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Luxembourg warrant plan regime amended

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On 29 November 2017, the Luxembourg tax authorities released the highly anticipated circular on stock option/warrant plans (the "Circular"). The publication of the Circular follows the announcement made by Finance Minister Gramegna during his presentation of the 2018 budget, according to which the regime of stock option/warrant plans would be amended soon. The Circular replaces the former circulars 104/2 Income Tax Law of 20 December 2012 and 104/2bis Income Tax law of 28 December 2015 as well as internal administrative guidelines from the tax authorities.

Which changes have been introduced, to which option/warrant plans will they apply and when do these changes become effective?

Scope of the Circular

The Circular deals with the valuation rules applicable for tax purposes when determining the value of benefits in kind granted by employers to employees (senior executives) in the form of options or warrant plans.

The specific lump sum valuation method which is presented in the Circular only applies to freely transferable options. In practice, in most cases, these will take the form of warrants, which are granted on stock exchange indexes and/or stocks of third party corporations.

What are described as stock options in practice are generally options granted to employees on the stock of their employers' company. Since these types of option are, in many cases, not freely transferable, most of the time, they will not fall within the scope of the lump-sum valuation rules described in the Circular.

In the comments below, we refer to "warrants" as these are in practice the most commonly used instruments, being warrants based on stock market indices, when applying the provisions of the Circular.

Valuation of warrants - Increase from 17.5 to 30% as from 2018

The Circular amends the rules applicable to the computation of the value of warrants (or any other freely transferable options). In the absence of a more precise valuation and subject to certain conditions, a lump sum valuation is allowed as follows:

- as from 1 January 2018, the value of the warrants will be deemed to be equal to 30% of the value of the underlying assets;
- the valuation at 17.5% (as applicable since 2013) will remain applicable until 31 December 2017.

The Circular specifies that the valuation at 17.5 or 30% cannot be applied when warrants are granted in lieu of a legal or contractual severance payment following the termination of an employment contract.

The conditions for being able to apply a valuation at either 17.5% (until 31 December 2017) or 30% (as from 2018), so-called reasonable conditions/circumstances, are now expressly mentioned in the Circular. These conditions were not clarified in any of the previous circulars on the subject but were already detailed in unpublished internal guidelines of the tax authorities, some of the content of which had been made public in a response to a parliamentary question 4 years ago.

The Circular now clarifies that the lump sum valuation at 17.5 or 30% is only possible if the 3 following cumulative conditions are met:

- The value of the warrant should not exceed 50% of the gross annual remuneration (warrant included). This percentage has to be computed individually, i.e. for each of the participants to the warrant plan;
- The warrant plan can only apply to senior executives within the meaning of article L 211 -27 5 of the Labour Law (i.e. “cadres supérieurs”);
- The characteristics of the warrant plan have to be such that the price of the warrant cannot exceed 60% of the value of the underlying assets/index.

Should one of these 3 conditions not be met, the Circular states that the value of the benefit in kind subject to tax will be equal to the full allotment price of the warrant, meaning that the real value of the warrant will be taxed.

Notification to the tax authorities

The former Circular 104/2bis Income Tax law of 28 December 2015 introduced an obligation for employers to inform the Luxembourg tax authorities about the warrant plans they put in place for their employees. The new Circular defines in more detail the rules related to this obligation and introduces new sanctions which will apply in case of non-compliance. The rules vary depending on the tax year concerned:

- **Up to 2015 included**

The information will have to be provided to the extent that it is requested by the Luxembourg tax authorities when reviewing the tax situation of the employer.

- **2016**

In respect of 2016, to the extent that no information has been provided yet to the Luxembourg tax authorities (withholding tax office, “RTS”) any benefit within the meaning of the Circular granted by an employer to its employee(s) has to be notified until 31 January 2018.

- **2017**

As far as 2017 is concerned, to the extent that no information has been provided yet to the Luxembourg tax authorities (withholding tax office, “RTS”), any benefit within the meaning of the Circular granted by an employer to its employee(s) has to be notified by 31 March 2018. In addition, since the new Circular replaces, as from its release, all former notification requirements (including the requirement, according to which the notification has to be made at least 2 months prior to the plan implementation), employers may still consider implementing a warrant plan before the end of 2017 under the valuation rules applicable until year-end (i.e. lump sum valuation at 17.5%).

- **As from 2018**

As from 2018, any employer who intends to grant to its employee(s) benefits falling within the scope of the Circular is required to inform the tax authorities (withholding tax office, “RTS”) as soon as the benefit is granted.

The notification has to be made electronically (form and guidelines are available on a dedicated platform on the website of the tax authorities: http://www.impotsdirects.public.lu/fr/echanges_electroniques/stock_options.html). The notification has to be performed for each beneficiary, meaning that one notification per plan is no longer sufficient. However, benefits granted by the employer to several employees on the same date may be subject to one single notification.

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In addition to the information already requested as part of the notification process, information about the annual salary of the beneficiaries will also have to be provided.

Should this information not be provided at the time the benefits are granted, taxation will apply on the total attribution price, effectively the full market value of the warrants granted.

Next steps

The Circular replaces, as from its publication, the current rules governing warrant plans. It covers both the plans already in place and the ones to be put in place by employers in the future. Therefore, employees benefiting from such plans as well as employers having implemented such plans or intending to implement such plans for their employees in the future should seek the advice of experts in order to assess the impact of the changes introduced and make sure that they comply with the amended notification rules.

Can we help? Do you have further questions?



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