

Bill on Share Option Rights Tax Scheme (Amendment) Act not changed in substance

On April 4, 2022 Deputy Minister of Finance Mr. Van Rij sent a letter about the bill on the Share Option Rights Tax Scheme (Amendment) Act to the Lower House of Parliament. This proposal had already been presented as part of the 2022 Tax Plan package. At the time, the Lower House of Parliament had doubts about both the costs of enforcement and the generic application of the bill. On November 10, 2021 it was therefore decided to stay the bill and examine it further. Numerous options have been explored during the past few months to, on the one hand, reduce the costs of enforcement and, on the other, restrict the generic application. The results of this have not given the Deputy Minister of Finance cause to change his mind: the bill will therefore not be changed in substance, only the effective date will be postponed until January 1, 2023.

The bill

The bill is intended to redefine how employee share option rights are to be taken into account as regards payroll tax and social security contributions. The current discount tax relief will be canceled.

Under current legislation, the taxation moment for share option rights is the moment the options are disposed of or exercised; even if the shares that are acquired by exercising the options cannot immediately be sold. Tax must then be paid, but there is no liquidity. This is especially the case with start-ups and scale-ups. Under the bill, an employee can in that case elect to defer the taxation moment. Taxation will then take place at the time the acquired shares become tradable, on the then applicable value. 'Become tradable' is defined as the moment on which any sale restrictions are lifted and the employee may sell the shares they acquired upon exercising the option.

This concerns an elective scheme. The employee can still continue to elect to have taxation take place at the time the share option right is exercised and then to subsequently enjoy the further increase (or decrease) in the value of the shares in Box 3.

To prevent improper use and long-term deferral of taxation, additional rules have been stipulated with regard to shares that cannot be traded, that become only partly tradable or that become fully tradable. If an employee is not allowed to sell the acquired shares due to a contractual restriction, the taxation moment will be deferred for a maximum of five years after the IPO of the company in which the shares are held. If the company is listed, the deferral is a maximum of five years after the share option right was exercised. Benefits such as dividends that are paid in the meantime, are taxed as salary.

Objections and considerations

The doubts expressed by the Lower House mainly related to the costs of enforcement and the generic application of the share option scheme. The exploratory surveys therefore focused on two possible changes, i.e. the possibility to 1) restrict the application of the bill to enterprises of a certain size and 2) exclude director-major

shareholders and executive directors from the possibility of postponing the taxation moment. How this potential change would affect the complexity, the costs of enforcement and the effectiveness and efficiency of the measure were subsequently assessed and weighed up. The changes that were considered are discussed below.

Maximum number of employees

In order to focus the scheme on start-ups and scale-ups – as is the wish of some members of the Lower House of Parliament – a demarcation based on the number of employees (a maximum of 100 or 250) would increase the complexity of the scheme. This would occur, for example, because the number of employees fluctuates during the year. It would also encourage calculating behavior, with as potential consequence that enterprises would remain (artificially) small in order to offer employees share option rights under better conditions, or that separate entities would be incorporated with no or few employees, the sole purpose being to award share option rights. Furthermore, a demarcation also entails a State aid risk, because such a demarcation (indirectly) benefits smaller enterprises. Moreover, at larger companies there may also be employees with insufficient cash to pay the tax on the value of the share options being exercised, if in the meanwhile the shares are not yet tradable.

Exclusion of director-major shareholders and directors

For various reasons it was decided not to exclude director-major shareholders and executive directors from the scope of the bill. Firstly, because it is difficult to impose such a restriction without also excluding C-level employees (e.g. CFOs and CTOs), yet start-ups and scale-ups spend a lot of time on filling these positions as such employees are difficult to recruit. Secondly, there is no effective way to restrict the bill to start-ups and scale-ups. It only excludes certain employees. Moreover, demarcation issues would make the bill more complex and thus lead to an increase in the costs of enforcement by the Dutch Tax and Customs Administration and an increase in the administrative expenses of enterprises.

Improper use and (disproportionate) tax benefit

There were also doubts as to whether the bill would lead to improper use or to a (disproportionate) tax benefit. In his letter the Deputy Minister writes that the bill will only lead to a postponement of the taxation moment and (depending on the movement in value) not to a reduction of the tax to be withheld. Seen in these terms, the measure will not lead to a (disproportionate) tax benefit. Moreover, the choice to pay tax immediately upon the exercise of the share options rights must be made by the employee at the time the option is exercised. This is therefore before the shares acquired from this become tradable. At that time, the movement in value of the acquired shares is still unclear, so that there is no arbitration element involved. Moreover, the bill has (and had) two five-year deadlines to prevent improper use and long-term postponement. Lastly, benefits – such as dividends – that are paid in the interim, will be taxed as salary to avoid erosion of the tax base.

Bill follow-up

The Deputy Minister will soon send a Memorandum of Amendment to the Lower House changing the (intended) effective date to January 1, 2023. The expectation is that the bill will then again be debated in the Lower House.

Should you have any questions about the above, Meijburg's advisors would be pleased to use their expertise to help you.

KPMG Meijburg & Co
April 5, 2022

The information contained in this memorandum is of a general nature and does not address the specific circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.