable taxes by the tax return deadline.

In conjunction with the new tax reporting and withholding regime, New Zealand Inland Revenue published the Commissioner's Statement CS 17/01 which contains additional guidance on how to value shares acquired pursuant to equity awards to calculate the taxable amount.

Unlisted companies generally can choose between multiple valuation methods and start-up companies generally are subject to the same valuation methods (with some slight variations).

Listed companies also can choose between multiple valuation methods ,including the closing price of the shares on the date of vesting (for RSUs).

Please contact your GES attorney for additional information about the new tax reporting and withholding regime in New Zealand and how your company can voluntarily elect to withhold taxes on equity compensation income.

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Philippines

Draft Tax Bill Proposes to Reduce (and Eventually Eliminate) Fringe Benefit Tax for Non-Rank-and-File Employees

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In May 2017, the Philippine House of Representatives passed a bill that would:

1. reduce the fringe benefit tax that companies need to pay on equity compensation income realized by non-rank-and-file employees from 32% to 30%; and
2. make such income includable in the taxable income of non-rank-and-file employees and subject to income tax beginning in 2020.

The Philippines Senate currently is considering the draft bill and is expected to finalize its version in the 4th quarter of 2017. Additional information about these potentially significant tax changes will be released as the tax bill works its way towards final enactment.

Poland

Ministry of Finance Announces Revisions to Income Tax Laws

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The Polish Ministry of Finance has announced plans to amend Poland's income tax laws (personal and corporate) in 2018, including plans to amend the income tax provisions impacting equity incentive plans.

Under the proposed revisions to Poland's income tax laws, equity award income realized at exercise/vesting/purchase by employees would be taxed as income from employment subject to income taxes at progressive rates and also subject to social security contributions. Where an equity award is granted to a manager or a board member who is not an employee, the income earned at exercise/vesting would be taxed as income from personal services subject to income taxes at higher progressive rates and also subject to social security contributions.

Because these proposed changes to the tax treatment of equity awards represent a departure from recent court decisions in Poland, it is questionable whether these changes will survive scrutiny by the Polish courts. Most courts in Poland in recent years have held that where shares are acquired as a result of an option exercise, RSU vesting, or ESPP purchase, the participant does not earn any employment income and the amounts should not be subject to social security contributions.

At this stage, the proposed tax legislation is only a preliminary publication by the Ministry of Finance, which is subject to further revision by the Polish tax authorities and the Polish parliament. Because of the conflict with the Polish court verdicts mentioned above, we believe that the proposed tax legislation likely will not be implemented as drafted.

We will continue to provide updates as we obtain more information on these developments in Polish tax legislation.

Ukraine

Ukraine Relaxes Exchange Controls to Allow Employees to Purchase Shares

As reported in our June 2017 Clients & Friends Quarterly Newsletter, the Ukrainian government issued a decree in early 2017 which effectively eliminated the restrictions on employee grants of equity-based awards, provided that no payment was required to be made from the Ukraine to obtain the underlying shares (or cash).

In a further relaxation of applicable exchange controls, effective July 2, 2017, the National Bank of Ukraine authorized the transfer of currency abroad for foreign investment up to USD 50,000 per calendar year on the basis of an e-license (which can be obtained by application to the National Bank of Ukraine). Thus, upon the receipt of an e-license, employees in the Ukraine now will be able to purchase shares pursuant to the grant of options or participation in an employee stock purchase plan by remitting payment of the exercise/purchase price.

For additional information about these favorable changes in Ukraine's currency controls and the other legal and tax considerations for granting equity awards to employees in the Ukraine, please contact your Global Equity Services attorney.

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United Kingdom

Post-Termination Non-Competition Clause Barring Share Ownership in Competing Business Held Unenforceable

In a July 2017 decision, the Court of Appeal in the United Kingdom overturned an injunction imposed by the High Court and concluded that a post-termination non-competition clause that barred an executive from being "concerned or interested in any business carried on in competition" with the executive's prior employer was unenforceable on the basis that it precluded the executive from holding shares in a competing company. In support of its ruling, the Court of Appeal found that because the provision effectively precluded any share ownership in a competing company (even a small interest), the clause was unreasonably broad and constituted an illegal restraint of trade.

The Court of Appeal paid particular attention to the fact that the executive's original employment agreement with the former employer permitted the executive to have up to a 5% interest in shares of a listed company during her employment, but the post-termination non-competition clause did not permit even this minimal ownership interest. The Court of Appeal also refused to re-write the clause in a manner to make it enforceable, noting that it could not remove words or phrases from a single covenant to make it enforceable. Rather, the Court of Appeal noted that it only could strike a single covenant in its entirety and allow any remaining covenants to stand on their own.

On the basis of this decision, companies that grant equity compensation awards to employees in the United Kingdom that include any post-termination non-competition provisions in the underlying award agreements should review such provisions to ensure they are not overly broad and unenforceable, particular where such provisions include any restriction on share ownership in directly or indirectly competing businesses (and where appropriate, adjust the affected provisions to permit and allow immaterial/insignificant holdings).

Employees Reaching State Pension Age Exempt From Employee Portion of National Insurance Contributions

Our colleagues in the United Kingdom recently confirmed that employees in the United Kingdom who reach the state pension age (currently age 65 but gradually increasing to age 67 in the coming years) are exempt from the employee portion of National Insurance Contributions ("NICs") on all employment-related compensation, including income realized from stock options, restricted stock units and other forms of equity compensation awards.

We thank our Employment & Compensation practice in London for their timely August 2017 client alert on this noteworthy case.

For additional information about NIC obligations generally or NIC obligations upon the attainment of state pension age in the United Kingdom, please contact your Global Equity Services attorney.

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The exemption does not apply to the employer portion of NICs (which are still payable) and does not impact any joint elections whereby the employer portion of NICs is pass along to the award recipients (again, the employer portion is still payable by the award recipient, even if the award recipient has reached the state pension age).

United States

SEC Issues Helpful New Guidance on CEO Pay Ratio Rule

On September 21, 2017, the SEC issued welcome new guidance on the requirements for preparing the CEO pay ratio disclosure, which - barring a last-minute legislative miracle - will be appearing in proxy statements as from January 1, 2018.

Although the issuance of the guidance confirms that the SEC has no plans to delay the effectiveness of the rule, the guidance should reduce the burdens of complying with the rule by:

1. permitting the use of recognized tests to identify excludible independent contractors;
2. clarifying that a "consistently applied compensation measure" used to find the median employee (in lieu of Summary Compensation Table annual total compensation) does not have to consider all widely-distributed elements of compensation;
3. reducing concern about SEC enforcement action by recognizing that the pay ratio will be an estimate; and
4. providing useful new guidance on the use of statistical sampling and other reasonable methods of finding the median employee, which guidance includes hypothetical examples.

For a full discussion of the SEC's new guidance and information from ISS on how institutional investors plan to use the pay ratio disclosure, please see our Compensation Connection blog post here.

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Foreign TIN and Date of Birth Required for Reduced Tax Withholding Rate in 2018

The IRS has issued guidance in Notice 2017-46 (the "Notice") relaxing the rules applicable to US financial institutions that require the collection of foreign taxpayer identification numbers (Foreign TINs) from US nonresident aliens. Under anticipated amendments to temporary regulations that are described in the Notice, withholding agents will be required to collect an Foreign TIN and date of birth (in the case of an individual account holder) on a foreign person's beneficial owner withholding certificate (e.g., a Form W-8BEN) where the foreign person is seeking to substantiate the right to a reduced withholding rate under an income tax treaty on US-source income that is reportable on Form 1042-S. However, withholding agents will not be required to collect an Foreign TIN or foreign person's date of birth where the Form W-8BEN is obtained solely to avoid Form 1099 reporting and "backup" withholding or in other cases where a payments is not otherwise subject to reporting on Form 1042-S.

The requirement to collect an Foreign TIN and date of birth applies to a withholding agent that is a US branch or office of a financial institution (a depositary institution, custodial institution, investment entity or a specified insurance company). Therefore, a US broker or US branch of a non-US broker that is administering the payment of a dividend on behalf of a US corporation to nonresident alien shareholders would be required to collect an Foreign TIN from the shareholder. However, a corporation that pays the dividend directly to its shareholder would not be required to collect the shareholder's Foreign TIN.

Under the Notice, beginning in 2018, a withholding agent will be required to collect an Foreign TIN or receive a reasonable explanation within certain narrow exceptions of why the required Foreign TIN is unavailable, such as that the country of residences does not issue TINs. In addition, a withholding agent must obtain or have on file a date of birth for individual account holders.

The Notice also provides that an otherwise valid withholding certificate signed before January 1, 2018 that does not include the nonresident alien's Foreign TIN will continue to remain valid for payments made after December 31, 2019 if the withholding agent (1) obtains his or her FTIN on a written statement, including by e-mail that the withholding agent associates with the individual's withholding certificate or (2) otherwise has the individual's Foreign TIN in the withholding agent's files. The alternative procedure described in the foregoing sentence will be valid for payments made through the earlier of the expiration date of the validity period of the certificate or the date when the withholding agent determines that a revised certificate is otherwise required. However, as a practical matter, most brokers will likely not rely on the alternative procedure made available by the IRS and will instead require a nonresident alien to submit a Form W-8Ben that includes the required Foreign TIN and date of birth.

If the withholding agent does not receive the required Foreign TIN (absent a reasonable explanation) and date of birth , the individual's US-source income will be subject to the 30% tax withholding rate beginning January 1, 2018, unless the alternative procedures described above apply or other limited exceptions apply.

IRS Determines Temporary CFO with Limited Duties Can Still be an "Outside Director" for Code Section 162(m) Purposes

In a recent private letter ruling (PLR 201733004), the US Internal Revenue Service (the "IRS") determined that an outside member of a company's board of directors who temporarily assumed the role of the company's CFO upon the unexpected resignation of the company's existing CFO did not lose his status as an "outside director" for purposes of the performance-based compensation exception under Code Section 162(m).

In general, Code Section 162(m) limits a publicly-held corporation's federal income tax deduction for compensation paid to its CEO and top three other highest paid executive officers (other than the CFO) to $1 million in any tax year. Performance-based compensation is not subject to the deduction limit and is not counted in determining whether compensation exceeds $1 million where (among other things) objective performance goals are timely established by a committee of the board consisting solely of two or more outside directors, shareholders approve certain material terms of the performance goals (usually through approval of the plan under which the performance awards are granted) and the committee of outside directors certifies that the performance goals were achieved.

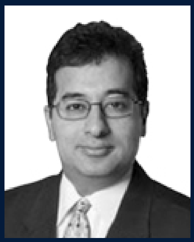
For this purpose, the regulations under Code Section 162(m) define an outside director as a director who is not a current or former employee and who has not been an officer or otherwise received remuneration from the company other than as a director. The regulations further provide that whether a director is treated as an officer is determined based on the facts and circumstances, including without limitation the source of the individual's authority, the term for which the individual is elected or appointed, and the nature and extent of the individual's duties.

In this PLR (and by contrast to previously issued Revenue Ruling 2008-32), the IRS concluded that the director did not lose his outside director status for Section 162(m) purposes where the director assumed the temporary CFO role for a pre-specified period with an automatic expiration date, exercised limited authority (focused primarily on financial statement disclosure matters) and received no salary for his services as the temporary CFO.

In the prior Revenue Ruling, by contrast to the recent PLR, the IRS concluded that an outside director who became the temporary CEO of a company lost his status as an "outside director" because his service was for an indefinite period of time (until a replacement was found) and he was provided full authority vested in the office of the CEO.

These rulings serve good reminders of the importance of ensuring that a properly constituted committee takes action on awards that are intended to constitute qualified performance-based compensation for purposes of Code Section 162(m).

For more information



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