Global Reward Update – Wrap Up

March 2024

As we approach spring it seems a good time for some share plan "spring cleaning" and checking in on key developments impacting global incentive plans since our last update. Some are an update on information provided in previous Global Reward Updates (GRUs) and others are new developments.

We hope this summary is useful, and if you have any questions, please do get in touch with your usual Deloitte contact or any of the Incentives partners listed on the final page.

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Global tax & legal updates

Brazil: Confirmation of changes to foreign share disposal compliance

New rules governing the tax treatment of income arising from non-Brazilian investments held by Brazilian tax residents entered into force as of 1 January 2024. We covered the proposed changes in our December 2023 edition of Global Wrap Up (here is the link).

As anticipated, with effect from 1 January 2024, income arising from non-Brazilian financial investments such as capital gains arising from shares sold (including shares sold in RSU sell to cover transactions), dividends, interest, etc will be taxable at a fixed rate of 15% and any tax due will be paid and reported on an annual basis through the Individual Income Tax Return (i.e. self-assessment). Monthly income and capital gains reporting will no longer be required and monthly tax will not be due on such income. The monthly exempt amount for sales proceeds of up to BRL 35K will also cease. However, it will be possible to use any losses on the sale of shares to offset gains in the same tax year.

The Brazilian tax authorities are expected to issue further guidance to individuals regarding these changes in the coming months. In the meantime, **we recommend** that employers consider updating any employee guidance to reflect the change from monthly to annual reporting.

Please let us know if you would like assistance in preparing communications to your employees regarding the impact of these changes.

Canada: SDA rule clarifications

In Canada, employment income is generally taxed on a cash basis for tax purposes. However, long-term incentives, like restricted stock units (RSUs) can be taxed earlier if the plan does not comply with Canadian salary deferral arrangement (SDA) rules. An SDA is a plan or arrangement that under certain conditions, allows an employee to receive an amount after the end of the tax year, relating to services rendered in that tax year or in a preceding year. Under an SDA, the employer treats deferred salary and wages as employment income in the year the employee earns the amount.

In late 2020 and early 2021, the Canada Revenue Agency (CRA) was asked whether a hypothetical equity award plan such as full-value RSUs (where shares or their monetary value are delivered at a later date) would be considered an SDA. The CRA restated their long-standing position that if the amount to be paid to an employee under an RSU plan is based on the full value of the specified shares, the RSU plan will generally be considered to have been granted in respect of the employee's past services and may be considered an SDA, unless an exemption applies. An equity plan taxable under Section 7 of the Income Tax Act would be excluded from the SDA provisions. This would also be the case for a deferred compensation plan if the related remuneration is paid before the end of the third calendar year following the year in which the services, to which the award relates, were rendered by the employee.

In November 2023, the CRA issued new views clarifying its prior comments that should be considered by employers with respect to past and current equity grants. Despite their rebuttable presumption that full-value RSUs are in respect of past services, the CRA acknowledged there are circumstances where a full-value RSU may be solely related to services to be rendered after the grant and that determining relevant service periods is ultimately a question of fact. This determination is key in assessing whether the three-year exemption applies or if the SDA provisions apply to the particular equity plan.

Canada: SDA rule clarifications (continued)

We recommend employers ensure a review has been undertaken for RSU plans (and other deferred compensation programs) to confirm there is appropriate documentation evidencing the period of services and whether the relevant plan(s) are excluded from SDA provisions. Where this has already been completed, employers should consider whether the latest announcements impact the previous conclusions.

We also recommend a full review of all equity plans offered to Canadian employees, considering recent changes to stock option taxation, to optimize the global tax implications of the current plans for all relevant stakeholders.

Czech Republic: Deferral of tax point for share-settled awards

Effective from 1 January 2024, the Czech Republic adopted new legislation for share-settled incentive awards with the intention to defer the tax point from delivery to eventual sale of the underlying shares. Previously, in certain scenarios in respect of share-settled awards, employer payroll withholding and reporting was applicable, and this change will likely impact these obligations. The specifics of the legislation and alignment between the income tax and social tax treatment remain unclear, and no additional guidance has currently been issued by the local tax authorities.

We recommend reviewing your current approach to the provision of and taxation of share-settled awards in the Czech Republic to ensure you understand the current approach adopted by your organisation. **We will** provide more updates once the local authorities provide further clarity.

Germany: 1/5 rule can still be considered within the withholding process in 2024

In our Global Wrap Up in December 2023 (here is the link) we discussed a proposal to remove the German 1/5 rule from 1 January 2024. The 1/5 rule in Germany allows income earned over multiple years to be taxed at a lower rate at the withholding stage.

Following further debate, the German parliament decided that the 1/5 rule can still be applied during the withholding process for 2024. However, we do not currently expect this to be available from 2025.

We will keep this under review and will provide any necessary updates.

Italy: Details of new special expat regime finalised

As discussed in our Global Wrap Up in December 2023 (here is the link), the Italian authorities proposed new legislation to replace the existing inward expatriate regime. The draft legislation has now been approved (subject to the changes outlined below). This will apply to individuals transferring their tax residence to Italy on or after 1 January 2024 (except for those who transferred their registered residence by 31 December 2023, as discussed below).

As previously reported, where the individual in question has not been tax resident in Italy for the previous 3 tax years and qualifies as a highly skilled or specialised worker, the new regime provides a 50% exemption on employment / self-employment income produced in Italy, subject to a cap of EUR 600,000 per annum, for a period of 5 years.

In a change to the original proposals, the initial 5 year period may exceptionally be extended by a further 3 year period (8 years in total) for eligible individuals who have purchased real estate in Italy used as primary residence before 31 December 2023. In addition, the exemption may increase to 60% where the individual who moves to Italy has at least one minor dependent child or becomes a parent during the 5 year period of tax relief.

The Italian authorities have helpfully clarified that individuals who moved to Italy during 2023 and registered in the Italian records as resident before 31 December 2023, may continue to benefit from the old regime.

In two further changes to the draft legislation, the individual must maintain their tax residence in Italy for a period of 4 (rather than 5) consecutive tax years to avoid having to reimburse the benefit received (plus penalties and interest). It is now possible to apply the regime in cases where a transfer is made between companies in the same international group, where the individual has not been tax resident in Italy for a period of 6 or 7 years prior to obtaining residency, depending on the precise facts and circumstances. This is a welcome addition to the new rules, but it will be necessary to consider any further interpretation given by the Italian tax authorities on this point.

Please contact us if you would like any assistance in considering any of the above.

Netherlands: Scaling back of the 30% ruling – changes now in force

The significant changes to the 30% ruling discussed in our December 2023 Global Wrap Up (here is the link) have now been approved by the Dutch parliament and came into force with effect from 1 January 2024. This includes a transition period for employees already benefitting from the 30% ruling in December 2023. It should be noted that the scaling back of the 30% ruling remains the subject of political debate in the Netherlands and new studies have been announced. We will update you if we become aware of any material developments which could affect the 30% ruling in due course.

In the meantime, we continue to recommend that relevant employers take steps to:

- update employee communications,
- consider timings of any new 30% ruling applications; and
- plan for adjustments in compliance and payroll processes, as necessary.

Please contact us if you would like our assistance in considering any of the above.

South Africa: Change to PAYE withholding requirements

Prior to 22 December 2023, where a taxable share gain arose in the hands of a South African (SA) tax resident employee, who was also subject to foreign taxes in respect of that share gain, the entity which had the obligation to withhold employees' tax (PAYE), was not permitted to take the estimated foreign taxes payable into account when determining the PAYE to be deducted. This often resulted in significant adverse tax consequences for the employee where these share gains were also subject to tax in other jurisdictions, as the employee would only be able to claim a tax credit in respect of any foreign taxes payable on their annual tax returns. This could also result in a significant tax liability for the employer, where employees were fully tax equalised on their taxable share gains.

With effect from 22 December 2023, employers can now apply to the South African Revenue Service (SARS) for a tax directive (IRP3(q)) to vary the basis of PAYE withholding and consider the estimated foreign taxes which may be payable when determining the PAYE liability. It is hoped this change will limit double taxation at an employer PAYE withholding level.

We recommend that, where applicable, employers review and include employee share gains together with the estimated foreign tax credits in the IRP3(q) applications to SARS, to ensure that they do not over-pay PAYE in respect of these share gains.

Please contact us if you would like to have a more in-depth discussion or have any questions relating to the above.

South Africa: Non-SA resident employers with SA permanent establishments brought into PAYE withholding

Many non-South African tax resident multinational companies, including their South African (SA) branches (i.e. foreign employers), have globally mobile employees (assignees) who are seconded to South Africa to render services there on international assignments. In certain cases, foreign employers may also have SA tax resident assignees rendering services to them in foreign countries. Prior to 22 December 2023, the foreign employer did not normally have an obligation to withhold PAYE in respect of any SA taxable remuneration it paid to these assignees in respect of their services rendered in South Africa or the foreign country (although equity-based remuneration obligations may differ).

However, with effect from 22 December 2023, all non-SA tax resident employers who conduct business through a permanent establishment (PE) in South Africa now fall within the SA PAYE net. This includes all foreign employers who have a “representative employer” (as defined in the relevant legislation) in South Africa. Accordingly, these foreign employers are now required to register as an “employer” with the South African Revenue Service (SARS) for PAYE purposes and must deduct PAYE from any SA taxable remuneration paid to any persons, unless SARS directs otherwise.

This change is expected to have far-reaching consequences for all impacted foreign employers who currently pay, or are liable to pay, SA taxable remuneration to their assignees who render services in South Africa, as they will now have to withhold PAYE in respect of this remuneration. It will also impact the current provisional taxpayer status of the assignees. It is also noted that where the foreign employer may operate a shadow payroll in South Africa, this does not automatically eliminate its employment tax obligations in South Africa and/or its employees’ provisional tax obligations.

The foreign employer’s current obligations to account for skills development levies and unemployment insurance fund contributions, and to potentially register for PAYE in South Africa, in these circumstances, remain in place.

Please contact us if you would like to discuss any of the above in further detail.

South Korea: Removal of local broker requirement

The Financial Supervisory Service of the Republic of Korea has reversed the guidance (the Guidance) implemented last year which required overseas-listed shares to be held and traded through a domestic brokerage firm. We covered this topic in our Global Wrap Up in August 2023 (here is the link).

Effective 5 March 2024, these restrictions no longer apply, substantially simplifying the operation of global plans in South Korea. Employers can now revert to delivery mechanics predating the Guidance including the operation of sell-to-cover to satisfy any relevant tax liabilities.

We would recommend ensuring that participants are notified of the changes and that employers consult with their administrator to ensure a smooth rollout of amended processes.

Please contact us if you require further assistance with any employee or administrator communications.

United Kingdom: ERS Returns - HMRC updates guidance

On 2 January 2024, HMRC issued updated guidance regarding the online filing of employment related securities (ERS) returns. The guidance reminds companies to save copies of the returns before submission as the ERS online filing system does not retain the information submitted, and companies will not be able to access their ERS returns once they have been filed.

Full details can be found on the HMRC website (here is the link).

Please let us know if you would like assistance in relation to the filing of your annual ERS return which is due for submission by 6 July 2024 in relation to the tax year ended 5 April 2024.

United Kingdom: EMI grant notification deadline extended

As mentioned in our August 2023 Wrap Up (here is the link) on 18 July 2023 HMRC published draft legislation to extend the deadline for reporting EMI option grants to 6 July following the end of the tax year in which the options are granted (rather than within the 92 day period following the date of grant). This new deadline will apply to EMI options granted on or after 6 April 2024.

This is a welcome change from an administrative perspective as it enables all EMI options granted in a tax year to be reported in one go. It remains essential that EMI option grants are reported within this new deadline in order to preserve the tax relief associated with the EMI status of the options

Full details can be found on the government website (here is the link).

Please let us know if you would like to discuss these reporting requirements or any other aspect of EMI plan design or implementation in further detail.

United Kingdom: Changes to the UK Corporate Governance Code

Changes have recently been announced to the UK Corporate Governance Code. Please see link here for a summary of the changes.

Please contact us if you would like any further information about the changes.

United Kingdom: UK Employment Tribunal case considers discrimination against good leavers

In the case of Fasano v Reckitt Benckiser Health Ltd and Reckitt Benckiser Group plc, the Employment Appeal Tribunal ("EAT") has offered significant commentary on discrimination against good leavers where awards are amended in-flight.

The participant (Fasano) had been a senior employee of Reckitt Benckiser Health Ltd ("RBH") and retired in June 2019 as a good leaver. He retained a 2016 LTIP award over shares in RBH's parent, Reckitt Benckiser Group plc (RBG), that was due to vest pro-rata at the end of 2019. One of the award's performance conditions centred on the performance of RBG's share price over a three-year performance period (2017-2019).

Prior to the end of 2019, RBG's share price had fallen sufficiently far that it was unlikely the 2016 award would vest. In September 2019, the terms of the 2016 award were amended as a retention tool, allowing 50% to vest in any event. However, it was a condition of the amended award that participants should be employed at the date on which the amendment took effect. Fasano (along with 24 other good leavers) did not meet this condition so no part of his 2016 award vested. Had his award been adjusted, it would have vested over shares worth £1.2m.

Fasano subsequently took RBH to an employment tribunal, claiming there had been indirect discrimination. The tribunal dismissed his claim on the basis that the amendments to the 2016 awards had been a "proportionate means" of achieving a "legitimate aim" (staff retention).

While the EAT dismissed Fasano's appeal on the grounds of a legal technicality, it found the tribunal's assessment of the amendment to the 2016 awards was wrong. The EAT noted that making the alteration of existing awards contingent upon being in employment as at September 2019 was not a "proportionate means" of achieving a "legitimate aim" and held that this conditionality was self-defeating, as participants who had already left the business could not be retained. The EAT considered that the only real reason for amending the terms of the 2016 awards was to save money and, in the absence of any pleadings from RBG to that effect, the changes could not be justified, and that Fasano had been unfairly disadvantaged.

The EAT's commentary serves as a reminder that employers should consider potential discrimination against classes of employees (or former employees) when amending plan rules or awards. The law in this area is still evolving, so **we recommend** that employers who find themselves in a similar position should contact us for specific advice given their particular circumstances.

Who to contact

Peter Simeonidis
Partner, Global Equity & Incentives Leader
+1 (212) 436 3092
psimeonidis@deloitte.com

Anita Grant
Partner
+44 (0) 118 322 2861
anigrant@deloitte.co.uk

Stewart Williams
Partner
+61 7 3308 7301
stewwilliams@deloitte.com.au

Deloitte.

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