

Research and Development Consultative Committee Minutes

Friday 8 December 2017

Venue: The Churchill Room, 100 Parliament Street, 1pm to 4pm

Present: Adam Kene, Adam Spriggs, Alexis Marz, Andrew Oury, Anthony Lalsing, Barrie Dowsett, Carol Johnson, Colin Hailey, Daniel Murray, Darryl Hoy, David Humphrys, David Clift, David O'Keeffe, David Ward, Gavin Bate, Guang Deng, Ian Rowland, James Ainsworth, James Boughton, James Rylatt, James Tetley, Jennifer Tragner (JT), Jinjing Wang, John Moore, John Moxon, Kathie Haunton, Laura Duggan, Lauren Wilson, Lisa Baum, Margaret Savory, Maria Kitt, Mary Tierney, Neil Taylor, Paul Barton, Paul Mann, Peter Denison-Pender, Peter Jelfs, Rachel Moore, Richard Lewis, Richard Thorpe-Manley, Rob Allan, Ron, Sheena King, Steve C Burgen, Steven Levine, Stuart Weekes, Teresa Latch, Terry Toms, Thomas Hayden, Vanessa Cooper, Vincent Walker, Robert Perrin, Chris Knott, Sam Stephens, Richard Turner, Tony Brett, Frances Pickworth, Aidan Reilly (AR), Ruth Froggatt (RF), Philip Hamblin (PH), David Harris (DH), Jane James (JJ), Sue Fawkes (SF), Vince Walker (VW), Steve Williams (SW), Mark Preston (MP), Patrick Gallagher (PG), Andrew Culley, Julia Neate

1. Introductions

AR introduced himself and the delegates, and thanked delegates for their attendance. He noted that members of other government departments were present, as well as other stakeholders such as professional bodies.

He noted the addition to the agenda of an explanation of progress made in rolling out a digital form for applying for research and development (R&D) tax relief, and thanked Jennifer Tragner of Forrest Brown for her assistance with this session.

2. Annual Office of National Statistics report

PH drew delegates' attention to the fact that the R&D Tax Credit statistics covering claims which relate to accounting periods ending in the year to 31 March 2016 had been issued in September 2017. The statistics cover claims received by 30 June 2017, and the figures will be updated for later claims when the 2017 statistics are issued in September 2018.

The number of claims, 26,255 is up by 19%, primarily due to a 22% increase in claims within the Small and Medium Enterprise (SME) scheme, which now total 21,865. About one third of these SME claims were from first-time claimants. Support provided by the schemes is up 20% to £2.9bn (an increase of £.47bn). The government's aim has been to increase the visibility of the SME scheme, so HMRC is happy with this increase. PH noted that this increase appears to have continued through the rest of 2017 and as a result the team is dealing with a lot of claims, so please bear with them if a claim is taking longer to process than expected.

PH also noted in response to a delegate comment that the statistics record a location of London for many of the claims; this indicates the registered office address of the companies concerned, and not necessarily where the R&D is actually taking place.

The web address for the R&D Tax Credit statistics is as follows:

<https://www.gov.uk/government/statistics/corporate-tax-research-and-development-tax-credit>

DH briefly introduced the recent Patent Box statistics release, explaining that they continue to show that take-up of Patent Box is very much in line with projections made when the relief was introduced. As yet, there is insufficient data to be able to gauge the impact of the introduction of nexus principles; the assumption was that this would reduce the cost of Patent Box, but not by much. Future statistics will be used to gauge the impact.

The web address for the Patent Box statistics is as follows:

<https://www.gov.uk/government/statistics/patent-box-reliefs-statistics>

3. WMBC ISU update

SF provided a brief operational update, including a reminder to file online to facilitate quicker turnaround. She noted that the next six months will represent the peak period for claims and will present HMRC with a resource challenge. Delegates were encouraged to help ensure claims are processed swiftly by providing the necessary information up-front, and responding promptly when asked for extra evidence.

A change to guidance at CIRD 80525 was brought to delegates' attention. This has been introduced to manage increased risks operationally.

SF then addressed two investigations that had recently received press coverage. One related to an ongoing case for suspected fraud involving £300m. The other concerned three men who had been involved in a series of elaborate frauds; the director of the company concerned was sentenced to 8 years in prison.

A delegate asked a question about advice from the Institute of Chartered Accountants of England and Wales suggesting that a company could submit an estimated amount for their claim if they are coming to the deadline for doing so and do not have enough time to make an accurate calculation. The delegate asked whether this was permitted, and the consequences of the figure being incorrect.

PH explained that if an estimated is made, this should be made clear in the corporation tax self-assessment (CTSA) claim. A box is provided on the first page of the CTSA for this purpose. If the estimate is too high this could lead to penalties applying for an incorrect return. If the estimate proves to be too small and the time limit for amending the claim has passed any increase in the claim can only be made through the late claim procedure (the claimant would be relying on the legislation at paragraph 83E(2) of Schedule 18 Finance Act 1998 and the late claim procedure (Statement of Practice 5/01)). He noted that advice on this point was provided by the Institute of Chartered Accountants of England and Wales, and that HMRC's expectation is that an estimate should be as accurate as possible. He added that he was not aware of any penalties that had been imposed due to estimated amounts being submitted as part of an R&D claim.

Another delegate asked whether there is any intention to impose different timescales for response depending on the nature of the claim. SF explained that HMRC is applying the same timescales to all claims, but that certain claims may need to be dealt with as a priority on a case-by-case basis. She added that all online claims are processed through the same system.

A delegate gave feedback that queries about whether a company is a going concern are not handled as smoothly as they could be. The delegate said that HMRC guidance on this issue was insufficiently specific, whereas the accounting standard was very specific, and this discrepancy was causing operational issues. PH asked the delegate to provide further detailed by email at a later date.

4. Evaluation of SME Advanced Assurance Scheme

RF explained that the project team for this work was now in place. The evaluation will consider both quantitative and qualitative aspects of the operation of the scheme to date, and identify areas for improvement or refinement.

Insight will be sought from various sources to inform the review, including scheme participants and RDCC members.

A question was asked regarding the timescale for the evaluation and RF replied that the intention was that the review be completed in time for recommendations to be fed into Autumn Budget 2018.

5. Autumn Budget

RF outlined the measures announced at Autumn Budget, which were: an increase in the rate of R&D Expenditure Credit (RDEC) from 11% to 12%, effective from 1 January 2018; the potential introduction of an Advanced Clearance service for large business RDEC claims following a pilot process; and the launch of a campaign to increase awareness of eligibility for R&D tax credit among SMEs.

RF explained that the awareness campaign will be case study-based and will be focussed on eligibility in relation to key emerging technologies.

6. Software and emerging technologies

RF outlined plans to form an RDCC subcommittee to identify commonly encountered 'grey' areas in software claims, examine how guidance relating to these areas can be created or improved and consider experiences of successful claims in areas of key emerging technologies. This ties in with the Autumn Budget announcement to increase awareness of eligibility for R&D tax credit among SMEs.

The subcommittee will provide material that HMRC will use to draft case studies based on successful claims, to enhance existing guidance. The group will not be considering any changes to the R&D guidelines.

The next steps will be for the group membership to be confirmed, with an initial meeting to be arranged in early 2018.

Discussion followed during which RF confirmed that the Chief Digital and Information Officer Group (CDIO) would be involved, as well as sector bodies. She invited suggestions for members and agreed to consider these. Cloud services were mentioned and RF confirmed that this could be the sort of area where clarification of the guidance could be achieved through case studies. She also confirmed that other digital technologies, and not solely software, could be considered by the group.

7. Patent Box update

JJ thanked the RDCC for incorporating Patent Box issues into the meeting and packed agenda, and noted that a slot on Patent Box would be a regular feature of RDCC meetings going forward.

She explained that data from the Intellectual Property Office (IPO) showed that over 14,000 patent applications had been made from UK companies and over 2,500 patents had been granted to UK companies in 2016. There were around 1,200 entrants into the Patent Box in 2014-15, according to statistics on Patent Box provided on GOV.UK. JJ noted that it is clear there is some way to go to raise awareness of the Patent Box scheme.

JJ said that previous speakers had mentioned the increase in R&D expenditure, and said that the intention of the Patent Box was to provide an incentive for successful R&D to be commercialised through UK companies. Reasons for failing to elect into Patent Box at an early stage include: fear of the complexity of the process; the fact that agents' fees may exceed the benefit for the smallest companies; and, for loss-making companies, the benefit offered through reduction in the rate of Corporation Tax (CT). However, JJ noted that this is not a static sector; small companies with a successful, patented product could quickly become the large companies of tomorrow, and it is therefore recommended that they start putting effective record-keeping processes in place now to ensure they can make Patent Box claims more easily once they are profitable.

JJ observed that, having compared the list of agents attending the RDCC with Patent Box records, 63% had made no elections for any of their clients. Therefore, instead of talking about technical issues, JJ invited an agent who had made Patent Box elections (VW) to talk about his experiences.

VW's presentation was based around the different steps of the Patent Box computation.

He explained that he had found that it did take some preparation to go through the Patent Box computation, and he could see why this might be off-putting. However, he found HMRC's Guidance to be helpful (CIRD200000+) and observed that once the client's first claim was in place, it was generally the same for future years.

VW then talked through the computation steps.

He explained that it is necessary to identify the client's qualifying IP rights, which are usually patented items. The starting point for that is to talk to the client to identify related income, and from that the amount of relevant profits. Streaming is often a good approach, if the patented item commands a higher mark-up than other items. The new regime always requires companies to stream their income.

It is then necessary to exclude from the amount of relevant profits any return which is connected to routine production. This is the 'routine return' which companies would achieve without patents, and is a formulaic calculation, explained in the Corporate Intangibles Research and Development Manual.

He explained that it is also necessary to exclude returns made from marketing assets; this involves reference to transfer pricing, and may appear complex and confusing. However, where a company's trade is generally 'business-to-business', or the company has no 'brand' as such, it is quite likely that the marketing assets return figure would be nil.

VW noted that the new OECD nexus fraction is another aspect of the calculation that adds complexity. However, it is not relevant in every case, so consider whether it affects your client's computation. For example, if the company is entirely UK-based and does its own R&D work (or subcontracts to third parties), then the R&D fraction would be 1. That would mean no reduction of Patent Box profits and no complex calculations. The fraction is really only a consideration for companies with complex structures.

He went on to consider 'tracking and tracing' of R&D expenditure. If the R&D fraction is clearly going to be 1, then tracking and tracing is not necessary; however, it is important to ensure that records are arranged in advance to identify whether there will be a reduction in the Patent Box benefit and, if so, what that reduction will be.

VW ended by summarising hints and tips on considering whether a Patent Box election may be beneficial. He suggested considering:

- Existing structures, to determine whether the company has patents and where its patents/IP are held
- Whether the company's IP and R&D function are in the right place
- How the company is going to match revenues to patents in future, and how to ensure this is done on a just and reasonable basis
- How the company is going to track and trace R&D spending in future
- Whether there is likely to be a marketing asset return, considering this is likely to be nil for business-to-business companies

He said that it may not be worth making a claim if the company is loss-making, or if the company receives low margins on the patented products (as the routine return is deducted from the relevant profits).

8. Technical issues

PH covered four technical issues:

- The interaction of GBER and s1138 subsidy rules
- The definition of an 'enterprise'
- An avoidance scheme involving R&D relief
- CT loss rules

Interaction of GBER and s1138 subsidy rules

PH spoke first about how aid subject to the Grant Block Exemption Regulations (GBER) interacts with the subsidy rules at s1138 CTA 2009. There were mixed views on this point at an earlier meeting of the RDCC, so PH wanted to make HMRC's position on the matter clear. He explained that s1138 (2) tells us:

'In this section "notified State aid" means a State aid notified to and approved by the European Commission'

First PH examined how widely the concept of State aid is drawn, drawing on Article 107 which can be found in the consolidated version of The Treaty on the Functioning of the European Union and reads:

'Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.'

PH went on to examine the reporting rules within GBER, specifically Article 11 and Annex II, explaining that there was an electronic notification system and showing the delegates a blank copy of Annex II. He then noted that whilst GBER generally allows for electronic notification after the event there are circumstances where earlier evaluation is required, for example see e.g. paragraph 8 of GBER.

From the above PH was satisfied that aid which is the subject of GBER is aid from the state, and that it is both notified to and approved by the European Commission. As such HMRC expects all aid subject to GBER to be treated as notified State aid for the purposes of s1138 CTA 2009.

PH noted that agents should always actively check for aids and other subsidies when drawing up claims, and should not wait for their clients to draw the agent's attention to them. He confirmed that the test for *de minimis* aid is not the quantity of aid received but the type of aid received. For example, the current *de minimis* limit is €200,000 over 3 years, but support of just €5 from a notified State aid is not *de minimis* and would be caught by s1138(1)(a) by virtue of s1138(2) CTA 2009.

In response to a question he pointed out that if the aid received by a client was not clearly documented in the aid documents as *de minimis* aid it should not be treated as *de minimis*.

Definition of 'enterprise'

PH went on to address the issue of whether partnerships are 'enterprises' for the purposes of the SME definition.

He noted that a number of agents have submitted claims where partnerships not covered by Article 3(1) or 3(2)(a) to (d) of the Commission Recommendation (2003/361/EC) were excluded from the SME calculation, along with any staff headcount and financial ceiling which flowed from their involvement with the claimant company. The exclusions have been made on the grounds that the partnerships are not enterprises under the definition in the Commission Recommendation.

PH said that HMRC do not accept this interpretation. (The following relates to UK-registered companies only, for the sake of brevity.) First he looked at Article 1 of Commission Recommendation which reads:

'An enterprise is considered to be any entity engaged in an economic activity, irrespective of its legal form. This includes, in particular, self-employed persons and family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity.'

He then looked at section 1 (1) of the Partnership Act 1890 and, in respect of the Limited Partnership Act 1907 at section 7 of that Act (which points towards section 1 (1) of the Partnership Act 1890).

Finally, he looked at section 2 (1) (a) of the Limited Liability Partnership Act 2000, which is shown below and which contains similar conditions to those which apply to Partnerships and Limited partnerships:

'2 Incorporation document etc.

(1) For a limited liability partnership to be incorporated—

(a) two or more persons associated for carrying on a lawful business with a view to profit must have subscribed their names to an incorporation document'

PH could not envisage a situation where a partnership would meet the conditions in the various partnership legislation which we had just looked at but would, at the same time, not be caught by Article 1 of the Commission Recommendation. No alternative interpretation was offered from those present. As such PH said he did not expect to see partnerships excluded from SME calculations, unless Article 3(1) or Article 3(2)(a)-(d) of the Commission Recommendation were in point.

Avoidance scheme involving R&D relief

PH advised delegates that they may receive queries from clients who have taken part in, or are considering taking part in, an avoidance scheme involving limited liability partnerships and R&D tax relief. This scheme involves partnership losses which are increased by an R&D claim and which are then used as losses by a corporate partner, subject to the corporate partners' interest in the partnership (see CIR 81220).

Delegates are welcome to refer any client involved in, or enquiring about, the scheme to HMRC guidance at the web address below, which includes advice on what happens when a company enters into a tax avoidance scheme and how such a company can get help to settle their tax affairs:

<https://www.gov.uk/guidance/tax-avoidance-an-introduction>

CT loss rules

PH mentioned that a colleague had supplied some advice for an RDCC delegate which he thought might be of interest to other delegates, and agreed to include that advice in the minutes. With thanks to his colleague Claire White, the advice is set out below:

'We don't need a note or an election form, but the losses the company has chosen to use should be shown in the CT600. The CT600 is being updated to include new boxes for carried-forward trading losses and non-trading loan relationship deficits that are set against total profits. Those new boxes are 285 and 263 respectively in the current draft. We also have new box 312 for group relief for carried-forward losses. All three of those boxes will relate only to post-1 April 2017 carried-forward losses. Any other losses should continue to be claimed in the same boxes as are used currently.'

Please note that the relaxation of carried-forward losses as part of the loss reform only applies to losses arising on or after 1 April 2017. In the period that those losses arise, they will be in-year losses and so the existing rules for in-year losses will apply. It is only when the losses arising on or after 1 April 2017 are carried forward to a subsequent period that the relaxation will apply. Therefore no losses should be included in boxes 285 or 263 until the company's second period ending on or after 1 April 2017.

We are not expecting any further changes to be made to the published draft of the CT600, though it is possible that amendments may be made. The form will be finalised after Royal Assent has been granted for the Summer Finance Bill 2017. As at 19 December the following web address will get you to that draft CT600, which also includes the amended supplementary page CT600C and the amended CT600 guide, but please note that at some time this address will cease to apply:

<https://www.gov.uk/guidance/draft-corporation-tax-forms-summary-for-software-developers>

We expect a company to amend its return if it includes a period of time beginning on or after 1 April 2017 and the loss restriction rules have not been applied, i.e. the company has claimed more losses than those to which it is entitled under the loss restriction rules. We have not identified any other situations where we would require a company to resubmit or amend its return. Given that no formal election statement is needed, we wouldn't require resubmission because such a statement was missing.'

9. Large Business update

SW referred to the recent press coverage about 'tax under consideration' by LB on R&D claims. HMRC had responded to a Freedom of Information request and issued a press release. The figures quoted showed a large increase from one year to another. SW confirmed that there had been no new policy concerning LB enquiries into R&D claims, or particular change in approach. While the figures are of course accurate they can be misleading and represent a particular point in time of an ongoing process. It would be inadvisable to try to draw specific conclusions from this data.

SW had been asked for a list of LB R&D specialists recently. SW explained that the preferred communication route for groups dealt with by LB is through the Customer Compliance Manager (CCM). For problems specifically relating to R&D, if the CCM has not provided you with the help that you need – including bringing in an R&D specialist – then agents are welcome to contact SW.

At the July 2017 RDCC SW had invited any agents or LB Customers having trouble getting their LB clients' RDEC payments after more than a 'reasonable time', by which he suggested around 60 days, to contact him and he would try to help. No one has yet come forward, but SW confirmed that the offer remains open.

SW confirmed that the software project was ongoing. R&D specialists continued to gain experience and knowledge in IT as an R&D project, supported by CDIO. Responding to concerns raised by particular agents SW had reviewed the data held, checking for any trends or outliers which might suggest that any particular agent was being treated differently to any other (in terms of R&D claims on software projects). SW found no evidence of this. Indeed, the number of enquiries into software claims by any particular agent matches in a proportionate way with the number of such claims submitted.

10. Digital R&D form update

SW apologised for the ongoing delays with this project. He expressed his disappointment that there was still no working form available on GOV.UK. He had hoped that by this point the team would be assessing feedback and trying to make improvements to a working form. However, there have been issues with the project that have resulted in a delay. SW gave his assurance that the idea had not been 'quietly dropped', but rather revamped in order to better fit with the Government Digital Services agenda. Indeed, the RDCC will have noted the importance placed on the project's eventual success by the amount of time allocated to it at this presentation.

A significant plank of the current work is user research, which is important because it ensures that the project team takes account of all user groups when designing the digital form so that it does the job that is needed, both for customers and for HMRC. In addition HMRC has a completely new team working on the form. Some are HMRC staff and others have been contracted to work for HMRC by our IT partners.

Project lead Mark Preston and user researcher Patrick Gallagher spoke about their work and provided a run through the current version. SW expressed his thanks for the work that Patrick had already done on user research, and also to those agents who have assisted HMRC with continued enthusiasm despite the length of time taken to get this far. SW ran through some of the other roles from the project team, including the architect and the content designer, and explained that other HMRC R&D specialists have continued to have input from time to time to ensure that the project aligns with internal HMRC practice.

Overall, although there have been a lot of changes made and some of these have been very recent (including some made since an email SW sent out in November) the team has not discarded all the earlier work. This work remains the basis for what they are trying to create, i.e. a high quality, consistent and concise R&D report which will present HMRC with sufficient information to swiftly validate claims in the vast majority of cases, or otherwise focus on perceived flaws by way of an enquiry which can be directed straight to the concern, rather than seeking information to inform a more general risk area.

In response to a question, it was confirmed that if tax inspectors ask for more information about a claim, this does not have to be submitted via the digital form.

SW assured delegates that the digital form should help agents provide more services for clients. It is not designed to reduce the need for agents or specialist software providers.

In response to a question, it was confirmed that the digital form will not remove the company tax return filing obligation, but instead will represent an amendment to a CT600 company tax return that has already been submitted.

A delegate asked whether the version seen in July for the user testing would be changed, as there were details in the original that have been missed out of the current version. The delegate asked whether the current version could be circulated for comment. SW replied that the aim is to distil the digital form down to the simplest possible version and that it would not be sent out for general comment again, but instead would now undergo interactive testing.

11. Thanks and next meeting

AR thanked the RDCC for an open and productive discussion.

The next meeting will be hosted in HMRC's new Croydon regional office, from 1pm to 4pm on 4 July. Details will follow. As space will be limited, it will be necessary to ask firms to restrict their attendance to one delegate each.