



Mobility: Tax alert

August 2022

The Netherlands

Changes announced to the taxation of employee stock option gains

Executive summary

New stock option legislation was approved by the Dutch Lower House and will be effective from 1 January 2023, subject to approval of the Upper House. Currently, employee stock option gains are taxable at rates up to 49.5% and the point of taxation is the date the option is exercised (or alienated).

Under this legislation, the taxation point will be the date that the shares, received when exercising the stock options, become tradeable. However, employees will be able to choose the pre-1 January 2023 tax treatment upon request. The current facility for start-up companies with respect to employee stock options will be canceled. Voting in the Upper House is expected around September this year.

Background

The Dutch stock option rules were analyzed in previous years following discussions that were initiated by the start-up/scale-up community in the Netherlands. The primary issue identified was cash-flow. Currently, Dutch tax is due when stock options are exercised (or alienated). However, for employees of start-up or scale-up companies and other non-listed companies, it is not always possible to immediately sell (part of) the shares to pay the relevant tax. The proposed plans are expected to solve the current cash-flow issue and provide flexibility for employees.

In 2021 these proposals were debated in the Lower House where practicability and scope concerns were raised. The State Secretary subsequently concluded that defining the employees covered by the proposed legislation would make the scheme less effective and more complicated to administer. Therefore, the plans were resubmitted to the Lower House unchanged.

Announced changes

Under the new legislation, the taxation point will be when the shares become tradeable, but the legislation does not define 'tradeable'. However, shares should be considered tradeable when the employee is able to sell the shares to any other person, even if only to a limited group of potential buyers. It is irrelevant whether the shares are actually sold. Specific (partial) buy-out situations will require careful consideration.

In practice, the new rules will have a significant impact for shares in non-listed companies. The new rules will have no impact if the shares are immediately tradeable.

For legal or contractual sales restrictions on the shares, the announced legislation will also have an impact on companies that are listed or become listed. The rules include exceptions where there are legal or contractual restrictions. Shares with legal sale restrictions are not considered tradeable until the restrictions end. For contractual restrictions, there is a specific rule to avoid a long-term tax deferral. In case of contractual restrictions, if the company is listed, the shares are deemed to be tradeable after a maximum of five years post-exercise. If the company is listed after exercise, the shares are deemed to be tradeable at most five years after the stock exchange listing date.

For clarity, the change of the taxable event does not itself result in a more favourable income tax position for the employee but rather offers a solution to the cashflow issue. The taxable benefit is the fair market value of the shares at

the taxable date less the employee purchase price. Thus, by taxing at the time of tradability, an increase in value of the shares will produce a higher tax liability.

Choosing the taxable event at exercise

The new rules permit an employee to choose the tax position to be determined on exercise of the option i.e., the current rule. However, an employee must submit a written request to the employer (the wage tax withholding agent), and it should be retained by the payroll administration. If a timely request is not made or has not been filed correctly, the new rule will apply (i.e., deferral until the shares are tradeable).

Concurrence with the 30% facility

Special attention is needed for employees who exercise their stock options and benefit from the 30%-facility. The 30%-facility can be applied for by employees who are recruited from abroad and meet specific criteria. The facility can be granted for a maximum period of five years from the start of the employment in the Netherlands. The facility enables the employer to pay up to 30% of the taxable salary as a tax-free allowance. This facility can also be applied on income from employee stock options, but only if the point of taxation is within the duration of the 30%-facility. Employees benefitting from the facility should consider whether taxation at the time tradability still falls within the duration of the 30%-facility, and within the income cap* and make an informed decision regarding the optimum time of taxation.

Further implications

The following should also be considered:

- ▶ Dividends paid between date of exercise and tradability will be considered taxable employment income. This is unfavourable for the employee compared to the current position of taxation at exercise;
- ▶ The current start-up facility for stock options, which provide a tax-free benefit, will be canceled;
- ▶ In case of employee termination, special attention is needed to evaluate the impact of stock options on possible excessive redundancy payments.

Next steps for employers

- ▶ Inform employees of the new rules and consequences and, in particular, that a clear decision must be received before any options are exercised, taking into account:
 - ▶ Their personal cashflow situation.
 - ▶ The potential higher tax liability in cases where the share value increases in the future.
 - ▶ The possibility to apply the 30% facility on their option gains.
- ▶ Recognise when the shares become tradeable, based on whether there are market, contractual or legal sales restrictions.
- ▶ In the case of legal or contractual restrictions, the deemed taxable event should be monitored.
- ▶ Track written requests from employees who choose to pay the tax due at exercise in their payroll administration records.
- ▶ Process dividend payments as taxable employment income if received between the date of exercise and tradability.
- ▶ Take into account the shares received by employees exercising stock options for the purpose of the potential employer tax levy which can apply to excessive redundancy payments where the shares have not yet been taxed as employment income.

** a cap on the income on which the 30%-facility applies is announced. More precise plans will be released on Budget Day, 20 September 2022. See our alert on this on our website, www.ey.com/en-gl/tax-alerts*

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