

# EMI Deal Optimisation

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# EMI Deal Optimisation

- ▶ How to deal with due diligence with respect to Enterprise Management Incentive (EMI) share plans; focusing on
  - ▶ tax status pitfalls, particularly with regard to
  - ▶ past actions and
  - ▶ exercise of discretion

# Who are you acting for? (part 1)

- ▶ If acting for the Vendor, try to get ahead of the game.
- ▶ Do some Vendor DD into the Plan;
- ▶ If mistakes have been made it may not be too late.
- ▶ Pre-heads it might be possible to regrant the options:
  - ▶ ~~Entrepreneurs'~~ relief BADR and valuation issues.
- ▶ Even after the heads, all is not lost. Consider approaching HMRC.

## Who are you acting for? (part 2)

- ▶ If acting for the Buyer, almost inevitably too late to regrant.
- ▶ Strategic Questions:
  - ▶ How important are the Optionholders?
  - ▶ What is the value of the shares under option?
- ▶ Not all issues are black and white.
- ▶ Follow the money!

# Tax Status Pitfalls

- ▶ Fatal plan drafting errors.
- ▶ Notification errors.
- ▶ Implementation errors.
- ▶ Issues because it's a group.
- ▶ Qualifying trading issues.

# Are we looking for perfect?

- ▶ What can you live with?
- ▶ Who is bearing the risk?
- ▶ Can you / would you sue them?
- ▶ Consider the tax covenant (trap for Vendors in the recovery from third parties clause).
- ▶ W&I.
- ▶ Specific insurance.

# Articles of Association

- ▶ Summary of restrictions given to each Optionholder. (One of two reasons why I prefer a contract over plan rules.)
- ▶ What is the right summary?
- ▶ Have the articles been amended to change value of the shares under option?
- ▶ Let's been nice to each other (trying to spot the changes can be hard without DV).

# Discretion

- ▶ Frequently all options are exercisable on an exit so discretion is irrelevant.
- ▶ Otherwise you need to see if Directors / Rem Com have a discretion to allow full exercise.
- ▶ EMI Guidance is surprisingly generous but you need to find a hook in the plan itself.
- ▶ Usually focus on current employees.

# M&A Discretion example

- ▶ Option granted over 10,000 shares:
  - ▶ 5,000 vest if Exit is in range of £10m to £50m; and
  - ▶ 10,000 vest if Exit is above £50m.
- ▶ Exit Price is £25m.
- ▶ Discretion in plan / option contract? (assume yes)

# HMRC Guidance ETASSUM54350

- ▶ Example 3, Alternative 1 Does this change impact when the option can be exercised?
- ▶ Alternative 2 “only the rate at which the option vests... when the holder may exercise the option has not changed, meaning there would be no change to the fundamental terms of the option.”

# Previous exercises

- ▶ Generally outside PAYE so deal irrelevant.
  - ▶ Unless eg if it's a public takeover of an AIM company.
- ▶ Don't forget section 431 notifications.
- ▶ Do you have to advise the Optionholders (generally not within your retainer)?

# Sabbatical Caveat

- ▶ Nothing in this presentation nor the accompanying talk including answers to questions and chat over coffee constitutes legal, financial or tax advice.
- ▶ Tax is tricky and you should always take fact specific advice before acting or deciding not to act.



Questions?