Germany – Improved Tax Framework for Employee Share Ownership

Germany has improved the tax framework for employee share ownership programmes including increasing the tax-free amount for all-employee share plans. Also, there has been a further improvement on a separate regulation allowing a tax deferral to avoid so-called “dry income” (when employees receive shares at a discount or free-of-charge without any cash payment/liquidity to cover arising income tax and social security obligations).

WHY THIS MATTERS

In order to create a more favourable environment for entrepreneurial activity, encourage employee incentive programmes, and foster alternative ways of compensating employees, Germany enacted the Future Financing Act (“Zukunftsfinanzierungsgesetz”, hereinafter “ZuFinG”), which brings significant changes into force from January 1, 2024.[1]

Background in Brief

Cash payments from virtual incentive plans (e.g., virtual options / phantom stocks) and the transfer of shares from equity-based plans (e.g., stock options, RSUs) at no cost or with a discount generally result in income from employment (Section 19 German Income Tax Act (*Einkommenssteuergesetz*)). The taxable benefit arises when the employee acquires economic ownership of the payments or shares.

A detailed review of the taxable event is often required (e.g., in case of restrictions on disposition) considering the individual plan regulations. Furthermore, challenges with regard to the liquidity of the company and employee arise if employees only receive shares with restrictions on disposal. This means shares cannot be sold immediately after transfer and, therefore, no cash is available to cover the corresponding income and social tax on the compensation (so-called “dry income”).

Increase of Tax Allowance to EUR 2,000

The allowance for the non-cash benefit from the transfer of employee shareholdings at a reduced price or free-of-charge has been increased from EUR 1,440 per year to EUR 2,000 according to Section 3 Nr. 39 German Income Tax Act. The central requirement for the tax-free allowance remains that the offer of participation is open to all employees who have been employed by the company for at least one year at the time of the announcement. It is still possible to use the tax-free amount for tax purposes through gross salary conversion.

Deferral of Taxation to Avoid "Dry Income"

Section 19a German Income Tax Act offers the opportunity to postpone the actual taxation of a taxable benefit-in-kind derived from the transfer of shares. The requirements to make use of this provision were extended in order to make the application available to a broader number of companies.

From 1 January 2024, companies with a maximum of 1,000 employees and an annual turnover of up to EUR 100 million or an annual balance sheet total of up to EUR 86 million, which were founded no more than 20 years ago, will fall within the scope of Section 19a German Income Tax Act. The deferral of taxation will therefore be extended from "start-ups" to some "scale-ups" in future.

The benefit would be achieved by postponing the taxable event until the realisation of a "substitute fact." A substitute fact is an event which is considered relevant for taxation purposes in place of the moment when the employee acquires economic ownership of the shares.

The end of the deferral is generally triggered when the shares are transferred to a third party. However, the end of the deferral is also triggered when the employee terminates the employment or when a 15-year period has expired. In these two cases, there is an optional liability regime for further deferral of taxation.

Ideally, taxation would only take place when the employee realises a profit via liquidation of the shareholding. In this case, an employee could be provided with shares from equity-based plans without having to cover wage tax that might otherwise be due upon transfer of the shares to the employee.

The deferral model is also extended to cases where the company shares are not transferred to employees by the employer itself, but by the (founding-) partner/ shareholder of the employer.

KPMG INSIGHTS

Employee incentive programmes are already an important component of providing long-term incentives to employees and fostering company loyalty and retention. The ZuFinG provides further tax incentives by increasing the tax allowance and by extending the scope of application of the deferral of the taxable event.

Although the provisions of Section 19a German Income Tax Act are generally beneficial, they will require close coordination between employers, taxpayers, and the tax authorities in terms of practical application.

FOOTNOTE:

1 *Gesetz zur Finanzierung von zukunftssichernden Investitionen (Zukunftsfinanzierungsgesetz, ZuFinG*) was adopted by the German *Bundestag* (Federal Parliament) on 17 November 2023 and approved by the *Bundesrat* (Federal Council) on 24 November 2023. For more information from the Federal Ministry of Finance, the *Bundesministerium*, in English, click here. In German, click here.

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