AUGUST 3, 2012

IRS provides sample Sec. 83(b) election form

Payroll usually doesn't withhold income and FICA taxes from employees who receive restricted stock until the restriction lapses and the stock vests. Under Section 83(b), however, employees can opt to have taxes withheld currently, long before the restriction lapses.

The IRS has now provided sample language for an 83(b) election, but using the sample is up to you. The IRS has also clarified the tax consequences of 83(b) elections. *(Rev. Proc. 2012-29, IRB 2012-28)*

Tax me now, please. Employees must file 83(b) elections with the IRS and their employer within 30 days of receiving restricted stock or other property. That triggers your obligation to withhold income and FICA taxes.

Taxes aside, making an 83(b) election isn't as illogical as it seems.

Employees must still satisfy the terms of the restriction, which apply even after 83(b) elections are made. If they do, and the stock vests, all additional appreciation is taxed at lower capital gains rates. Not a bad deal, especially if you believe the stock will increase in value when it vests.

Of course, employees don't always satisfy the restriction.

Example. In 2012, Eli receives 25,000 shares of company stock worth $25,000, for which he pays $25,000 (the stock's fair market value).

If Eli's employment terminates before 2014, he must sell the stock back for the lesser of its current fair market value or $25,000. If Eli *doesn't* make an 83(b) election, he has no payroll-taxable income until the stock vests. If he remains employed until 2014, the stock vests and the difference between the stock's fair market value at vesting and $25,000 is fully taxable as wages to Eli.

If Eli makes an 83(b) election, he's taxable on $0 in 2012, since he paid the fair market value for the stock—$25,000. *Result:* If he remains employed until 2014, the stock vests, but no payroll taxes are due, since he paid them (even though he paid $0) in 2012. Any later sale results in a capital gain. *Flip side:* If Eli's employment terminates in 2013, he must sell the stock back for the lesser of $25,000 or the stock's current fair market value. If the stock is worth $30,000, he doesn't have a capital gain on the sale of the stock.

Sample language. All 83(b) elections must include these standard elements:

- The employee's name, address and Social Security number
- A description of the property with respect to which the election is being made
- The date the property was transferred and the taxable year the election is made
- A description of the restriction
- The property's fair market value at the time of transfer, determined without regard to the restriction
- The amount, if any, the employee paid for the property
- A statement that copies have been furnished to the employer and the IRS.

Using the IRS' sample 83(b) election isn't mandatory. The sample language is available at

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http://tinyurl.com/83-b-sample. (Scroll down to page 9.)

Changes to make: Replace bracketed items and blanks with applicable information about the employee. An election with respect to property other than stock—stock options, for example—must include a description of the property in item 2 and modifications to items 5 and 6, as necessary.

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