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Q&A

Please provide a brief overview on how an ESOP in a start-up is usually structured in your jurisdiction (of particular interest: virtual or real participation programs, market practice with regard to vesting, participation (exits, proceeds and dividends) and voting rights).

HPP Attorneys, Finland: As of 1 Jan 2021 the new ESOP regime came into force. Under the new regime employees are able to subscribe for shares in their employer company at net asset value without triggering any tax at subscription. The new regime does not cover publicly quoted companies and employees of subsidiaries. The new regime applies only if majority of the employees are able to participate and if shares are allocated between the employees based on objective criteria such as annual salary. This is to say that the new regime does not usually apply to top management only, but tax planning is possible to fulfil the respective requirements. As the new law is fairly new, our experience is somewhat limited, but it is our view that only real participation is used (as virtual participation schemes are regarded as salary), heavy vesting and/or good/bad leaver and/or tag/drag along terms are included. Typically employees are given full economic rights of an shareholder, but are in some cases denied voting rights.

Please provide an overview of the respective tax situation an employee finds him-/herself in when he/she participates in a real/virtual equity investment program (applicable taxes and approximate tax burden (a) at the time of the investment and (b) at the time when revenues therefrom are received).

HPP Attorneys, Finland: (a) Subscription of shares at net asset value does not trigger any tax under the new ESOP regime. Under previous ESOP regime the difference between fair market value of the shares and the subscription price was taxed as earned income. (b) The tax advantage of the new ESOP regime for an employee is the postponement of taxation until exit at which time taxation will be assessed as capital gain at 30/34% capital tax rate. No earned income taxation will take place.

Are there any tax advantages for an employee if the revenues based on the equity investment are reinvested in start-ups or other companies?

HPP Attorneys, Finland: No. In case these proceeds are reinvested into another start-up or any other company, such an investment is to be done at post tax funds, no tax regimes apply.

Are there any tax advantages for the company if an ESOP is established in the company?

HPP Attorneys, Finland: The share issuance does not trigger any tax or social securities for the company if done at minimum at net asset value. The benefit is factually coming from the existing shareholders in form of dilution. Under the previous scheme the company was liable to withhold payroll tax and pay social securities to the extent the share was subscribed at undervalue.

Please highlight one pro and one con of the legal set up with regard to ESOPs in your jurisdiction.

HPP Attorneys, Finland: Pro: The value of share subscription is now stated in law and there is no need to evaluate fair market value.

Con: Majority of the employees have to have right to participate in the share subscription. However, this can be mitigated by applying investment terms which would not in practice limit the number of participants. Also, the fact that shares can be allocated between the employees based on their value-add to the company can mitigate the majority participating requirement.