IF GROUP

NEWSLETTER

On 29 November 2017, the Luxembourg tax authorities issued a new circular L.I.R. n°104/2 amending the tax regime applicable to stock options and warrants plans[1].

1. Increase of the taxable basis from 17,5% to 30%

As a reminder, the granting by the employer to its employees of listed or freely transferable options[2] constitutes a taxable benefit in kind at the time they are granted[3].

Based on the rules applicable until 31 December 2017, freely transferable options (but unlisted) may be subject to a lump sum valuation at 17.5% of the value of the underlying assets.

As from 1 January 2018, the lump sum basis of these options is fixed at 30% of the value of the underlying assets.

The warrants plans (non-correlated to company shares) may also benefit from this lump sum valuation if they comply with reasonable conditions. These conditions, which had been clarified by the Minister of Finance in a response of 1 July 2013 to a parliamentary question, are now included in the new tax circular, i.e.:

- The portion of remuneration paid in the form of warrants cannot exceed 50% of the employee's yearly total gross remuneration (warrants included). This percentage must be verified on an individual basis for each beneficiary of the plan;
- The warrants plan can only apply to senior executives according to the article L.211-27 (5) of the Labor Code (i.e. employees with a significantly higher salary than employees covered by a collective agreement or another salary scale, taking into account the time required to perform their duties, if this salary is paid for the exercise of a real power of management or whose nature of the tasks includes a well-defined authority, a large independence in the work organization and a wide freedom in the working time);
- The price of the warrant cannot exceed 60% of the value of the underlying asset.

If one of these conditions is not met, the warrants must be taxed based on their total acquisition price.

In addition, the circular explicitly foresees the possibility to set up so-called "syndicated plans"

integrating employees of several companies.

Finally, the circular foresees that if the employer allocates freely transferable options (or warrants) instead of severance pay (statutory, contractual, transactional or judicial), the lump sum valuation at 17.5% (respectively 30%) of the value of the underlying assets cannot be applied. In this case, the taxable benefit in kind will have to be valued based on the total acquisition price of the options.

[1] This circular replaces the circulars L.I.R. n°104/2 of 20 December 2012 and n°104/2bis of 28 December 2015 and the service notes L.I.R./N.S. n°104/3 of 22 May 2013 and n°104/4 of 12 January 2015.

[2] Options which cannot be cancelled by the employer.

[3] As a reminder, non-freely transferable options are taxable at the time of exercise.

2. Removal of the prior notification requirement

Since 1 January 2015, employers wishing to put in place a stock options or warrants plan were required to notify the officer of the withholding tax office on which they depend, at least two months before the implementation of the plan, sending him the copy of the plan and the list of the eligible beneficiaries.

This obligation of prior notification is removed as from the circular of 29 November 2017 is issued.

3. Electronic communication of benefits (options/warrants)

Employers are required to submit data related to the granted options/warrants plans through an electronic form:
http://www.impotsdirects.public.lu/fr/echanges_electroniques/stock_options.html
The circular provides for transitory provisions depending on the date the options were granted.

Grant of options / warrants	Electronic notification[4]		Maximum delay	Data to be communicated	Absence of notification
2015 and previous years	NO		Upon request of the withholding tax office (when auditing the withholding tax on wages)	• Name, first name and tax number of the beneficiaries • Grant year • Type of options • Number of options • Total acquisition price • Value of the underlying asset • Amount of the taxed BIK	N/A
2016	YES		31.01.2018	Idem	Lump sum valuation of the BIK is excluded for future years
2017	YES		31.03.2018	Idem	
2018 and following years	FREELY TRANSFERABLE OPTIONS	YES	At the time the options are granted[6]	Idem + beneficiaries estimated gross annual salary (options excluded)	Taxation based on the total acquisition price of the options
	NON FREELY TRANFERABLE OPTIONS		At the time the options are exercised	N/A	Discount (if any) - in case the shares are blocked during a certain period - is denied

[4] As far as no communication has been made by the employer, either in the framework of the withholding tax on wages' audit, or upon initiative of the employer.

[5] At each granting date.

The employee who leaves the company during the year, after the grant of options, has now the obligation to inform his/her new employer of the salary earned with his/her former employer as well as options (or warrants) he/she received. The new employer will be able to grant him/her additional options under the 50% limit of his/her total annual remuneration.

In case of non-compliance with these obligations, leading to exceed the 50% of his/her annual remuneration, the tax will be regularized through the income tax return/withholding tax adjustment.

EXPERTS EN FORMATIONS FISCALES ET SOCIALES

MEMBER OF IF GROUP	IF ADVISORY
	45, RUE DES SCILLAS
	L-2529 HOWALD
	WWW.IFGROUP.LU

JANIQUE BULTOT	JULIE RATAJCZAK
Partner	*Assistant-manager*
T +352 47 68 47 - 445	T +352 47 68 47 - 473
janique.bultot@ifgroup.lu	julie.ratajczak@ifgroup.lu

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