1. Introduction

There is frequent debate over the question of entitlement to a bonus on top of a fixed salary, whether or not an employment relationship is under notice of termination. From a legal point of view, the decisive factor is whether the agreed bonus constitutes owed salary (variable salary component) within the meaning of Art. 322 of the Swiss Code of Obligations (CO) or a voluntary extra allowance in accordance with Art. 322d CO. In practice, the legal classification or differentiation is primarily based on an interpretation of the written or verbal agreements between the parties (typically, the employment contract, bonus regulations, stock option plans, etc.) relating to the contested bonus payment or the granting of other financial incentives such as shares and options. It has also long been standard practice to recognize contracts implied from a company’s customary conduct (remuneration history) as well as the principle of accessoriness, i.e. the ratio of the bonus payment to the fixed salary.

2. Differentiating criteria

Consequently, according to the established practice of the Federal Supreme Court, the relevant parameters for the concrete assessment of whether a bonus qualifies as a (variable) salary component or an extra allowance are:

- reservation of discretion and voluntariness;
- regularity of payment;
- accessoriness.

2.1 Reservation of discretion and voluntariness

Essentially, the difference between salary and extra allowance lies in the fact that an employee has a legal entitlement to a salary (i.e. payment by the employer is not on a discretionary or voluntary basis), whereas an extra allowance is paid at the employer's discretion (reservation of voluntariness). If an employer can exercise discretion regarding both whether to make a payment and regarding the amount, the extra allowance is considered to be genuine; if the employer's discretion is restricted solely to the amount of the payment, the extra allowance is non-genuine. The yardstick for assessing the degree of discretion is whether the payment can be determined or calculated according to objective criteria (mainly numerical values) or whether it is based on subjective criteria (above all, the employee’s individual qualities or achievements as perceived by line management). While objectively definable elements tend to suggest salary and subjective elements point more to an extra allowance, a variable salary frequently constitutes a combination.

2.2 Regularity

The Federal Supreme Court found that continuous unconditional payment of the full bonus during a span of three years or regular, continuous payments over a prolonged period (more than ten years) on a non-discretionary basis can, regardless of any corresponding reservation, establish a legal entitlement in the case in question and cause an extra allowance to be reclassified as salary (cf. Federal Supreme Court Decision 131 III 615).
2.3 Accessoriness

According to the Federal Supreme Court, a bonus only qualifies as a voluntary payment - and therefore as an extra allowance - if it is remunerated in addition to the fixed salary (i.e. it is accessory) and thereby appears to be secondary to the salary. By contrast, the condition of accessoriness is, as a rule, not fulfilled if the bonus regularly exceeds the amount of the fixed salary (cf. Federal Supreme Court Decision 129 III 276). However, the Federal Supreme Court has to date not defined a generally applicable ratio between fixed salary and extra allowance or the maximum permissible bandwidth. Irrespective of or contrary to the will of the parties, the principle of accessoriness only applies if a reservation of voluntariness has been asserted (since otherwise a salary entitlement will exist).

Recent case law has provided further clarity here and relativized the principle of accessoriness to some extent. For instance, the Federal Supreme Court ruled that in the event of a violation of the principle of accessoriness, the bonus is generally to be reclassified as salary only in an amount sufficient to restore accessoriness (i.e. the rest of the bonus still qualifies as an extra allowance, cf. Federal Supreme Court Decision 139 III 155). In the same decision, it was also held for the first time that in cases where very high incomes clearly guarantee the employee's economic existence and significantly exceed his or her living costs, the absence of a need for protection as afforded under labour legislation means that accessoriness is no longer taken into account as a differentiating criterion. The most recent Federal Supreme Court Decision of 11 August 2015 (4A_653/2014) provides a concrete definition of "very high income" as an annual income which is at least five times higher than the median of all Swiss salaries (and not managers' salaries) in the private sector. Multiplying the current median of approximately CHF 5,900 a month by five produces an annual salary of around CHF 355,000. The Federal Supreme Court stipulated that for the purposes of comparison against the median income, those salary payments are factored in which are effectively made to an employee within the space of a year (fixed salary and bonus). This latest Federal Supreme Court decision also lays down that where precedent deems a level of income to be very high, the individual living costs will not be factored in and the principle of accessoriness will no longer apply (not even partially). Conversely, it can be inferred from this that the principle of accessoriness will at all times continue to apply to incomes below the defined salary threshold. This means that for the majority of employees in Switzerland who are entitled to a bonus the difficult question of differentiation remains and with it the uncertainty regarding a concrete claim to a bonus and how high it will be.

3. Conclusion

As a "rule of thumb", we can conclude from the Federal Supreme Court judgments that extra allowances may represent a larger percentage of the remuneration paid to employees in a high income bracket than for those whose salaries are on the lower side. Based on this, we can also reasonably assume that the higher the fixed salary, the lower the risk of an extra allowance being reclassified as salary. Such a risk cannot be ruled out entirely for very high incomes as defined by the Federal Supreme Court (i.e. currently CHF 355,000 or more p.a.) - naturally, always under the fundamental assumption that the employer has in all such cases stipulated appropriate reservations of voluntariness and discretion and effectively asserted them. Besides, the specific circumstances of each individual case are always the deciding factor. Generalizations and rules of thumb should still be met with caution.

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