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R&D Tax Reliefs
HM Treasury
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Ref: SL/CR

Dear David

Research and Development tax relief advance clearances

We welcome the opportunity to take part in this consultation.

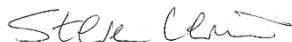
We have answered the specific questions overleaf, but I would like to reiterate a couple of key issues here.

Firstly, while we agree that both voluntary and mandatory clearances may be useful, whatever system is introduced should not duplicate current administrative burdens such as the Additional Information Form - this would be counter-productive.

Secondly, whatever form of clearance system is taken forward, it must be resourced correctly so that businesses can have a timely, positive experience when using it. If businesses don't find a new system worthwhile, easy to use and quick, take-up will be as low as for the current clearance/ assurance process and HMRC will not achieve the government's objective. Therefore, phasing in the new system in some ways seems sensible.

If you would like to discuss our comments, please get in touch.

Yours faithfully



Steven Levine
Partner
For and on behalf of BDO

R&D Advanced Assurance Consultation

[Q 1-8 relate to identification of respondent]

9. Were you aware of the advance assurance scheme before this consultation?

Yes

10. Have you or your clients used the current advance assurance scheme?

Our clients have not used the current advance assurance scheme. As an agent, we have not encouraged our clients to use the scheme.

11. If you or your clients have used the current advance assurance scheme, please tell us if and how this met your needs.

As noted above, our clients have not used the current advance assurance scheme for many years.

12. If you or your clients have used the current advance assurance scheme, please tell us about what worked less well in the process.

As noted above, our clients have not recently used the current advance assurance scheme.

13. For those who are aware of the current advance assurances, but chose not to use them, what were the reasons for this?

Our view of the current advance assurance scheme is that the balance of time, effort and cost required from companies and their agents versus the level of certainty obtained is not attractive. Moreover, the level of granularity frequently requested by HMRC was too intense for the size of the claim as to render the process uncommercial. Further, the scheme did not provide certainty that the R&D claims of a company using the current scheme would not be subject to HMRC enquiry following submission.

In addition, we believe the eligibility criteria for the current scheme is too narrow, given it is only applicable for companies with turnover below £2million and fewer than 50 employees.

14. Is the current focus in advance assurances on treatment of a whole claim right or should it focus on a particular issue or number of issues in a claim? (please select)

- focus on the whole claim
- focus on one particular issue in the claim
- focus on more than one particular issue in the claim
- other (please specify)

As a large, regulated R&D agent, the advice we provide to our clients is based on established practice and legal precedent. As such, we believe voluntary advance assurances could be valuable where these provide timely clarification on particular issues within the claim. Specific examples may be technical provisions introduced for accounting periods commencing on or after 1 April 2024.

We can see some of those issues being:

- Considering the potential for and countering conflicting clearances - an example being Company A seeking and achieving a clearance as Contracted-Out R&D whereas Company B sought and achieved clearances for Contracted-In R&D and it later transpires that both companies were in the same supply chain transacting with each other.
- Whether expenditure incurred by an R&D claimant company represents 'qualifying overseas expenditure (and the level of evidence required to support this).
- Whether a company qualifies for the ERIS regime, particularly from an R&D intensity perspective.

For mandatory advanced assurances, particularly if this was to be targeted at sectors with high levels of non-compliance, then we can see the merits of a focus on the whole claim. In such circumstances, whether the work being undertaken aligns with the DSIT guidelines will be a key consideration, and wider advance assurance would therefore seem appropriate.

15. Which issues in R&D claims are of the most concern?

One of the issues in R&D claims which is of most concern is ensuring projects align with the DSIT guidelines to be R&D qualifying. This is invariably the focus of HMRC compliance activity and is naturally a fundamental part of the support we provide to clients in making R&D claim submissions.

In addition, changes relevant for accounting periods commencing on or after 1 April 2024 arising from the merged scheme in relation to contracted-out R&D, restrictions on claims for overseas expenditure and complexities within the ERIS scheme are likely to be areas of concern in future claims.

It should be highlighted that regulated tax advisors already have mandatory duties arising from compliance with the Professional conduct in relation to taxation (PCRT) rules and the changes in law and PCRT duties already constitute substantial checking processes.

16. Do you have any views on the current criteria for eligibility for advance assurances?

The current criteria for eligibility for advance assurances (based on turnover and employee numbers) is too restrictive and has contributed to the low uptake of the scheme. As such, we agree that the eligibility criteria should be expanded.

17. Can you foresee circumstances in which paid-for voluntary assurances might be attractive?

Large Corporates subject to HMRC Large Business procedures need to comply with mandatory pre-approval processes covering changes covering changes to / introduction of sampling methodologies and / or agreeing variations to the “Top 10” Advance Information Form projects. These should be made available to all claimants but there is no reason why a fee should not be levied on all claimants (including those subject to LB processes).

We believe that paid for voluntary assurances would only be attractive to companies where there is a binding guarantee from HMRC regarding protection from enquiries (please see further comments below in respect of this).

There would be a lot of thought required around the pricing of such a paid for assurance, i.e. a fixed fee, time and materials fee or a tiered fee dependent on the level of qualifying expenditure or tax benefit. In addition, timing of payment of a fee would need to be clarified. Rather than a payment of a fee upfront, we would welcome a system where payment could be made via a deduction from the tax credit the company was entitled to upon submission of the claim. Both the fee amount and payment terms would need to be clearly communicated by HMRC to the company and their agent at the outset of an application.

Our recommendation would be for advanced assurances to be provided on a free of charge basis for a period post implementation (of at least two years). Subject to widespread uptake of the system and positive customer feedback, then paid for advanced assurances could subsequently be introduced.

18. Do you agree that a voluntary service could be focused on growing and high-potential companies as well as sectors set out in the government’s Industrial Strategy?

If there are restricted resources within government for staffing the advanced assurance process such that full advanced assurances are not feasible, we agree that a voluntary service could be focused on growing and high-potential companies as well as sectors set out in the government’s Industrial Strategy. There are 8 sectors included (advanced manufacturing, clean energy industries, creative industries, defence, digital and technologies, financial services, life sciences, professional and business services). These are wide ranging and already cover a large population of claimant companies. This wider eligibility for advanced assurance would be welcomed. We would though suggest that the list be kept under review as there are bound to be further types of emerging technologies in the future.

Given the breadth of application and as HMRC have restricted resources, we believe that a phased approach to implementing the scheme on a technically focused or a sector-by-sector (or sub-sector) basis would help in making the scheme a positive customer

experience from the outset. Once additional resources are recruited by the government, the scheme could then be expanded, taking on board positive and negative customer feedback to build on the positives and refine areas that have resulted in a negative experience for customers. If customers receive a positive experience, then we believe it is more likely that customers would be willing to pay for assurances.

HMRC would also need to clearly outline the definition of a growing or a high-potential company. If there was to be a focus on sub-sectors within the 8 sectors, these would also need to be defined.

19. If not, at which companies should a voluntary service be focused?

If there isn't a focus on growing and high-potential companies as well as sectors set out in the government's Industrial Strategy, then we wouldn't propose there being a restriction on which companies a voluntary service should be focused on from a growth or sector perspective. However, we would encourage a focused or phased implementation given the lack of government resources. There could be limited take up of the scheme should those resources be spread too thinly at the outset.

It may be the case that the existing advanced assurance scheme with a £2m turnover and 50 employee thresholds would be applicable for growing or high potential companies. As the existing scheme has been underutilised, we would encourage HMRC to ensure a clear differential between the existing and the broadened system (in particular moving away from the turnover and employee number thresholds).

20. Do you agree there is a minimum expenditure below which significant R&D does not take place?

In the 2023 consultation on R&D reliefs, some stakeholders outlined that it would be difficult to demonstrate significant R&D for less than £25,000 of expenditure. Further, HMRC have stated that claims under £25,000 tend to be subject to the highest incidences of fraud and / or error. Consequently, we would agree and believe that re-introducing a minimum expenditure threshold may help to remove some of the smallest claims in which we understand there have been high levels of erroneous and fraudulent claims.

21. If yes, please give that level (in thousands)

We would agree that £25,000 would seem a sensible minimum expenditure threshold for non-ERIS claims. We don't believe that ERIS claims should be subject to a minimum expenditure threshold. However, for non-ERIs claims, there may be scenarios where there was, say, £20,000 of qualifying expenditure in a claim where qualifying activity began close to the end of an accounting period, and then there is then a much higher level of expenditure in the subsequent period. Therefore, the minimum threshold could be set across a minimum of two periods where businesses request that, but the average of both periods would need to be more than £25,000 per period.

22. Do you agree that the assurances should be mandatory for some?

We agree that assurances should be mandatory for some claims.

23. If so, what factors should be considered in determining who must seek assurance?

We believe that the factors which should be considered for mandatory assurances should be:

- First time claimants - we would like this to be specifically linked to the claim notification process such that there is limited duplication of documentation between the claim notification and advanced assurance application. However, HMRC should consider any 'group history' as a form of risk assessment prior to a mandatory assurance being required. For example, if a claimant company is part of a group which contains other companies which have historically made claims, in that case a mandatory assurance may not be needed.

To the extent that advance clearances are sought, we consider that Claim Notifications should not be required.

Further, in the event that an averaging is needed to avoid the £25,000 minimum expenditure threshold (see 21 above), the claim notification requirement is disregarded for the earlier accounting period (as would have undoubtedly been missed).

- Sector based - focused on the sectors with high levels of non-compliance. This would logically be in relation to claims determined rarely eligible by HMRC (care homes, childcare providers, personal trainers, wholesalers and retailers, pubs, restaurants etc.). We would recommend that HMRC provide clarity on how these sectors will be identified. In line with the Additional Information Form, using Companies House SIC codes may be one option. However, this does have its limitations as SIC codes could be incorrect, misleading and / or subject to manipulation (e.g. a defence sector warfare simulation provider with a SIC code of "Other Education" is not necessarily incorrect but could mislead HMRC). Therefore, a balanced approach could be used whereby company websites, financial statements and press coverage could be considered in addition to the SIC code.
- Claims below £25,000, which are not made under ERIS (although we are supportive of a minimum expenditure threshold being introduced).

24. How can HMRC best recognise the role of agents in designing a clearance service?

The role of agents should be recognised in the design of the clearance service by HMRC ensuring that agents can submit requests for clearances on behalf of their clients.

We believe that there could be a distinction between regulated agents (such as BDO) and 'higher risk' generally non-regulated agents. In most circumstances, we believe that reputable, regulated agents may be more likely to use an advanced assurance service for specific technical points (say one or two areas) based on a client's specific circumstances. Applications by higher risk non-regulated agents could be subject to a more detailed review of the claim by HMRC as part of the process.

It should also be highlighted that regulated agents are subject to the PCRT processes. Whilst HMRC have a version of the PCRT for unregulated agents, we believe that there are no instances where action has yet been taken under these HMRC powers.

25. Do you see value in pre-activity advance assurance?

We believe that there would be value in pre-activity advance assurance in certain circumstances. For example, new start-up companies seeking funding under EIS programmes would benefit where the clearance can be publicised as part of the fund raising. However, we believe the key drawback to advance assurance at that stage is that, by their very nature, there is often unforeseen/problem solving R&D undertaken within qualifying projects, and that would not be captured as part of a pre-activity assurance. We can foresee circumstances where this would necessitate another clearance being required.

Competent professionals can define the technological uncertainties at the start of a project, but additional, unexpected uncertainties can arise as the R&D is being undertaken, and the work can differ from that originally anticipated. We believe that a key component of a successful advance assurance scheme is that the assurance given is binding on HMRC, and, therefore, project scope creep is a concern around pre-activity advance assurance.

26. If so, what sorts of issue might be raised with HMRC?

We foresee that the key issues which might be raised with HMRC would be:

- Obtaining clarity that the activity which is going to be undertaken would constitute qualifying R&D activity. This could add value for large companies who may base investment decisions on whether to undertake R&D activity in the UK on the net cost of the UK activity, factoring in the tax credit. The value this would add would be dependent on the level of resource HMRC would have to provide assurance from a technical perspective. Given resource constraints, a phased approach to pre-activity assurance implementation would be welcomed, and the scheme could be expanded once additional technical resources are available. We are aware that some companies have left the UK because of recent HMRC compliance enforcement and the downgrading of the UK as an attractive location for R&D.

Pre-activity assurances in respect of larger claims, for example those for UK taxpayers with an allocated Customer Compliance Manager at HMRC, may be an example of where a paid for voluntary assurance would be appropriate.

- In addition, pre-activity advance assurance would be helpful to drive investment and commercial decisions in relation to the new technical areas of overseas cost restrictions and contracted-out R&D. Such assurances may be helpful to feed into early-stage contractual discussions around location of R&D work and utilisation of third-party resources. The assurance around the contracted-out R&D position may be particularly helpful at the pre-activity stage. If a company's competent professionals can define the R&D they expect to undertake pre-activity, then that could be persuasive as to the party who claim for the qualifying work.

27. What sort of information might companies be able to provide to HMRC at this stage?

We are keen that there is minimal duplication of information provision and reporting

requirements between an advanced assurance scheme and the established reporting of the Additional Information Form and the Claim Notification Form. For pre-activity advance assurance, we would recommend that the information provided to HMRC is closely aligned to the Claim Notification Form requirements and requests for pre-activity advance assurance could form part of that submission where a Claim Notification Form is required.

To help address our concerns around project scope creep post pre-activity advance assurance being given, we would encourage a system whereby the Additional Information Form could include a 'top-up' provision for projects or activity where pre-activity assurance was given. This would allow for a description of the 'unforeseen R&D' carried out if that work is materially different to the work for which assurance was provided.

28. Which of the options A to C do you think would be most useful? (please rate all options: not useful, somewhat useful, useful)

We believe that pre-activity advance assurance would be most useful, and we have rated all the options below:

Option A (Pre-activity) - Useful

Option B (Pre-claim) - Somewhat useful

Option C (Post claim, pre-payment) - Not useful

29. Please give reasons.

We believe pre-activity advance assurances would be most useful for regulated advisors such as BDO in limited circumstances. This would be where the advanced assurances were focused on specific technical areas which would be fundamental to the potential claim (such as contracted-out R&D and whether exemptions are available for overseas activities). We appreciate that there could be limited certainty at this point given the potential for unforeseen activities to be undertaken and unforeseen costs incurred. Consequently, as a more informal process, pre-activity advance assurance would seem to be the lowest time and cost option.

We believe pre-claim advance assurance would also be useful, particularly if the assurance provided is binding on HMRC. We believe pre-claim advance assurance should be on both a voluntary and mandatory basis in order to be equitable. Table 1 within the consultation suggested this was being considered solely on a mandatory basis. Our concern is the potential duplication of time and cost in preparing the claim, and then the additional time and cost required for the advanced assurance process.

We believe the post claim; pre-payment assurance would have limited benefit. This would appear to be more akin to a formal HMRC enquiry and would likely result in significant time and professional costs for business, on top of the costs of claim preparation and submission.

At this stage, the claim itself should be sufficient, and we would encourage HMRC to devote more resources to reviewing and processing claims quicker, rather than adding this additional level of scrutiny.

30. Please give any other suggestions you have for useful changes to R&D relief administration, particularly those that would address error and fraud.

The other suggestions we have for useful changes to R&D relief administration encompassing the design of the proposed advanced assurance scheme are as follows:

Advanced Assurance scheme design

Enquiries and HMRC powers

While enquiries are referenced a few times in the consultation, it isn't categorical that HMRC would guarantee not to enquire into a claim despite previously providing advance clearance. We appreciate that there may be a reluctance from HMRC to provide such a binding guarantee, particularly if the facts may differ from the ones submitted for the clearance.

If the government decides to progress with a new clearance mechanism, the associated HMRC guidance needs to be clear so that taxpayers (and agents) are fully informed of the usefulness of the clearance response from HMRC. The expectations of all parties need to be managed correctly for the scheme to be successful. For example, HMRC could use discovery assessments to reverse (partly or fully) a previous clearance and charge error penalties where appropriate.

We would welcome a system that, in circumstances where the facts disclosed are materially correct (compared to the actual R&D taking place), would allow both sides to treat the clearance as binding for the transaction/project/accounting period in question. We feel this should be done at the pre-claim stage. The scope of the clearance in that regard needs to be clear between the parties. If the facts differ materially, it may be reasonable for HMRC to take a different view, but HMRC should define what is 'material' in this context.

We would also recommend that clarity is provided by HMRC around how legislative changes or changes in HMRC interpretation would be dealt with from a clearance perspective. This is important so that businesses can make an informed decision on making clearance applications, and their usefulness.

We would highlight that should HMRC start backtracking from clearances in a widescale manner, these would undoubtedly be publicised, and the scheme would be difficult to revive.

Administration and reporting

We would recommend that duplication of work and reporting is kept to a minimum, as we are concerned that the administrative burden in respect of R&D claims could become too high. For example, if an advance assurance is granted, a clearance code system could be implemented such that this could be included in the Additional Information Form in lieu of providing detailed analysis on the activity considered for a second time. We'd also reaffirm that there would be value in aligning the claim notification and pre-activity advance assurance as far as possible.

It is of critical importance that HMRC outlining clear, and guaranteed, timelines for the advanced assurance process to ensure an effective system. For example, upon submission of an application, we would welcome HMRC committing to a meeting within 30 days, with the same timescale for any post meeting requests. Following all requisite information being provided, HMRC's conclusion should similarly be issued within 30 days.

Other R&D relief administration matters

There is a frustration amongst agents that claims are being denied for simple errors. In our experience, this is particularly the case where there is a transposition error in a Corporation Tax UTR number. We'd recommend that HMRC introduce a system whereby these issues could be flagged automatically via an error message prior to submission if UTRs do not match HMRC's records for the company. Failing that, we would appreciate HMRC exercising a degree of discretion where the denial is based purely on simple administrative entries on the Additional Information Form being incorrect.