

Tax - Breaking News



March 2021

Consistent with our commitment to keep you updated on the most significant tax developments, we outline below the main topics of the new circular regarding the income arising from employee's stock option and share plans

The new circular **E.2208 / 24.12.2020** issued by the Ministry of Finance provides clarifications regarding the tax treatment of the income which arises for an employee or a partner or a shareholder from a legal entity in the form of stock options, as well as in the form of free shares given within the framework of share plan which require the achievement of specific goals or the occurrence of a certain event.

The main points of respective new circular are listed below:

Stock options

- According to the new circular, various issues are clarified. Specifically, the holding period of the shares is now defined, the market value of the benefit is determined, as well as the time of acquisition (and therefore taxation) of the said income. In addition, instructions are provided to both individuals earning such income as well as their employers in terms of their reporting obligations. Finally, for the purposes of a more accurate understanding, various indicative examples are provided.

Holding period

- Clarifications are provided for the **holding period** of the shares acquired upon exercise of the stock options in order for the income to be taxed as employment income. Specifically, in case the shares are transferred before the completion of **24 months from the "grant date of stock options"** or before the completion of 36 months under certain conditions applicable to small or very small enterprises then the income arising will be taxed as employment income.
- It is now explicitly defined that the **time of acquisition of the stock options is deemed to be the time they are granted** by the company based on the relevant distribution program, **a point of time internationally known as "grant".**

- In addition, **a small or very small enterprise is defined as the entity** that meets the criteria of paragraphs 2, 3 and 4 of article 2 of Law 4308/2014 on Greek Accounting Standards. It is also clarified that start-up companies fall within the scope of application of the provisions for small or very small enterprises (paragraph 2, article 42A, Law 4172/2013) if they meet the conditions set in respective provisions, regardless of their registration or not in the national register of start-up companies ElevateGreece of the Ministry of Development

Market value of the benefit is defined at exercise

- It is clarified that the **market value of the benefit is determined on the "exercise date of stock options"**, a point of time known as **"exercise"**, regardless of whether the beneficiary's employment relationship exists at that time or not.
- Specifically, the **income is determined as the difference between the closing price of the share on the stock exchange at exercise and the price of the stock option at grant (preferential acquisition price)**. In case of shares listed on the Athens Stock Exchange, the exercise date of stock options is the one during which the shares are transferred to the beneficiaries through the Intangible Securities System (DSS), since during that time the benefit can be determined as the closing price reduced by the grant price of the option (preferential price) (relevant the document with protocol number DEAF 1055728 EX 2015/23.4.2015).

- In case of **non-listed shares**, the income is determined as the difference between the share price based on company's valuation at the time of exercise (internal value of the share) and the exercise price (preferential acquisition price). Internal value of the share is the current value of all the assets of the company reduced by its liabilities divided by the number of its shares, as they appear in the books kept at the exercise of stock options. At this point it is worth mentioning that this clarification is not in line with the explicit provision of law which stipulates that in case of non-listed shares the market value at the exercise of stock options is the sale price reduced by the exercise price.
- Therefore, despite of whether the shares are listed or non-listed, the income is determined as the benefit which arises for the employee / partner / shareholder upon acquisition of company's shares at preferential price, at a price lower than the value of the share at exercise.

Taxable event is upon transfer of shares

- The taxable event is now clearly defined. Specifically, it is stipulated that "**employment income** (benefit in kind) is acquired at the "time of transfer of shares", which were acquired upon exercise, provided that they are transferred prior to the completion of 24, or 36 months depending the case, from the grant date of the stock options. It is clarified that for the purposes of application of respective provisions, as transfer is not considered only the sale of shares at a price, but also their donation, parental donation or inheritance. The reason is that any subsequent transfer of the shares free of charge does not cancel the benefit that resulted from their acquisition at a preferential price. In case of inheritance, the income is taxed in the name of the deceased (since it was acquired at the exercise that he was still alive) through the submission of income tax return that will be submitted by the heirs on his behalf.
- **On the contrary**, in case the shares, which were acquired upon exercise of stock options, are transferred after the completion of 24 months since grant, regardless of whether an employment relationship exists or not, at the time of sale capital gain arises which is taxed at a rate of 15%, plus special solidarity contribution.
- Regarding the **non-listed small or very small enterprises**, the capital gain arising from the transfer of shares, which were acquired upon exercise of stock options, is subject to the lower tax rate of 5% if the following conditions are cumulatively met: (a) the stock options are acquired within five (5) years after the incorporation of the company and (b) the company is not incorporated upon merger and (c) the shares are transferred after the completion of 36 months upon grant. It is clarified that the above **conditions (a) and (b) shall be met at the time of grant**.
- In case of **listed shares**, the capital gain is defined as the difference between the closing price of the share on the stock exchange on the exercise date and the exercise price. For **non-listed shares**, capital gain is defined as the difference

between the share price based on company's valuation at the time of exercise (internal value of the share) and the exercise price (preferential acquisition price).

Extra capital gain upon sale at a higher value & beneficiary's reporting obligations

- It is clarified that the provisions of article 42 of the Income Tax Code are not applicable in case of income / capital gain arising upon exercise of stock options. Respective provisions apply to the **capital gain which may arise upon sale of the shares**. In such a case, apart from the benefit of acquiring the shares at preferential price, **additional income arises upon sale of respective shares at even higher price than the price they had at exercise**.
- Upon sale of shares, any **additional income** is determined as the difference between the **sale price of the shares** and the **acquisition price**, meaning **the price they had at exercise**. As **sale price**, in case of listed shares, is taken into consideration the one stated in the documents supporting the transaction as issued by the brokerage company or the credit institution, while in case of non-listed shares, the one which arises based on company's valuation at the time of sale or the shares' sale price or market value as stated in the transaction agreement, whichever is higher. As **acquisition price**, in case of **listed shares**, is taken into consideration the **closing price of the share on the stock exchange at exercise**, whilst in case of **non-listed shares**, the **price which is determined based on company's valuation at exercise (internal value of the share)** and not the price which was actually paid by the employee for the acquisition of the shares. The reason is that the difference between the price actually paid (i.e. price at grant) and the price at exercise date has already been calculated for the determination of the income upon exercise of the stock options.
- In case of listed shares, if the beneficiary participates in the company's share capital with a percentage of less than 0.5%, the capital gain from the sale of shares as above determined is **tax exempt**, and **should be reported in the personal income tax return (Form E1)**, in code **659 - 660** of Table 6.
- In case of **non-listed shares** or **listed shares** where the beneficiary participates in the company's share capital with a percentage of at least 0.5%, the capital gain from the sale of such shares is **taxable at the rate of fifteen percent (15%)** and is reported in **codes 829-830 or 865-866**, as the case might be, of sub-Table 4.E of the personal income tax return (Form E1).
- In case of capital **loss** upon sale of shares, respective loss is carried forward for the next five (5) years and is offset only against future capital gains if the company is non-listed or if it is listed and the beneficiary participates in the company's share capital with a percentage exceeding 0.5%. If the company is listed and the beneficiary participates in its share capital with a percentage of less than 0.5%, the capital loss is not reported in the annual income tax return and is not carried forward for future offsetting purposes.

- It is further clarified that according to the previous provisions, the stock options were taxable at the exercise date. Given that the stock options which were exercised until 31.12.2019 have already been taxed, the **new provisions apply to the stock options which are exercised after 1.1.2020**, regardless of the grant date.

Employer's reporting obligations

- For electronic verification and monitoring purposes of the income until its taxation (as the case might be) as well as in an effort for the Tax Administration to ensure correct application of the provisions, the companies granting stock options, regardless if they are the issuers of the titles or not (e.g. in case of stock options which relate to titles of another affiliated Greek or foreign company), should provide the **employees / partners / shareholders with a hardcopy distinct salary letter relating to the tax year that the stock options were exercised, which will indicate the amount of the income as per the related provisions as well as clearly state the grant date of the stock options**. At the same time, the companies should **include respective income to the monthly electronic payroll withholding return** without proceeding with the withholding of the applicable income tax and special solidarity contribution. The amount will be pre-populated in the personal income tax return of the beneficiaries / individuals of the relevant tax year, however only for informational purposes since the date and the way of taxation is conditional.
- It is also clarified that the new provisions apply only in case of Societe Anonyme stock option plans and not in case of Private Company (I.K.E.) stock option plans, for which the general tax provisions for benefits in kind shall apply.

Free shares

- It is clarified that the income arising for an employee or partner or shareholder in the form of free shares granted by a legal entity via share plan (indicatively mentioning employee's incentive schemes: restricted Stock Units (RSUs), performance shares or performance units, restricted shares plan, matching shares or employee stock purchase plan, deferred stock, etc.), which require the achievement of specific goals or the occurrence of a certain event in order for the shares to be granted, **is classified as capital gain**.
- In case of granting free shares, the **capital gain is equal to:**
 - a) **the closing price of the share on the stock exchange on the vesting (acquisition) date, in case of listed shares**, assuming the sale price is equal to or less than the closing price at vest. If the sale price is higher than the closing price of the share on the stock exchange on vest,

the excess amount is taxed as capital gain according to the general provisions (i.e. tax exempt if the beneficiary participates in the company's share capital with a percentage of less than 0.5%).

- b) **the sale price in case of non-listed shares**, if it exceeds the price of the share as it is determined at the date of vest, whilst in case the sale price is lower, the capital gain is equal to the value of the share at the date of vest.
- Therefore, according to the new provisions, as of 1.1.2020 onwards, upon sale of listed shares which were granted free of charge to an employee or partner or shareholder, a tax at the rate of 15% is imposed on the closing price of the share on the stock exchange on the vesting date.
- In case the **sale price of the listed shares**, as determined in the documents supporting the transaction which are issued by the brokerage company or the credit institution or any other institution conducting transactions, **is higher than the closing price** of the share on the stock exchange on the vesting date, **and**
 - A. **the employee / partner / shareholder - beneficiary participates in the company's share capital with a percentage of less than 0.5%, the excess amount is reported as tax exempt in codes 659-660 of Table 6 of the personal income tax return (Form E1) and is only subject to special solidarity contribution,**
 - B. **the employee / partner / shareholder - beneficiary participates in the company's share capital with a percentage exceeding 0.5%, the excess amount is reported in codes 829-830 or 865-866, as the case might be, of sub-Table 4.E of the personal income tax return (Form E1), as capital gain and is taxed according to the general provisions at the rate of 15%, plus special solidarity contribution.**
- Furthermore, in case of sale of **non-listed shares** which were granted free of charge to an employee or partner or shareholder, as of 1.1.2020 onwards, tax at the rate of 15% percent is imposed on:
 - the sale price of the shares, which is the one stated in the transfer agreement, if it exceeds the value of the shares as determined at the time of their vest
 - or
 - the value of the shares at the time of their vest, which is determined based on company's valuation (internal of the share), if the sale price is lower than such a value.

Employer's reporting obligations

- For verification purposes and close monitoring of the income taxation as well as in an effort for the Tax Administration to ensure the correct application of the provisions, the companies granting free shares, regardless if they are the issuers of the titles or not (e.g. in case of titles of another affiliated Greek or foreign company), should provide the **employees / partners / shareholders with a hardcopy distinct salary letter relating to the tax year that the free shares were granted, which will clearly indicate the number of the shares vested as well as the value of the shares on vest date**. At the same time, the companies should **include respective amount in the monthly electronic payroll withholding return** without proceeding with the withholding of the applicable income tax and special solidarity contribution. The amount will be pre-populated in the personal income tax return of the beneficiaries / individuals for the relevant tax year, however only for informational purposes since the date of taxation is conditional.

Granting stock options and free shares to employees of subsidiaries

- These provisions are also applicable to income arising from stock option plans and free share plans of affiliated companies (either in Greece or abroad).
- Finally, it is highlighted that especially for tax year 2020, the income derived from capital and capital gains is exempted from the special solidarity contribution.

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