



## GUIDANCE ON R&D TAX RELIEF CHANGES FROM 1 APRIL 2023

Issued 17 February 2023

ICAEW welcomes the opportunity to comment on the draft guidance on R&D tax relief changes from 1 April 2023 published by HMRC on 20 December 2022, a copy of which is available from [this link](#).

For questions on this response please contact the Tax Faculty at [taxfac@icaew.com](mailto:taxfac@icaew.com) quoting REP 9/23.

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This response of 17 February 2023 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the ICAEW Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business. ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark the tax system and changes to it, are summarised in Appendix 1.

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## KEY POINTS

1. There remains considerable uncertainty as to the lengths to which claimants must go to determine to what extent expenditure incurred by subcontractors has been incurred in the UK.
2. More examples could be included to illustrate the “wholly unreasonable” test which relates to whether conditions can be replicated in the UK.
3. To that end, more details would be useful in determining situations where cost and availability of workers are not excluded factors.
4. There remains considerable uncertainty as to the nature of the information that needs to be included in the additional information form and the impact of projects carried out across multiple group companies or accounting periods. This may become clearer when the form is made available.
5. It is also unclear whether the provision of information using this form means that other forms of information traditionally included in R&D project reports will no longer be of interest to HMRC eg claim methodology, benchmarking data, etc.
6. There are also a number of areas within the updated rules for which there is currently no draft guidance. Will this be expanded before the guidance goes live?

## SPECIFIC POINTS

### OVERSEAS EXPENDITURE

#### General

7. No guidance has been provided on how to comply with the obligation on the claimant to ensure that work contracted out is undertaken in the UK, or when/whether the claimant should confirm this. A company is unlikely to specify to the subcontractor as to where it requires the R&D to be undertaken, as long as the subcontractor delivers the work contracted out. For example, will the claimant need to check if the subcontractor begins the R&D in the UK whether it has transferred some of it abroad?
8. It is not uncommon for R&D to be undertaken remotely by a number of individuals working across various locations or countries, especially in industries such as IT or automotive. Often, the subcontractor themselves might not know which engineers/technicians it will assign to the project at the outset. There may also be commercial sensitivity to providing this info if the workers are perceived to be from ‘cheaper’ countries, where pay is generally lower, and this may also result in GDPR issues.
9. Can HMRC make it clear that there will be no penalties applied if the claimant has made all reasonable efforts to determine where the work is carried out by the subcontractor and it transpires that some or more than the amount originally envisaged is carried out overseas?
10. Will the Patent Box guidance be updated to explain the treatment of QOE/non-qualifying overseas expenditure for Nexus/R&D fraction purposes?

#### 1.2 Qualifying overseas expenditure

11. This section includes a short list of conditions that HMRC believes it would be wholly unreasonable to replicate in the UK. This list could include more examples. The guidance obviously says that this list is not intended to be exhaustive and that every case depends on its own facts and circumstances, but further examples would provide further guidance on where HMRC sees the line is drawn.

### 1.3 Legal or regulatory requirements

12. There appears to be a typo in the second paragraph (section in brackets).
13. Would it be possible to include additional examples of 'excluded factors'? In particular, it would be useful if HMRC could expand on what it means by 'time pressures' and the situations in which these would not prevent expenditure from qualifying.
14. For example, what would the situation be in specialist/niche sectors where the skills simply do currently exist in the UK eg agriscience where the required knowledge of a particular climate/soil/crop does not exist in the UK? Would an inability to train or find sufficient people in this sector in time to carry out the necessary R&D constitute a time pressure?
15. Would this also extend to, for example, where the supplier has been heavily involved in an ongoing project for a number of years, and it would be impractical to transfer the work to a UK-based supplier - perhaps from a knowledge transfer/retention perspective, as well as from a logistical/cost perspective? Would this also cover, for example, legal/contractual requirements if a pre-existing contract exists.

## DATA LICENCES AND CLOUD COMPUTING SERVICES

### General

16. The guidance says that where data or cloud services are used for multiple purposes within the business HMRC will accept a reasonable apportionment between different functions eg staff hours used, number of licences used, a ratio of R&D data storage to non-R&D data storage. Have these methods been tested with claimants and agents as to whether it will be possible to make these apportionments? Will HMRC accept a method that is easiest for the business to calculate but might not give the most favourable outcome for the Exchequer?

### 2.1 General Exclusions

17. S1126ZA (1) (b) CTA 2009 provides for an exclusion from relief for expenditure on licence or service costs where the business has a contractual right to publish, share or otherwise communicate data with a third party, although an exception is made where the data is published, shared or communicated with a third party for the purposes of communications reasonably necessary for, or incidental to, the relevant R&D. Does sharing or communicating with a third party include intra-group communication? Otherwise, it is foreseeable that situations will arise where expenditure is not claimable simply due to having a group structure.

### 2.2 Data licences

18. There is a typo in the first line of the section headed "2.4 Points to note"- it should refer to "cloud computing service costs".

## CLAIM NOTIFICATION

19. The guidance refers to "R&D claimants who have not made an R&D claim in any of the previous 3 calendar years" – this is inconsistent with the draft legislation, which refers to the previous three accounting periods.
20. There appears to be some wording missing in the final bullet point of the section headed 'Information required'.

## MATHEMATICS

21. This section refers to updated BEIS guidelines from 1 April 2023. Will the guidance eventually include a link to these guidelines?

## ADDITIONAL INFORMATION FORM

22. This section lists out the information that will need to be included in an additional information form. Will this list be included in regulations, such that it is a legal requirement that this information is provided?
23. Will a failure to provide all of the information requested invalidate the claim, or will HMRC accept a 'best efforts' submission?
24. We note that for company tax returns reflecting 10 or more R&D projects, the company must describe the 10 largest. Where multiple companies in a group are involved in the same project, would it be possible to submit a group-wide form to prevent duplication of reporting? Similarly, where projects span multiple accounting periods, will it be possible to refer back to previous disclosures rather than having to provide all the information again?
25. Some of the specific additional information requirements could cause difficulties, or further clarification may be required to determine exactly what information is needed:
  - Number of externally provided workers (EPWs) who worked on the projects - will this be required in total across all projects or on a project-by-project basis? And will this be the number of EPW suppliers/providers, or the number of individual workers?
  - PAYE scheme reference for those EPWs - Does this refer to the PAYE reference of the EPW supplier/provider, or to the individual workers – if the latter, does this create a potential GDPR issue?
  - Contact details of any agent working on the claim – If there are multiple agents involved in the claim, will details need to be provided for all of them?
26. Will it be possible to provide information about the claim outside the additional information form or through a white space area on the form?
27. Will it be possible to provide a supporting report alongside the claim? Will HMRC still be interested in the claim methodology, benchmarking data, etc. or purely focused on the project descriptions?
28. Will there be an alternative way of providing this information for a company that has concerns about the security of the form (eg those in the defence industry)?
29. Will there be any guidance on the nature of the project description HMRC will expect companies to make eg length, type of information to be provided?
30. Will there be anywhere to disclose the capital v revenue analysis for tax and accounting purposes and the amount of expenditure capitalised to IFAs for which a year-one deduction has been taken via s1308 CTA 2009?

## FURTHER GUIDANCE

31. There is currently nothing included in the guidance on the following areas. Will this be expanded over time?
  - Power of HMRC to collect overpaid R&D tax relief or expenditure credit (Part 5 s25)
  - Time limits for R&D claims (Part 5 s26)
  - Circumstances in which enterprises are treated as SMEs (Part 6 s29-30)
  - Going concern basis (Part 6 s31)
  - Meaning of expenditure incurred on payments (Part 6 s32)

## IMPLEMENTATION

32. Given the 'teething trouble' that we have seen with the CT600L supplementary form, will HMRC continue a transition period whereby the additional information form will be 'phased in' for certain entities/sectors before it 'goes live' for all claimants?

## APPENDIX 1

### ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. **Statutory:** tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. **Certain:** in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. **Simple:** the tax rules should aim to be simple, understandable and clear in their objectives.
4. **Easy to collect and to calculate:** a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. **Properly targeted:** when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. **Constant:** Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. **Subject to proper consultation:** other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. **Regularly reviewed:** the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. **Fair and reasonable:** the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. **Competitive:** tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see <https://goo.gl/x6UjJ5>).