IT 2635 - Income tax : syndicated research and development arrangements

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TAXATION RULING NO IT 2635

INCOME TAX: SYNDICATED RESEARCH AND DEVELOPMENT ARRANGEMENTS

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Reference no.:	Subject refs:	Legislative refs:
I 1012643	RESEARCH AND DEVELOPMENT	73B
	SYNDICATION	73C
	RISK	73CA
	GUARANTEED RETURNS	73D
	RECOUPMENTS	Part IVA
	CORE TECHNOLOGY	

OTHER RULINGS ON THIS TOPIC: IT 2442, 2451 and 2552

PREAMBLE
Section 73B of the Income Tax Assessment Act 1936 (the "Act") provides income tax concessions to increase the level of industrial research and development (R&D) in Australia. These concessions apply to expenditure on certain qualifying R&D activities and were designed to compensate for the higher commercial risks which R&D entails. Some proposed R&D syndication structures have endeavoured to remove all or most of these commercial risks to investors by guaranteeing them a minimum return on their investment.

2. There are a number of complementary provisions to be read with section 73B. The purpose and effect of these provisions is to limit the concession to the extent that a claimant is effectively at risk for the R&D expenditure. This Ruling explains the ATO's views of how these provisions operate - particularly in relation to syndication arrangements. Certain aspects of syndication arrangements to which the general anti-avoidance provisions of Part IVA of the Act may apply and other miscellaneous matters are also addressed.

Syndication structures

3. Taxation Rulings IT 2442 and IT 2451 issued in 1987. They address specific issues in relation to investor funding of R&D activities. Legislative amendments have since been made to the R&D provisions that permit syndication arrangements between eligible companies (claimants) in partnerships formed to undertake qualifying R&D activities and to commercially exploit the results for the benefit of the Australian economy. As a

consequence, claimants in partnership in a syndicate structure are entitled to deductions for qualifying expenditure commensurate with their respective equity contributions and entitlements to distributions of any returns from commercial exploitation (subsection 73B(3A) and see IT 2451).

4. Syndicated R&D arrangements can take any of several forms. These may include contractual agreements between partnerships or joint ventures of eligible companies, industry associations or research organisations. The Attachment gives a basic diagrammatic representation of a commonly encountered syndicated R&D structure. Features common to many of the more recently proposed syndication structures include some of the following:

(a) 2 or more entities (often a financial institution along with a company or other body already carrying on R&D activities) create special purpose R&D subsidiary companies for the venture - these companies form the R&D syndicate;

(b) the funding of the R&D syndicate is by way of loan funds advanced and equity contributed by the parent/investor;

(c) investor funding is sometimes limited to an equity contribution and the researcher advances loan funds to the R&D syndicate on a limited-recourse or non-recourse basis (i.e., the security for the amounts lent is limited to the results of the R&D project in order to protect the investors from claims);

(d) the R&D syndicate pays the researcher for the right to use or for acquisition of the researcher's pre-existing core technology (patents, prototypes, formulae, etc.);

(e) the R&D syndicate pays the researcher to undertake contract work to develop the pre-existing core technology to commercialisation stage;

(f) the payments to the researcher for the right to use or the acquisition of the core technology and the profit component of the contract work payments are placed in a special account;

(g) the special account either earns interest of itself or the funds in it are able to be invested (e.g., in the short-term money market);

(h) where the researcher is a tax exempt body, such as a university, no tax is payable on the returns from the special account;

(i) there is a put option exercisable at certain stages (e.g. commercial failure) to sell back the technology developed by the R&D syndicate, or the shares in the companies forming the R&D syndicate, to the researcher;

(j) if the put option is exercised, then the moneys held in the special account, usually as security, are used to discharge the debts owed to the investors;

(k) should the put option not be exercised, the moneys in the special account serve as collateral to pay an advance royalty to the R&D syndicate which is generally used to discharge the debts owed to the investors; and

(l) the researcher has the right of first refusal or right to match the best offer on commercialisation of the results.

The fundamental element of "risk"

5. Taxation Rulings IT 2442 and IT 2451 by their approach to the "on own behalf" requirement accept that ownership is ordinarily attributed to the entity taking the risks. These Rulings discuss how subsections 73B(1) and 73B(9) of the Act implicitly require that a claimant of the concession undertake the R&D on its own behalf by having effective ownership rights in respect of its proper part of the results of the R&D activities and having control over the conduct of the R&D activities. On this basis, paragraph 44 of IT 2442 states that subsection 73B(9) restricts entitlement to s.73B deductions to the claimant that effectively owns the R&D project results. However, in certain circumstances, where the benefits flowing from ownership are retained and the risks are borne by another, subsection 73B(9) may not apply. Therefore matters that need to be taken into account in considering whether subsection 73B(9) applies are: the substance of arrangements; and the particular circumstances of the case (see paragraph 52 of IT 2451).

6. To the extent that a claimant receives a grant or recoupment in respect of certain R&D expenditures, it cannot be said that the claimant is at risk for that expenditure. Lack of "risk" is fundamental to the operation of sections 73C and 73D of the Act. These provisions reduce the deduction otherwise available in respect of recouped R&D expenditure or R&D expenditure the subject of a grant. Moreover, "risk" is an explicit element in section 73CA of the Act. Section 73CA reduces the deduction otherwise available where a claimant is not at risk in respect of the whole or a part of the R&D expenditure. It should be noted that subsection 25(1), paragraph 26(j) or subsection 73B(27A) may also have effect.

7. Note that subsection 73B(1AA) states that section 73B has effect subject to sections 73C, 73CA and 73D which themselves are all to be read and construed as if they were part of section 73B. Amendments of assessments under any of these sections will therefore be authorised under subsection 170(10).

Guaranteed returns

8. To the extent that a return on an R&D project is guaranteed, the R&D expenditure will effectively not be at risk. Arrangements guaranteeing returns can take many forms. These

can range from direct reimbursement of R&D expenditure to the more complex forms encountered in R&D syndication arrangements. The common features of syndication structures listed at paragraph 4 of this Ruling and the Attachment illustrate how a return can be guaranteed from moneys which qualify as expenditures attracting the various concessions in section 73B. The mechanisms involved in achieving the guaranteed return may result in the actual expenditure on R&D activities representing only a small proportion of the total qualifying R&D expenditures.

9. In some cases a claimant's desire for a guaranteed return may give rise to a finding that the effective ownership in the results of the R&D project resides in another. Where such a finding is reached, deductions under section 73B are precluded altogether by subsection 73B(9). Examples of this include reimbursements between companies in a company group (i.e., the holding company reimburses the subsidiary and also has effective ownership of the results), and agreements entered into for the sale or exploitation of the results for a price or royalty percentage determined prior to the completion of an R&D project: refer to paragraph 46 of IT 2442 and paragraphs 25 - 26 of IT 2451.

10. Guaranteed returns may be structured so that it cannot be said that the effective ownership in the results of the R&D project belongs to another party. However, where a guaranteed return mechanism can operate to effectively reimburse a significant amount of the qualifying R&D expenditures before the project is expected to reach its exploitation phase, and this reimbursement is associated with an effective transfer in ownership of the results, then subsection 73B(9) would still apply. For example, a researcher in a syndication arrangement may grant the R&D syndicate a put option which requires the researcher to buy back the results of the R&D. This security does not bind the R&D syndicate to exercise the option and, if the R&D project is successful, it is still free to exploit the results. While such a put option reduces or eliminates the investment risk, the R&D syndicate still retains the effective benefits of the project. However, should the exercise of the put option in the above example operate at the end of the research phase and require the researcher, or an associate of the researcher, to repay the accumulated debt of the R&D syndicate (in the form of the R&D results thus far), then that would effectively amount to a reimbursement associated with a change in ownership.

11. Similarly, subsection 73B(9) may also have application to a debt-funded syndication arrangement where it is likely that the terms of the loan will be exercised to terminate the project before it reaches its exploitation phase and an effective recoupment of the R&D expenditures results. In these circumstances ownership of the results of the project is effectively transferred from the claimant(s) to another party to the arrangement - such transfer being associated with an effective reimbursement. Funding of syndicated R&D arrangements should therefore have regard to the long-term nature of the R&D activities generally undertaken.

12. Another example of a mechanism to effect a guaranteed return is an arrangement where the researcher obtains a right of first refusal to acquire rights over the results of the R&D. In such an arrangement the R&D syndicate is still free to seek the best offer from other parties, albeit the researcher will have the right to match that offer. In consideration for the granting of this right of first refusal, the researcher agrees to make a non-refundable, advance payment in respect of the future royalties due to the R&D syndicate under the agreement yet to be struck. Provided that the royalty rate is negotiated on commercial terms on completion of the project, this will not amount to a predetermined exploitation of the results to which subsection 73B(9) would apply.

13. For section 73CA - Guaranteed Returns to Investors to Apply - paragraph 73CA(2)(c) requires that, when the expenditure is incurred, the company was not at risk in respect of the whole or a part of the expenditure. The meaning of the expression "not at risk" is defined in subsection 73CA(5) as follows:

> "For the purposes of the application of this section in relation to any expenditure incurred by a company, the company is taken to have not been at risk at the time when the expenditure was incurred in respect of so much of the expenditure as does not exceed any consideration that, in the opinion of the Commissioner, because of:
>
> (a) any act that occurred, transaction or agreement that was entered into, or circumstance that existed, before or at that time; or
>
> (b) any act that was likely to occur, any transaction or agreement that was likely to be entered into, or any circumstance that was likely to exist, after that time;
>
> the company or any associate of the company could reasonably have expected at that time to receive as the direct or indirect result of the incurring of the expenditure".

14. While the elements necessary for section 73CA to operate must be satisfied at the time that the expenditure is incurred, subsection 73CA(5) contemplates circumstances that would trigger its operation developing at some future date - not just presently existing. However, it is not necessary to wait to see whether these circumstances in fact eventuate, but only to determine that they are "likely" to eventuate. The word "likely" has various shades of meaning ranging from "material risk" to "probable": Tillmanns Butcheries Pty Ltd v. Australasian Meat Industry Employees's Union (1979) 42 FLR 331 at 339. Ultimately the meaning to be given to the word "likely" where it is used in a statute will depend upon the statute and the context in which the word is used - but it must be more than a bare possibility and, while not probable, an event that could well happen: Transport Ministry v. Simmonds [1973] 1 NZLR 359 at 363. The very nature of R&D is such that there will generally always be a material risk of failure. It is this risk

that explains the existence of the various guaranteed, minimum-return mechanisms in place in syndicated R&D arrangements. The "likely" operation of such mechanisms is therefore present at the time when the expenditure is incurred for the purposes of section 73CA.

15. The application of section 73CA also depends on whether "consideration" is received. A loan made on a non-recourse or limited-recourse basis to a borrower who could reasonably be expected to lack the capacity to pay, confers a benefit on the borrower. That benefit arises because it enables an outgoing to be incurred upon the application of the moneys borrowed where non-repayment of those moneys is likely: see Case W2 89 ATC 107 at 124; 20 ATR 3033 at 3052. The benefit that arises in these circumstances amounts to "consideration" for the purposes of section 73CA. Moreover, the term "consideration" used in subsection 73CA(5) must be read, having regard to sections 21 and 21A of the Act, which bring to account the money value of any non-cash consideration.

16. Section 73CA also requires the Commissioner to form an opinion as to the amount of consideration that "the company or an associate of the company could reasonably have expected to receive". In the context of guaranteed return mechanisms this amount may be specified in the actual instrument. For example, where a put option has an exercise price of X dollars, then that is the amount that the company could reasonably expect to receive. Where a limited recourse debt arrangement may result in all of the borrowed funds not being paid, then the amount that could reasonably be expected to be received is an amount equivalent to the full amount of the borrowed funds.

17. Section 73CA is expressed and defined in the widest possible sense and would therefore apply to all arrangements that guarantee minimum returns on R&D activities undertaken.

Recoupments and grants

18. Where a claimant has received (or become entitled to receive) a recoupment or a grant in respect of its R&D expenditure, then to the extent of such grant or recoupment the claimant is not at risk for the expenditure. A predetermined grant or recoupment in respect of R&D expenditure is just another form of a guaranteed return.

19. An effective recoupment may take place in various circumstances. For example, a guarantee of a loan raised in the marketplace on normal terms would not amount to a recoupment. However, payments made by the guarantor under the guarantee would amount to a recoupment where the borrower did not repay the guarantor. Whether certain acts or transactions result in a recoupment should involve a substance approach with regard to economic realities and not just contractual form: see Dampier Mining Co. Ltd v. FCT 78 ATC 4237 at 4249; 8 ATR 835 at 848.

Forgiven debt

20. Where a claimant's R&D expenditure is funded by way of debt which is effectively forgiven, abandoned, waived, released or otherwise written-off by the lender, there will be a recoupment to the extent that the debt is not repaid. Where such a recoupment is not assessable, then section 73D would reduce the available deduction by the amount of the recoupment. Moreover, where no arrangements are in place to ensure the continued servicing of a debt apart from the results of the R&D project, non-payment of the debt is a circumstance that is likely to exist. Because of this circumstance, it can be said that a claimant could reasonably have expected at the time of incurring the expenditure that such debt may be written-off, resulting in a recoupment ("consideration") being received. That is the claimant was not at risk. In these circumstances section 73CA would operate to reduce the claimable deduction allowable under section 73B (subject to section 73C if the lender is a government or a government body) in respect of expenditure met out of debt which is not repaid.

Limited-recourse or non-recourse debt

21. The reality of limited-recourse or non-recourse debt funding of an R&D venture is that the lender will have to write-off all or a part of the debt should the venture fail. A loan agreement to provide non-recourse or limited-recourse debt to fund an R&D project is in substance providing for the lender to assume or forgive the debt in the event of failure (even though in form it may be concluded that the debt remains payable). As with forgiven debt, there will be a recoupment to the extent that the debt is not repaid and the deduction otherwise allowable is reduced in the manner discussed at paragraph 20 above.

Early termination

22. Syndicated R&D arrangements invariably involve up-front contract payments deductible on an accelerated basis. Given the risks involved, early termination of an R&D contract may occur and the relevant documentation will generally provide for such an occurrence. In the event of an early termination, a claimant might seek some form of recovery from the R&D contractor. If the termination is voluntary, any recovery would be for a refund of the amount advanced under the contract that was not utilised. For a termination resulting from a breach of contract by the contractor, the claimant might recover some or all of its advance contract payments in the form of damages. Any recovery from an R&D contractor in such circumstances would be assessable to a claimant: paragraph 73B(27A)(d).

23. Where a recovery results from termination of the R&D contract it is considered that a recoupment of expenditure has occurred and also section 73CA has application (and section 73C if the R&D contractor is a government or a government body). That is, where there is an agreement in terms of subsection 73CA(5) for unexpended advance contract payments to be recoverable, the advanced funds actually recovered would not be at risk at the time they were incurred by the claimant for the purposes of paragraph 73CA(2)(c).

24. In the case of contract payments deductible on an accelerated basis, the time when the expenditure is incurred will depend on the service period: which is defined in subsection 73B(1) as "...the period during which the thing done under the agreement in return for the amount of expenditure is done". Therefore an amount recovered because of early termination of an R&D contract might only be incurred after the service period is adjusted to the period over which a contract actually runs. In these circumstances the appropriate time for applying section 73CA will be at termination, when there will be an amount of consideration the company could reasonably expect to receive.

25. By way of example, take the case of a claimant who pays an initial $100,000 to an R&D contractor in circumstances such that the expenditure qualifies for the full 150% deduction under s.73B. The research project is cancelled at the point where the R&D contractor has expended $60,000 out of the original $100,000 advanced. The terms of the cancellation are such that the R&D contractor returns the remaining $40,000 to the claimant. The tax consequences would be as follows:

- The initial $100,000 is deductible at 150%

- The $40,000 repaid to the claimant is assessable: paragraph 73B(27A)(d).

- The 50% "premium" element in the allowable deduction referrable to the $40,000 that was returned is effectively denied: section 73CA.

- The result is:

	$
Initial deduction	(150,000)
Assessable income	40,000
Reduction to deduction	20,000
Net deduction	(90,000)

26. The net deduction of $90,000 represents the $60,000 actually spent on R&D (and therefore at risk) allowable at the 150% concessional rate. If the recovery on termination of a contract was from a government or government body and related to expenditure incurred after 20 November 1987, then the formula provided for clawback in section 73C would apply in the following manner:

	$
- Deductible relevant expenditure:	100,000
- Initial clawback amount under paragraph 73C(3)(b) is twice the amount of the recoupment:	80,000
- Amount not subject to clawback under paragraph 73C(7)(b):	20,000

Therefore clawback applies to $80,000 of the contracted expenditure which under subsection 73C(8) is deductible at a

100% rate only. The amount deductible under section 73B as affected by section 73C is:

		$
-	$80,000 @ 100%:	80,000
-	$20,000 @ 150%:	30,000
-	Amount deductible:	110,000

27. Because the amount deductible under section 73B as affected by section 73C ($110,000) exceeds the relevant expenditure ($100,000) by $10,000, the conditions of subsection 73CA(2) are satisfied. The deductible amount is then further reduced by the operation of subsection 73CA(4) as follows:

$10,000 (Excess) x $40,000 (Part of expenditure not at risk)
$100,000 (The amount of the expenditure)

28. The deduction allowable is $106,000, i.e. $110,000 - $4,000. In the above example the $40,000 recoupment is assessable, effectively reducing the net deduction to $66,000. Where the recoupment is not assessable, section 73D would on the above figures reduce the deduction of $106,000 by the amount of the recoupment to arrive again at a net deduction of $66,000.

Part IVA

29. In addition to the possible application of the specific R&D provisions (including subsection 73B(31) which deals with non-arm's length transactions), there may be various aspects of a syndication arrangement which together lend themselves to a conclusion that a party to the arrangement has a dominant purpose of obtaining a tax benefit; thereby attracting the operation of Part IVA of the Act. In coming to a concluded view as to whether Part IVA applies to a syndicated R&D arrangement, it would be necessary to examine the purpose of a person entering into or carrying out the arrangement having regard to the eight factors in paragraph 177D(b). This would include a consideration of the following matters:

(a) whether the parties to the various agreements are dealing on an arm's length commercial basis;

(b) the nature of the R&D project as a whole, including its commerciality;

(c) whether the financing arrangements are artificially structured to allow one party to attribute to another party what would - on a proper commercial approach - have been its share of the R&D concessions;

(d) control of the R&D activities;

(e) the actions of the parties over the period of the arrangement in relation to their various legal rights and obligations; and

(f) the manner in which the agreements are interpreted and given effect to by the parties.

30. The borrowing of moneys to finance R&D activities is an acceptable method of conducting R&D projects, with the related finance costs being qualifying expenditure: see paragraphs 18-19 of IT 2442. However, some proposed financing arrangements are such as to leave in doubt whether expenditure on financing the project has in fact been incurred or paid. For example, where the interest expense is capitalised up-front, rather than actually paid and yet from the documentation in place, it could not be said that it has been incurred at the time of capitalisation for the purposes of section 73B. However, where the claimant is under a definite existing obligation to pay the interest it will qualify as advance R&D expenditure for the purposes of subsection 73B(11). This, of course, is subject to the proviso that such an arrangement is motivated predominantly by commercial rather than fiscal objectives - otherwise Part IVA may apply.

31. Where an arrangement to carry out an R&D project is not structured to effect a guaranteed return, there will be an incentive, for the parties funding the project, to minimise associated costs because expenditures will be fully at risk. But where such arrangements are structured to effect guaranteed returns (typically the case with R&D syndication arrangements), it becomes necessary to consider whether any payment made pursuant to the various agreements represents a genuine arm's length price. If not, then Part IVA may apply. Specific matters in relation to the value to be attributed to core technology for instance are addressed at paragraphs 35 - 37 of this Ruling.

32. Parties to a syndication arrangement that is structured to effect a guaranteed return may also bear certain risks that would not generally be borne by parties dealing at arm's length. An example of this to which Part IVA of the Act may have application is the funding of R&D by way of limited-recourse or non-recourse debt. Such debt funding allows the borrower to incur outgoings of R&D expenditures with repayment of the borrowed funds being as remote as the R&D project's likelihood of success. The commercial reasons for why a lender would loan funds on a limited-recourse or non-recourse basis in these circumstances need to be determined. Similar considerations would arise where a party agrees to grant a put option that results in the grantor undertaking to purchase what was originally its own project for a price that is not based on the market value of the results of the R&D; but rather the price is apparently set to achieve the fiscal objective of a predetermined return to the holder of the put option. In these types of arrangements a project's level of commercial viability becomes a significant factor in considering the application of Part IVA.

Special accounts

33. Another factor relevant to any application of Part IVA would be the existence of collateral arrangements to secure the guaranteed return in a syndicated R&D project. Reference was made to one such mechanism in paragraph 4 of this Ruling, namely, the setting up of a special account to hold moneys made up from payments for the core technology and the profit component on the contracted R&D work payments. Such collateral arrangements may not be considered to be arm's length commercial undertakings. This may be particularly evident in circumstances where there is a requirement that the funds securing the guaranteed return are to be placed in an account with an investor or an associate of the investor. In view of the many restrictions often placed on the operation of these special accounts, a specific question of fact may arise as to whether the moneys in such accounts are made up from qualifying expenditure "incurred" or represent funds held beneficially for the claimant or the investor.

34. Also the question of who derives the interest earnt on these special accounts may arise where the circumstances suggest that the funds in such accounts are really held for the benefit of another. For example, if at a point in time it can be said that the funds in a special account will revert to the investor at some future point in time, then it would be necessary to examine who in fact derives the interest earnt in that account from that time.

Core technology

35. There is no requirement that a claimant acquire or license qualifying core technology as a means of satisfying the "on own behalf" rule. That rule is concerned with effective ownership of the results and control of the conduct of the R&D project. Where, however, qualifying core technology is acquired or licensed a proper commercial reason for so doing should exist. Furthermore, any payment for the acquisition of, or the licence for, the right to use the core technology should reflect an arm's length market-value price for the core technology. If the acquisition of core technology is for other than an arm's length, market-value price or is not commercially justifiable, then Part IVA may apply.

36. Because guaranteed return mechanisms in place in a syndication arrangement may operate as an artificial price support, it becomes necessary to consider in such circumstances whether any payment for the acquisition of, or the right to use core technology, represents a genuine arm's length price. A price based on the future benefits or service potential of successfully developed core technology would not be considered an arm's length price if it attributes the profit on the core technology component to the vendor. The price paid for core technology should also reflect what the market is prepared to pay for it - which assumes that there are no guaranteed returns in place.

37. The actual arm's length, market-value price for core technology may not be reflected in a price based on the present

value of estimated future cash flows from successful commercialisation of the R&D results. A genuine buyer (dealing at arm's length and required to commercially exploit the results) would usually, in determining a price for core technology, have regard to discount factors additional to the risks of successfully completing the R&D project and commercialising the results. For instance, a genuine buyer may take into account comparative advantages held over competitors and the likely period to full commercialisation. Also, where the core technology is in the high-risk concept stage, it is to be expected that the discount factor used will be significantly greater than for "close to the market" core technology. Therefore the actual price paid for core technology should:

(a) reflect the market realities;

(b) ignore any guaranteed returns; and

(c) not simply be equated with an "expert" valuation - which should generally only provide a basis from which parties can negotiate a price.

Management fees

38. Management fees qualify as R&D expenditure to the extent that they are incurred directly in respect of eligible R&D activities. The question of whether the fees are incurred directly in respect of the R&D activities is one of fact to be established over the period in which the fees are incurred and with regard to the nature of the services provided. For example, expenditure would not be deductible under section 73B in a syndication arrangement where it was incurred in relation to advice on: the commercialisation of the R&D results; the returns to various parties; the financial structures to be adopted; and taxation matters generally.

Deduction rate for finance costs

39. It was formerly the case that expenditure on acquiring pre-existing core technology could qualify for the 150% rate of deduction. That rate has now been reduced to 100% for expenditure incurred in acquiring core technology after 7 September 1989: Subsection 73B(12). Finance costs are regarded as expenditure incurred "...in acquiring, or in acquiring the right to use, technology for the purposes of research and development activities...": see subsection 73B(1) definition of "core technology". Therefore the rate of deduction for finance costs on funds borrowed is determined by identifying what R&D expenditures the borrowed funds are applied to: see the Attachment for the rate applicable to core technology in a particular case.<
SEE HARD COPY FOR THE ATTACHMENT

COMMISSIONER OF TAXATION
9 May 1991