

Board of Taxation Secretariat
The Treasury
Langton Crescent
Parkes ACT 2600
via email RandD@taxboard.gov.au

Attention: N Mitchell and C Vanderkley

15 September 2021

Dear Messrs Mitchell and Vanderkley

REVIEW OF R&D TAX INCENTIVE DUAL AGENCY ADMINISTRATION MODEL

The R&D tax incentive is the only broad based Government incentive available to companies for undertaking eligible R&D activities and it is also a rare example of an incentive that is subject to a dual agency administrative model (“the model”).

Grant Thornton advises companies of all sizes and across all industry sectors in respect of their applications for the R&D tax incentive. We are pleased to provide our comments and observations on the consultation themes based on our advisory experiences.

Current administration model

As advisors, we understand the roles and responsibilities of the ATO and ISA (AusIndustry) under the model.

However, SMEs and companies without an in-house tax function, often do not understand this. Taxpayers see the R&D tax incentive as part of ‘tax’ which is administered by the ATO. This view often leads to frustration when a taxpayer is subject to separate reviews by both agencies under the model at different times.

The other related taxpayer perception is that the R&D tax incentive is a “grant” which, once received, concludes their entitlement. This leads to frustration when the company is subsequently reviewed, not just once but often twice, at different times, and long after the relevant incentive has been received. This challenge is not caused by the administrators. The R&D registration letter notes that the claim can be subject to future review and there is information available which does explain the model. However, practically, it is still often only when under review that some companies begin to fully understand the implications arising from the model.

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It is important to state and understand these taxpayer perceptions because they often underlie and exacerbate taxpayer frustrations when claims are subject to review. By understanding these perceptions, steps can be taken to help address the challenges presented by the model.

Dealing with the current administration model

The challenges in dealing with the current model include:

- The risk of a de facto “double jeopardy” – A company can conclude an individual review conducted by AusIndustry or the ATO, however it is still open to the other regulator to review. That is AusIndustry may conclude no further action in its review of activities, however, the ATO can still examine the eligibility of the expenditure claimed.
- The administrative burden of “double handling” – If a company is reviewed by the ATO and AusIndustry at separate times, our experience is that the two authorities do not share information already obtained such that the company is effectively required to provide the same or similar information twice on the same incentive claim. Companies should legitimately expect that such information already provided to one authority and its conclusions should already be available to the other before it proceeds with a subsequent review.
- If a company receives a negative finding on its activities but is still in the process of exercising its review rights, the taxpayer is required to amend its income tax return to reflect the negative findings. There are mechanisms which companies can access in relation to deferring the debt arising pending the review outcomes, but we have found that it can take a considerable amount of time to get such debt related matters resolved.
- In relation to a company’s review rights, if the matter proceeds to the AAT, there are many examples of matters taking years passing before a decision is handed down.

Improvements and efficiencies

The object of the R&D tax incentive is to encourage companies to conduct

“research and development activities that might otherwise not be conducted because of an uncertain return from the activities, in cases where the knowledge gained is likely to benefit the wider Australian economy”

Accompanying this object, are the necessary integrity measures/programs which are part and parcel of any tax regime. As the taxation and R&D tax incentive system is a self-assessment system, reviews can be undertaken many years after the incentive has been received. The outcome of the review may be negative. While this is stating the obvious, what can be lost is the impact this has on the confidence of companies to make the investments or else make the investments and not access the R&D tax incentive. The former may slow down R&D projects. The latter may place them at a disadvantage if others in the sector are claiming.

Our submissions to improve efficiencies are:

- That AusIndustry and the ATO implement a streamlined combined review and RFI process when a review is initiated. As the AAT matters have shown and from our own experience, the outcome of a review often turns upon whether there is evidence to support that R&D activities have been undertaken. This evidentiary issue should be addressed by a single administrative review process so that the company can collate and provide documents in a single process. Both regulators could also benefit from sharing this information and working together in assessing the incentive claim, albeit still independently making an assessment on the issues relevant to each of their respective domains. By implementing this combined information gathering, the challenges faced on double jeopardy and double handling can be dealt with more effectively.
- That the pilot program started by AusIndustry during 2020 to provide companies a draft report before findings are issued be implemented as a matter of course. This provides a reviewed company with more transparency, and is an opportunity to identify any errors of fact which can impact the outcome before the findings are finalised. This would in turn allow the errors to be addressed by the company

with the administrators without unnecessarily resorting to a more complex, expensive and time consuming AAT or judicial review process. Importantly, where the decision is looking to be negative, it would provide companies with specific feedback on what is expected in relation to a successful R&D claim, so future claims can be made with confidence.

- Consideration of alternative dispute resolution mechanism (e.g. mediation and ADR processes with specialist R&D tax incentive mediators) to R&D tax incentive claim reviews by AusIndustry if agreed outcomes cannot be reached with the administrators at first instance and before applying to the AAT or a Court for review.

Please contact the undersigned by email at Sukvinder.Heyer@au.gt.com if you wish to discuss the above submissions further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Sukvinder', followed by a long horizontal flourish.

Sukvinder Heyer

Partner – Innovation Incentives