

## The new profit-sharing bonus

In October 2020, it was decided to abolish the tax regime for stock options and warrants. This decision entered into force as from tax year 2021, thus putting an end to a preferential tax regime which made it possible to reduce the taxation of variable remunerations.

A new regime called "**profit-sharing bonus**" has been introduced in parallel to this repeal. The new **Article 115, 13a of the Tax Code**, introduced by the **Act of 19 December 2020**, now offers employers the possibility to pay their employees a bonus that can be **tax exempted up to 50%** provided that certain conditions of application are met.

### I. Conditions of application of the bonus

Thanks to this new bonus scheme, an employer can pay a profit-sharing bonus to one or more employees, **whom he can freely choose**, with the advantage of obtaining a **tax exemption of 50%**.

By employer, we mean the party registered as such in the files of Inland Revenue for a given employee. For the employee, it is therefore the entity to which he is bound by an employment contract. Any consideration of the "group" context is to be excluded.

*The amount of this exemption is however capped at two levels:*

- On the one hand, the employer must make profits and the total amount of bonuses paid to employees must not exceed **5% of the profit** of the previous financial year;
- On the other hand, the bonus may not exceed **25% of the employee's gross annual remuneration** during which the profit-sharing bonus is allocated.

#### A. What about the company's profit?

The new Article 115, 13a of the Tax Code stipulates that **the employer must generate income** (commercial, agricultural and forestry profit or from a licensed profession) and **keep regular accounts** during the tax year in which the bonus is granted as well as during the previous year.

In addition, **the sum of the profit-sharing bonuses that an employer can grant to his employees and on which he can apply the 50% exemption, is limited to 5% of the positive result** of the operating year that immediately precedes the one for which the profit-sharing bonus is paid. Thus, the result of the last operating year closed before 1 January of the year in which the profit-sharing bonus is paid

should be considered. For bonuses paid in 2021, the results of the year 2020 must therefore be taken into account.

A positive result means the employer's net profit as shown on the last balance sheet closed before January 1 of the year in which the profit-sharing bonus is paid to the employee. In the case of a commercial company, the commercial profit after deduction of taxes should be considered (i.e. the result of the financial year as shown in the 142 account).

## **B. Calculation of the limit of 25% of the employee's gross annual salary**

The new Article 115, 13a of the Tax Code stipulates that the 50% exemption applies only to the part of the bonus that does not exceed **25% of the employee's gross annual salary** during which the bonus is paid.

If a profit-sharing bonus is paid during the year, a **foreseeable annual salary** will have to be calculated so as to verify the 25% limit. This estimate must be made on the basis of all data available up to that point or likely to have an impact on the amount of the beneficiary's remuneration during the year.

*To calculate the 25% limit, the following must be considered:*

- The ordinary gross salary;
- As well as any possible constituent element of this ordinary gross salary such as overtime, period bonuses, etc.

*Conversely, the following are excluded:*

- Cash benefits such as bonuses, 13th month, interest rebates, travel expenses, reimbursement of expenses, etc;
- Benefits in kind;
- And the amount of the profit-sharing bonus itself.

### **1) What about the profit-sharing bonus exceeding 25%?**

In the event that an employee is granted a bonus exceeding the limit of 25% of his or her annual salary, only the amount within this limit will be eligible for a 50% tax exemption. The balance of the bonus will therefore be fully taxable as non-periodic income.

### **2) What if there is a change in salary during the year?**

Any salary adjustment during the year, after payment of a bonus, that has an impact on the 25% limit will result in an adjustment of the tax withheld by the employer to the extent that the exemption granted were too high.

In practice, when a bonus is paid during the year, the employer will have to make a projection of the employee's annual salary in order to calculate the 25% limit. Different situations may give rise to adjustments of the annual salary, however: dismissal, resignation, retirement, change of working hours, etc.

Once the change in the employee's annual salary impacts the 25% limit therefore, the employer will be required to recalculate the tax withholding by considering the annual salary finally paid to the employee.

*Example:*

An employee receives a monthly salary of €4,000.

In March 2021, his employer pays him a profit-sharing bonus of €10,000. At that moment, his foreseeable annual salary for 2021 amounted to 48.000€ (= €4,000 x 12). Based on this projection, the 25% limit corresponds to €12,000 (= €48,000 x 25%) and the maximum exemption limit amounts to €6,000 (= €12,000 x 50%).

Therefore, in March 2021, half of the profit-sharing bonus (€5,000) could be paid out tax-free.

A few months later, the employee resigns and his last day of work is set for 31 August 2021. It is therefore necessary to check whether the limit of 25% of his annual salary is still met.

From January to August 2021, the employee's annual salary corresponds to €32,000 (€4,000 x 8). The 25% limit is now €8,000 (= €32,000 x 25%) and the maximum exemption limit is €4,000 (= €8,000 x 50%).

As the employee is leaving, only €4,000 could be exempted, so the profit-sharing bonus will have to be recalculated in order to tax the difference of €1,000 (=€5,000 - €4,000).

**Good practice:** In order to avoid such a situation, we advise you to pay the profit-sharing bonuses at the end of the year.

### 3) Can an existing bonus be replaced by a profit-sharing bonus?

The tax exemption foreseen for this bonus makes it more attractive than an ordinary bonus, which is fully taxable. Companies may therefore be tempted to replace an existing (contractual or vested) bonus with a profit-sharing bonus.

**An amendment** to the contract will consequently have to be drawn up. In the absence of such an agreement, in fact, the employee could claim, in addition to this new bonus, the payment of his or her contractual bonus or the one related to a vested right. The aim is therefore to spare the employer from being faced with such a situation.

It is therefore imperative that the employee **agrees** that he or she is no longer entitled to his or her contractual bonus and that he or she will now receive a profit-sharing bonus.



If the profit-sharing bonus replaces a vested right of the employee, the latter will have to acknowledge in the amendment that the bonus he or she used to get was discretionary, that it was not an acquired right and that he or she will now receive a profit-sharing bonus.

## II. Communication of the bonus to Inland Revenue:

In order to obtain this 50% exemption, the employer is required to inform Inland Revenue accordingly by electronic means, at the time the profit-sharing bonus **is made available**.

This notification must be made by means of a predefined excel file to be requested beforehand from the relevant office for tax withholding on wages and salaries. In this file, the employer must indicate inter alia the result of the previous year, the foreseeable gross annual salary of the employee and the maximum exemption limit.

This secure transmission method is **mandatory**. In the absence of such transmission, the exemption cannot be granted and an adjustment will be made in the event of a tax audit of the company.

**Please note** that Securex can take care of the calculation of the 25% limit, the application in the payroll and the communication of this profit-sharing bonus to Inland Revenue. Please do not hesitate to contact us.

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