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EMI OPTIONS; CREATING ELEGANCE

28 JUNE 2022

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The EMI question in front of me

- How do you put right:
 - Missing documents
 - Missing declarations
 - Minor mistakes or
 - Amend level of detail

Missing documents

- What's missing?
 - No Plan Rules?
 - No signed Award Certificate?
- All a question of evidence
- Any contemporaneous indications that it existed? Email communications, RNSs, accounts, Form 40s
- NB Paragraph 37 Sch 5 ITEPA; must be in writing and must refer to Sch 5.

Missing declarations

- Committed Time declaration
- Para 44(6) Sch 5 ITEPA; company must have Optionholder's declaration: 25 hours per week or 75% of working life.

- Hard if never given (strict legislative requirement)
- What if this is 2nd option, can 1st declaration bless you?
- What if clear employee works 25 hours plus?

- We have suggested it be removed but to no avail

Missing restriction notification

- This change took us all by surprise (28 July 2016)
- Restrictions stated in accordance with HMRC's guidance in force at the time of grant will be considered to be acceptable
- Evidence restrictions have been brought to Optionholder's attention in a meaningful way at or near the date of grant
 - HMRC to QCA "HMRC is not aware of any options that have yet been disqualified for this reason." 17 February 2018
 - Failure to state a trivial restriction will not be a compliance issue
 - Exit only options; HMRC relaxed

What are common restrictions?

- Reference the economic rights (probably not a restriction but money is key and doesn't hurt)
- Can directors refuse registration
- Do you have to offer shares around before you can sell them
- Compulsory sale of your shares
- Conversion of your shares
- Pre-emption rights
- Drag [and tag] rights
- If the company is listed; hard to say there are restrictions (lock in???)

Faulty EMI contracts

- Must refer to Schedule 5
- Death plus one year
- Inappropriate Performance Conditions
- Cashless Exercise
- Hard First Exercise Date
- 1% of the company

- Must be in writing

Faulty EMI contracts; what have I corrected

- ~~○ Must refer to Schedule 5~~
- ~~○ Death plus one year~~
- ~~○ Inappropriate Performance Conditions~~
- ~~○ Cashless Exercise~~
- ~~○ Hard First Exercise Date~~
- ~~○ 1% of the company~~

- Must be in writing

Amending contracts

Eurocopy

“the tax advantaged share option scheme legislation contemplates a right

- to acquire a specified number of shares,
- at a specified price,
- within a specified time span.

If [e.g.] the time span is altered, so the right is altered”

Rectification but make sure you go to High Court otherwise just between Company and Optionholder and tax advantage is lost

What does the future hold?

- HMRC are considering discretions but HMRC cannot go beyond the law
- Draft guidance in circulation; should be published by the Autumn???

Top tips in drafting EMI Share option contracts

- Plan Rules
 - Negotiation of terms less likely
 - Probably easier for client to roll-out (without me)
- Stand alone Contract
 - Easier for Optionholder to understand terms
 - Hands not tied
 - Requires Optionholder to physically sign

EMI 9 things to check

1. Does it refer to Schedule 5 ITEPA?
2. Is there any comfort the Options have been notified to HMRC?
3. Check the number and class of shares (do they even exist)?
4. Can you have a cashless exercise (or is the exercise price so low it doesn't matter)?
5. Is there a valid exercise trigger?
6. Who is paying any tax / employer's NIC?
7. Has there been a disqualifying event?
8. Are the options in the money?
9. Has a valuation been agreed with HMRC and was it on the basis of cards up?

HMRC

- Credit where credit is due:
 - They actually give an answer
 - They respond quickly
- Enquiry powers
 - 12 months after the end of the 92 day notification period;
or
 - Longer if information in the notification of grant is false or misleading in any material respect
- Are you feeling brave?

What's happening today?





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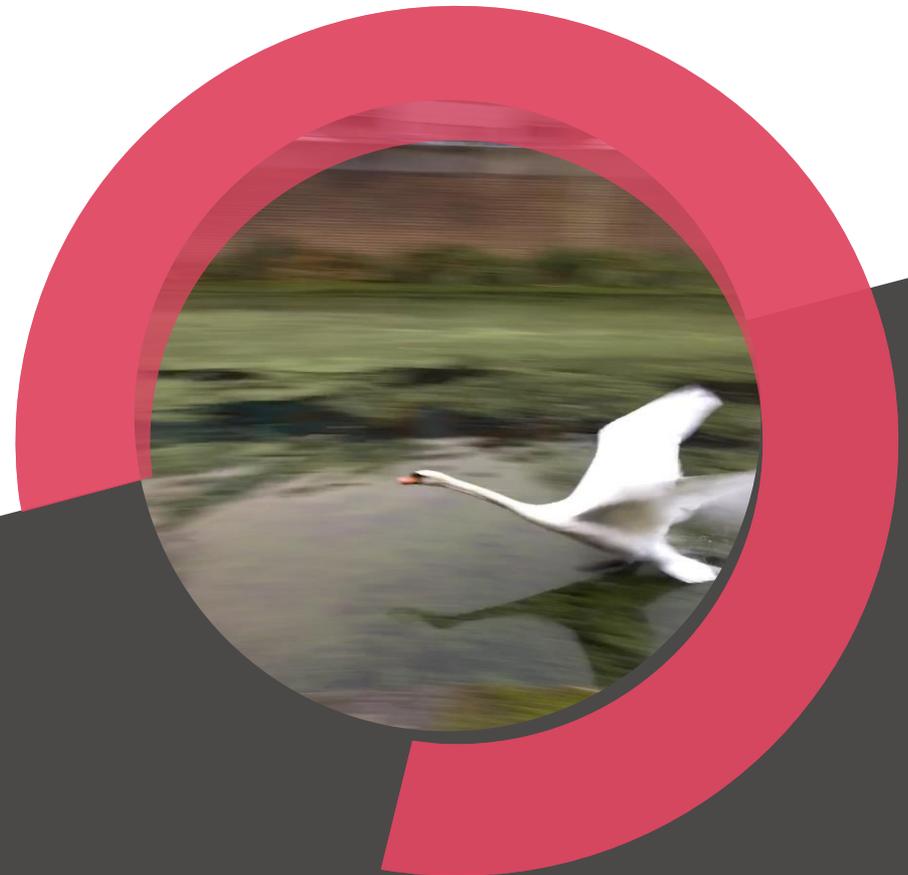
QUESTIONS

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