

# **Notes for Guidance - Taxes Consolidation Act 1997**

**Finance Act 2021 edition**

## **Part 29**

### **Patents, Scientific and Certain Other Research, Know-How and Certain Training**

**December 2021**



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**PART 29**  
**PATENTS, SCIENTIFIC AND CERTAIN OTHER RESEARCH, KNOW-HOW**  
**AND CERTAIN TRAINING**

CHAPTER 1

*Patents*

**Overview**

This Chapter deals with the taxation of income deriving from patents and includes provision for the granting of capital allowances in respect of expenditure incurred on the acquisition of a patent or patent rights. The general provisions relating to the granting of capital allowances contained in *Chapter 4* of *Part 9* are applied, and adapted, as necessary, for the purposes of the allowances provided by this Chapter by virtue of *section 762*.

**754 Interpretation (Chapter 1)**

**Summary**

The section gives the meaning of certain terms and provides rules for the construction of certain references used in the Chapter.

**Details**

***Definitions***

“the commencement of the patent” is defined as the date from which the patent rights (1) become effective.

“income from patents” includes not only any royalty or other sum paid for use of a patent but also any amount on which tax is payable by virtue of the Chapter.

“Irish patent” is a patent granted under Irish law.

“patent rights” means the right to do something without infringement of a patent.

“the writing-down period” is defined in *section 755(2)*.

***Grant or acquisition of licence to use a patent***

The grant or acquisition of a licence to use a patent is to be regarded as a sale or purchase of a part of the rights under the patent. However, where the terms of a licence are such that the licensee is to have the sole use of the patent to the exclusion of the grantor and all other persons for the remaining life of the patent, the grant of the licence is to be treated as equivalent to the sale by the grantor of the whole of the patent rights. (2)

***Use by the State***

If an invention which is the subject of a patent is made for the service of, or is used by, the State under section 77 of the Patents Act, 1992, the Chapter applies as if the making or using of the invention had been under licence. The Chapter applies similarly to an invention made for the service of, or used by, the government of another country under any corresponding legal provisions of that country. (3)

## **755 Annual allowances for capital expenditure on purchase of patent rights**

### **Summary**

This section provides that capital allowances are available in respect of expenditure incurred on the acquisition of patent rights. The capital expenditure qualifying for the allowances is written off by equal annual instalments over a period of 17 years or, where the remaining life of the patent or the term for which the rights are acquired is a shorter period, over that shorter period. The Finance Act 2009 disapplies this section for companies subject to a transition period of two years during which time companies may elect to claim relief under this section for capital expenditure incurred on the purchase of patent rights after 7 May 2009 and before 7 May 2011.

### **Details**

#### ***Writing-down allowances***

Writing-down allowances are made available for capital expenditure incurred on the purchase of patent rights. The allowances are only given, however, to a person who is a trader or to a person liable to tax in respect of the income from the patent rights. (1)

#### ***Writing-down period***

In general, the allowances are available over a writing-down period of 17 years (2)(a) beginning with the chargeable period in which the expenditure is incurred.

If, however, the patent rights are acquired for a specified shorter period, the allowances are given over that period. (2)(b)

Where purchased patent rights begin one complete year or more after the date from which the rights became effective (and *subsection (2)(b)* does not apply), the allowances are given over 17 years less the number of complete years which, when the rights begin, have elapsed since the rights became effective. If 17 complete years have so elapsed, the writing-down period is one year. (2)(c)

#### ***Pre-trading expenditure***

Pre-trading expenditure is to be treated as incurred on the first day on which trading commences unless before that day the person concerned has sold all the patent rights on which that expenditure was incurred. (2)(d)

#### ***Discontinuance of relief for companies***

Subject to *subsection (4)* this section shall not apply to a company within the charge to corporation tax. (3)

#### ***Election by companies to claim relief***

Notwithstanding the discontinuance of relief under this section for companies, this subsection allows a company to claim relief, on making an election to this effect, for capital expenditure incurred on the purchase of patent rights after 7 May 2009 and before 7 May 2011. The election must be made on the company's statutory return for the accounting period of the company in which the expenditure is incurred and must be made not later than 12 months from the end of the accounting period in which the capital expenditure, giving rise to the claim, is incurred. (4)

## **756 Effect of lapse of patent rights**

### **Summary**

Where a person has incurred expenditure on the purchase of patent rights, the grant of the writing-down allowances provided for in **section 755** would, if continued for the whole of the writing-down period, completely write off that expenditure. It may happen, however, that before the end of that period is reached the patent is allowed to lapse, or the person enjoying the annual allowances in respect of the expenditure in question may sell part or the whole of the rights acquired by incurring that expenditure. This section provides for certain adjustments in such circumstances. However, this section shall not apply to patent rights for which an allowance has been made to a company under **section 284** as applied by **section 291A**.

## Details

### ***Stop on further allowances***

If, before the end of the writing-down period — (1)

- patent rights cease to belong to the person who incurred the expenditure,
- the rights are sold, or

if the rights are sold and the proceeds are not less than the amount of expenditure remaining unallowed,

the person is to receive no further writing-down allowance in respect of the expenditure.

### ***Balancing allowances***

Where, before the end of the writing-down period, the patent rights cease to belong to the person who incurred the capital expenditure on the purchase of the rights, or the person sells those rights and the net proceeds of the sale are less than the amount of the capital expenditure remaining unallowed (see **subsection (5)**), a balancing allowance is given equal to the amount of the capital expenditure remaining unallowed. (2)

### ***Balancing charges***

Where a person who incurred capital expenditure on the purchase of the rights sells those rights and the net proceeds of the sale exceed the amount of the capital expenditure remaining unallowed (see **subsection (5)**), if any, a balancing charge is made equal to the amount of the excess or, where the capital expenditure remaining unallowed is nil, the net proceeds of the sale. (3)

### ***Part-sale***

Where there is a sale of part only of the patent rights but a balancing charge does not apply because the proceeds of sale are less than the amount of the capital expenditure remaining unallowed, no balancing allowance is made. In addition, the title of the seller (who retains part of the rights) to future writing-down allowances over the remaining writing-down period are to be computed by reference to the amount of the capital expenditure remaining unallowed, less the proceeds of the sale in question. (4)

### ***Expenditure remaining unallowed***

The expression “expenditure remaining unallowed” is defined as the original expenditure, less the writing-down allowances already made and less also the net proceeds of any previous sale of a part of the patent rights on the acquisition of which the original expenditure was incurred. (5)

### ***Miscellaneous***

No balancing allowance is to be granted except where a writing-down allowance has been or could have been made. This ensures that balancing allowances are granted (6)

only to the persons mentioned in *section 755*, namely, traders and other persons liable to Irish tax on income derived from the exploitation of the patent rights in question. Also, there is the usual stipulation restricting the amount on which a balancing charge may be made to the aggregate of the allowances already enjoyed in respect of the expenditure (in so far as those have not been withdrawn by any previous balancing charge). It should be noted, however, that the imposition of a balancing charge may not end the matter. Where rights are sold for a sum which yields the seller an overall capital profit (that is, a sum in excess of the price paid), there will, in addition to any balancing charge, be a liability under *section 757* on the excess.

### ***Non-application of section where relief claimed under intangible asset scheme***

This section shall not apply to patent rights for which an allowance has been made to a(7) company under *section 284* as applied by *section 291A*.

## **757 Charges on capital sums received for sale of patent rights**

### **Summary**

A charge to tax under Case IV of Schedule D arises on a resident person who sells a patent right for a capital sum. (By virtue of *section 754(2)*, the term “sale” includes the grant of a licence). The taxable amount is, in general, spread over a 6 year period commencing in the year the capital sum is received. Where the recipient is a nonresident person, the whole sum is chargeable under Case IV of Schedule D and is treated as if it were an annual payment, tax being deducted at source. A non-resident person may elect to have the charge to tax spread over a 6 year period. However, the sum is still subject to full tax at source in year one, with the necessary adjustments being made year by year by means of repayment.

### **Details**

#### ***Charge on residents***

Where a person resident in the State sells patent rights for a capital sum, that person is liable to tax under Case IV of Schedule D on one-sixth of the sum received for each of the 6 chargeable periods beginning with the chargeable period in which the sum is received. (1)(a)

However, the recipient of the capital lump sum may, by a written request to the inspector, opt to be charged on the whole sum in the chargeable period in which the sum is received. This option is useful where that person is a trader and it may be of advantage, if the trade has incurred a loss, to treat the whole of the capital sum as income of the chargeable period in which the sum is received so as to set the loss against that income. Any such request must be made within 12 months of the end of the chargeable period in which the sum is received. (1)(b)

In addition, the recipient of the capital sum may, by notice in writing to the inspector within 12 months of the end of the chargeable period in which the sum is received, request that the tax charge be spread over a period other than 6 years. In such circumstances, the Revenue Commissioners are empowered to direct that the charge be spread over a number of chargeable periods greater or less than 6, where it appears to them that the normal treatment would give rise to hardship. (1)(c)

#### ***Charge on non-residents***

There is special provision to meet the case where a person resident outside the State sells Irish patent rights. Since the seller is non-resident, proceedings for recovery of tax might be ineffective. It is provided, therefore, that tax on the whole sum is to be charged under Case IV of Schedule D and that the purchaser must deduct income tax at the standard rate from the payment as if it were an annual payment under *section 238*. (2) & (3)

The seller may, by notice in writing to the inspector within 12 months of the end of the chargeable period in which the capital sum is paid, elect to be charged on one-sixth of that sum for that period and for each of the 5 succeeding chargeable periods. This option for a 6-year spread of the charge does not, however, affect the obligation of the purchaser to deduct income tax at source under *section 238* but the seller may claim repayment subsequently year by year, as and when his/her revised liability can be worked out on the basis of the charge being spread over 6 years.

#### *Allowance for acquisition costs*

Due account can be taken of the fact that the seller of patent rights may have incurred capital expenditure on their acquisition at an earlier date. The capital gain which the seller makes and for which the seller is to be charged with tax under the section is the difference between what was paid and what is received. Where part of the patent rights have already been sold, the amount received from that sale must be reflected in an equivalent lowering of the acquisition costs to be deducted from the final sale proceeds. These adjustments cannot, however, influence the amount of tax to be deducted at source under *section 238*. Thus, where a non-resident seller of Irish patent rights acquired those rights by purchase, the person to whom the rights are being sold may have no knowledge of the original cost of acquisition to the seller. It is provided, therefore, that the purchaser (who is to account for tax to the Revenue) is to treat the whole sum which he/she pays as liable to deduction of tax, without any enquiry into the possible reduction in the seller's liability which might otherwise apply by the application of this provision. Any relief due to the seller is to be given by way of repayment of tax. (4)

#### *Part-sales*

These rules apply to the sale of part of any patent rights as they apply to the sale of patent rights. (5)

### **758 Relief for expenses**

#### **Summary**

The section provides for the write-off of various fees and expenses incurred in connection with devising a patented invention and of the fees and expenses incurred in connection with obtaining the grant of a patent or the extension of the term of a patent.

#### **Details**

##### *Expenses of traders*

Expenses incurred for the purposes of a trade in taking out a patent or in obtaining an extension of the term for an existing patent can be written off as a deduction in computing the profits or gains of the trade. The provision, therefore, overrides *section 81* which generally prohibits the write-off of such expenses. (1)

##### *Expenses of non-traders*



Where a non-trader incurs any expense in connection with the grant or maintenance of a patent or in obtaining an extension of the term of a patent, an allowance equal to the amount of the expenses is to be made to that person for the chargeable period in which those expenses are incurred. This allowance can be offset against patent income for that chargeable period and, in so far as any balance remains, can be carried forward to future chargeable periods years for set-off against patent income. Expenditure in connection with the “maintenance” of a patent relates to the ordinary renewal fees payable periodically during the term of a patent together with any related agents’ charges. (2)

***Expenses of inventors***

There is also provision for an allowance to be given to the actual devisor of a patented invention for expenses incurred in working out and perfecting the invention. The allowance is to be made for the chargeable period in which those expenses are incurred. (3)

**759 Spreading of revenue payments over several years**

**Summary**

The section provides that where certain royalties or other similar sums are received for the use of a patent that extends over a period of 6 years or more, the recipient is entitled to have his/her tax liability readjusted on the basis of spreading the royalties or similar sums over the preceding 6 years.

**Details**

***Married couples/civil partners jointly assessed***

In the section references to tax payable by a person who is jointly assessed include references to tax payable by the person’s spouse or civil partner. (1)

***Spreading of lump sum payments***

Where the owner of a patent receives a royalty lump sum under deduction of tax, covering use of a patent in a past period of 6 years or more, that person may apply to have his/her tax liability adjusted on the basis of spreading the lump sum over the preceding 6 years. (2)

***Spreading over shorter periods***

The right to spread lump sum payments is extended to cases where the period of use has exceeded 2 years and is less than 6 years. In such cases, the payment is to be spread back for the number of complete years of use. (3)

***Non-application to non-residents***

The section does not apply to capital sums from which tax is deducted under **section 757(2)**, namely, lump sums paid to a non-resident who sells Irish patent rights. **Section 757** contains its own provisions for spreading such lump sums. (4)

**760 Capital sums: effect of death, winding up and partnership changes**

**Summary**

This section supplements **section 757** under which the tax chargeable in respect of capital sums received for the sale of patent rights is spread over subsequent years. The provisions of the section are necessary to secure that a part of the tax is not lost where the person chargeable dies or a company is wound up so that one or more of the subsequent assessments cannot be made. The section provides that, in the case of the death of an individual or the winding-up of a company, no annual tax charge under **section 757** is to be made for years after that in which the event occurs. Instead, the outstanding balance of the capital sum being charged on the basis of being spread forward is assessed in one amount for the year in which the death takes place or the winding-up commences. The section applies also, with suitable modifications, to partnerships.

#### Details

##### ***Married couples/civil partners jointly assessed***

In the section references to tax paid or payable by a person who is jointly assessed **(1)** include references to tax payable by the person's spouse or civil partner.

##### ***Year of death or winding-up***

In the case of the death of an individual taxpayer or the winding-up of a company or other body corporate, no annual charges under **section 757** are to be made for years after that in which the event occurs. The whole outstanding balance of the capital sum which is being charged on the basis of being spread forward is to be assessed in one amount for the year in which the death takes place or the winding-up commences. **(2)**

##### ***Death of an individual***

In the case of the death of an individual, the individual's executors have the right to reduce the tax payable by virtue of **subsection (2)**, so as not to exceed the total tax which would have been payable if the additional amount rendered chargeable for the year of death had been allocated in equal parts as income of the years from (and including) the year in which the original capital sum was received to (and including) the year of death. **(3)**

##### ***Partnerships***

The section provides that the provisions of **subsection (2)** in relation to the winding-up of a company are to apply also to the discontinuance of a trade carried on jointly by 2 or more persons in partnership. The additional sum chargeable (as representing the onesixth parts of the capital receipt originally allocated to years of assessment later than the year in which the discontinuance occurs, or is treated as occurring) is to be apportioned among the partners immediately before the discontinuance according to their several interests in the partnership profits. Each partner is entitled to claim the same modification of his/her own liability on the basis of a spread over the period from the date of receipt to the date of partnership change as can be claimed by the executors of an individual who dies. **(4)**

### **761 Manner of making allowances and charges**

An allowance or charge is to be made to or on a person in taxing the person's trade (1) (that is, in charging the person's trading profits in the case of income tax or in computing trading income in the case of corporation tax) if the patent rights in question are owned by that person for the purpose of a trade which that person is carrying on. This does not, however, apply to a charge under *section 757* as distinct from a balancing charge made for the purpose of withdrawing writing-down allowances which are ultimately seen to have been too generous in relation to the depreciation of the rights actually occurring.

Where an allowance is to be made to a person who is not a trader, it is made by way (2) of discharge or repayment of tax in the normal way but is available only against income from patents. In so far as an allowance cannot be given against patent income in the year of claim, it can be carried forward for offset against patent income in subsequent years.

### **762 Application of Chapter 4 of Part 9**

The section applies to the Chapter the provisions of *Chapter 4* of *Part 9* which (1) contains a number of general provisions supplementing the legislation on capital allowances. Thus, any references in the Tax Acts to capital allowances given by means of discharge or repayment and available against certain income only are to include references to allowances given under section 761(2).

The section also applies specific provisions of *Chapter 4* of *Part 9* in a modified way (2) to ensure a particular application in the case of patent rights.

Thus, in the application of *section 312* (special provisions as to certain sales) to (2)(a) patent rights, where the seller and buyer of patent rights are under common control, the seller and buyer may make a joint election in writing to the inspector to have the sale of the rights treated as if it were made at the amount of the capital expenditure (on the acquisition of the rights) remaining unallowed instead of the open market price. Such an election may only be made where the tax written-down value of the asset is less than the open market price and the sale is not a sale the sole or main benefit of which is to obtain a capital allowance. In any such case, the seller will not have a balancing charge and the buyer will effectively be granted capital allowances on a reduced amount over the remainder of the writing-down period of the patent. However, in computing any future balancing charge to be made on the buyer in respect of the patent, account will be taken not only of the capital allowances granted to the buyer but also of the capital allowances granted to the seller.

A joint election to have the sale of patent rights treated as if it were made for the amount of the capital expenditure remaining unallowed may not be made if, at the time of the sale, any of the parties to the sale are not resident in the State. This rule will not apply, however, if the non-resident party or parties is or are entitled to a capital allowance, or subject to a balancing charge, as a result of the sale. This would arise where a nonresident company is carrying on a trade in the State through a branch or agency.

For the purposes of **Part 9** (capital allowances for industrial buildings or structures, machinery or plant and dredging), **section 316** provides that capital expenditure and capital sums do not include any expenditure or sum from which tax is or may be deducted under **section 237** (annual payments made wholly out of taxed income) or **section 238** (annual payments not payable out of taxed income). However, for the purposes of the application of **section 316** to patent rights, this exclusion is not to include a sum in the case of which such a deduction is to be or may be made in charging capital sums received for the sale of patent rights under **section 757**. (2)(b)

## CHAPTER 2

### Scientific and certain other research

#### Overview

This Chapter provides tax relief to persons carrying on a trade in respect of both revenue (**sections 764** and **766**) and capital (**section 765**) expenditure on scientific research.

#### 763 Interpretation (sections 764 and 765)

##### Summary

The section contains definitions used in **sections 764** and **765** as well as a number of other introductory provisions.

##### Details

##### Definitions

Some of the more important definitions include — (1)

“designated area” is an area designated by order under section 2 of the Continental Shelf Act, 1968.

“exploring for scientific minerals” is searching areas in the State, including searching by drilling, for deposits of specified minerals and includes testing such deposits and winning access to such deposits, but excludes mine development and mine working operations.

“licence” covers an exploration licence, a petroleum prospecting licence, a petroleum lease and certain other licences referred to as reserved area licences.

“petroleum” includes any mineral oil and natural gas and any other mineral substance contained in oil or natural gas obtained in the extraction process, but excludes coal and bituminous shales from which oil can be extracted by distillation. It is necessary for such substances to be extracted or to be capable of being extracted under the authority of a licence.

“petroleum exploration activities” consists of searching for deposits in a licenced area and testing and assessing such deposits or in winning access to such deposits for the purpose of searching for, testing or assessing such deposits.

“petroleum extraction activities” consists of searching for, winning access to and extracting petroleum from a relevant field under a petroleum lease authorising such activities and transporting the petroleum to an area for storage and initial treatment.

“specified minerals” means certain minerals occurring in non-bedded deposits. The minerals in question are listed.

“expenditure on scientific research” excludes expenditure incurred in the acquisition (2) of rights in connection with scientific research.

“scientific research” is any activities in the fields of natural or applied science for the (2) to (4) extension of knowledge. However, specifically excluded are specified mineral and petroleum exploration activities as well as petroleum extraction activities carried on after 28 January, 1992.

### ***Restriction on reliefs***

For the purposes of a deduction under **section 764** or an allowance under **section 765** (5) expenditure incurred by a person must be on a net of grant basis.

Expenditure can only be taken into account for the purposes of the reliefs under (6) **section 764** or **765** in respect of only one trade.

### **764 Deduction for revenue expenditure on scientific research**

The section provides that a person carrying on a trade is entitled, in computing the profits or gains of the trade, to deduct amounts representing non-capital expenditure on scientific research, whether or not the scientific research is related to the person’s trade. In addition, a similar deduction in computing profits or gains of a person’s trade is also available in respect of sums paid whether capital or otherwise to a body carrying on scientific research that is approved for this purpose by the Minister for Finance, or to an Irish university, in order that the body or university may undertake scientific research.

This latter relief is, with effect from 6 April 2001, only available under and within the provisions of section 848A.

### **765 Allowances for capital expenditure on scientific research**

#### **Summary**

This section gives an allowance in respect of capital expenditure on scientific research incurred by a person carrying on a trade to which the expenditure relates. An allowance is also available where the capital expenditure on scientific research is incurred by a person carrying on a trade but the expenditure is not related to the person’s trade.

#### **Details**

##### ***Research related to a trade***

A person carrying on a trade is entitled, in computing the profits or gains of the trade, (1) to an allowance representing capital expenditure on scientific research other than capital expenditure on a building or structure except where the construction or development is itself scientific research relating to the trade. The allowance is also available where the person has incurred the expenditure before the start of trading. A claim must be made within 2 years of the end of the chargeable period in which the expenditure was incurred or, where the expenditure was incurred before the trade was set up, within 2 years of the end of the chargeable period in which the trade was set up. Any asset which represents the capital expenditure must be in use for the purposes of scientific research at the end of that chargeable period.

##### ***Research not related to a trade***

An allowance can also be claimed in respect of capital expenditure incurred by a (2) person carrying on a trade on scientific research which is not related to any trade carried on by the claimant.

***Asset no longer used for research***

Where an asset representing capital expenditure on scientific research ceases to be (3) used for the research relating to the trade of the person who incurred the expenditure, the trader must include as a trading receipt an amount representing the lower of the amount of the allowance granted or the value of the asset at the time it ceases to be used.

***Bar on double allowances, etc***

Where in a chargeable period an allowance is made for capital expenditure on (4) scientific research and that expenditure is represented by an asset, no wear and tear allowances are to be made in respect of the expenditure on the asset. Likewise, where the asset is an industrial premises, no deduction based on the rateable valuation of the premises is to be made in the period in ascertaining trading profits.

***Carry forward of allowance***

Unused allowances in respect of capital expenditure on scientific research may be (5) carried forward against future trading income.

**766 Tax credit for research and development expenditure, etc**

**Summary**

This section provides for a 25% tax credit for incremental expenditure on certain research and development (R&D) activities over such expenditure in a base year (2003) defined as the “threshold amount”. The Finance no.2 Act 2013 increased the amount excluded from the incremental basis of calculation from €200,000 to €300,000. The tax credit is due on such expenditure at 25% without reference to the 2003 “threshold amount”. These provisions apply in respect of accounting periods commencing on or after 1 January 2014. **Section 766A** provides for a 25% tax credit for expenditure on buildings or structures used for research and development.

***Expenditure (other than on buildings)***

Expenditure incurred in a relevant period by qualified companies who are members of a group of companies is aggregated. The group expenditure on R&D in that period is compared with the group expenditure on R&D in a base period. A tax credit equal to 25 per cent of the increase is given to the group and can be allocated to companies that are members of the group in such manner as they wish. The amount allocated to a company must be offset against corporation tax payable by the company in accounting periods falling into the relevant period. Unused credits can be carried forward indefinitely against the corporation tax liability for subsequent accounting period.

Any unused credit in respect of expenditure incurred in accounting periods commencing on or after 1 January 2009 may, instead of being carried forward indefinitely, be offset against corporation tax of the preceding accounting period of equal length. Any remaining amount may then be carried forward indefinitely, or, on receipt of a claim, paid to the company in 3 instalments, subject to some further offsets against corporation tax.

A limit applies to the amounts that can be paid to a company. The limit is the greater of (i) the corporation tax payable by the company for accounting periods ending in the 10 years prior to the relevant period and (ii) the aggregate of payroll liabilities for the relevant period and the preceding accounting period.

The Finance Act 2011 amended the definition of “expenditure on research and development”. Where a company incurs expenditure on the provision of a “specified intangible asset” within the meaning of section 291A, such expenditure shall not constitute expenditure on machinery or plant for the purpose of this section.

The Finance (No. 2) Act 2008 fixed 2003 as the base year for all future accounting periods.

### ***Qualifying Expenditure***

To qualify for a credit, the R&D activity must be carried on by the company itself in a European Economic Area country or the United Kingdom. The expenditure must qualify for a tax deduction under Irish law and in the case of an Irish resident company must not qualify for a deduction under the law of another territory.

Other circumstances where expenditure may qualify are set out below. Expenditure incurred by a company in the management or control of research and development activities, where such activities are carried on by another person, will not qualify for the tax credit.

Where a company incurs expenditure on research and development and pays a sum to a university or institute of higher education to carry on research and development activities in a relevant Member State, so much of the sum so paid as does not exceed the greater of 5 per cent of the company’s own expenditure on research and development or €100,000 will qualify for the credit.

Where a company incurs expenditure on research and development and pays a sum to a person, other than a university or institute of higher education in order for that person to carry on research and development activities, so much of the sum so paid as does not exceed the greater of 15 per cent of the company’s own expenditure on research and development or €100,000 will qualify for the credit.

The claimant company must notify the sub contracted person in writing that they may not claim the tax credit in respect of that expenditure.

### ***R&D Activities***

The section contains a core definition of R&D activities. The definition requires a systematic, investigative or experimental approach to be taken in a field of science or technology. The definition covers the full range of R&D activities from basic research and applied research to experimental development. The definition sets out two additional fundamental tests that are applied to determine if an activity is R&D. The first requires that the activity must seek to achieve scientific or technological advancement. The second is that the activity must involve the resolution of scientific or technological uncertainty. The Minister for Enterprise, Trade and Employment, in consultation with the Minister for Finance, may make regulations providing that certain categories of activities are, and certain categories are not, R&D activities.

### **Details**

#### ***Definitions***

“authorised officer” is defined as an officer of the Revenue Commissioners **(I)(a)** authorised by them in writing for the purposes of this section.

“EEA Agreement” is defined as the EEA Agreement of 2 May 1992.

### ***Expenditure on R&D***

“expenditure on research and development” is a core definition for the purposes of the section. It means expenditure incurred by a company on research and development activities carried out by the company in an EEA Member State or the United Kingdom. However, it does not include expenditure on a building or structure. A number of conditions must be satisfied in order to qualify for the credit. Before expenditure can be regarded as expenditure on research and development for the purposes of the tax credit, it must qualify for tax relief in Ireland under one of a number of headings:

- it can be an amount which is an allowable deduction of a trade or as a charge on **(i)** income. This does not include capital allowances (which are treated as deductions under **section 307**),
- it can be expenditure which is allowable as capital allowances on machinery or plant **(ii)** under **Part 9**, or
- it can be other expenditure that qualifies for scientific research allowance under **(iii)** **section 764**.

A number of other conditions also apply in considering whether expenditure is to be regarded as being on R&D.

- a royalty payment will not be regarded as expenditure on research and development **(I)** for the purposes of the relief if it is an exempt patent royalty in the hands of the recipient or if it is not at arm’s-length.
- interest will not be taken into account as expenditure on research and development **(IA)** for the purposes of the tax credit even though, for accounting purposes, it may be included in the value of an asset.
- expenditure on Research and Development shall not include- **(IB)**
  - Except as provided for in **subparagraphs (vii) and (viii) of subsection (1)(b)**, **(A)** any amount paid to another person to carry on research and development activities, or
  - Expenditure incurred by a company in the management or control of research **(B)** and development activities where such activities are carried on by another person, and ‘in the carrying on by it of research and development activities’ shall be construed accordingly.
- where expenditure is incurred by an Irish resident company, it will not be regarded **(II)** as expenditure on research and development for the purposes of the credit if it qualifies for tax relief in a territory other than the State.

Where machinery or plant will not be used wholly and exclusively for research and development activities, a proportionate allocation, as appears to the inspector (or on appeal to the Appeal Commissioners) to be just and reasonable, will be made of the expenditure on such plant and machinery for the purposes of determining the amount that will be treated as wholly and exclusively incurred on research and development activities. **(IA)(a)**

A subsequent apportionment is to be made where the earlier apportionment requires **(IA)(b)** to be revised in the light of actual events and any resulting assessments or repayments of tax as are necessary will be made.



“group expenditure on research and development” is defined as the aggregate of expenditure on research and development incurred by member companies of a group in a relevant period. This is subject to two qualifications:

- where a company that incurs expenditure on research and development is a member (i) of the group for only a part of the relevant period, expenditure is only to be taken into account if it is incurred at a time when the company is a member of the group.
- if research and development expenditure incurred by a company is taken into (ii) account in relation to one group, the same expenditure cannot be taken into account in relation to another group.

“key employee” has the meaning ascribed to it by *section 472D*.

### ***Qualified Company***

“qualified company” is defined as a company that satisfies 4 conditions:

- throughout the relevant period the company itself must carry on a trade, or be a 51 (i) (I), per cent subsidiary of a trading company or be a member of a trading group (II), (III) (i.e. a 51 per cent subsidiary of a holding company of a trading company),
- it must carry out research and development activities in the relevant period, (ii)
- it must maintain a record of its research and development expenditure, (iii)
- in the case of a company which is a member of a group of companies that carries on (iv) research and development activities in separate geographical locations, it must maintain separate records of expenditure incurred in respect of the activities carried on at each location.

“qualifying group expenditure on research and development” is incremental expenditure.

It is arrived at by the following calculation:

A + B Where:

**A** is the amount of group expenditure on research and development in relation to a relevant period as does not exceed €300,000, and

**B** is the amount equal to the excess of the amount of group expenditure on research and development in relation to the relevant period over the threshold amount in relation to the relevant period

This is subject to a proviso that the amount of qualifying group expenditure on research and development in relation to a relevant period cannot exceed the amount of group expenditure on research and development in relation to that relevant period.

“relevant Member State” is an EEA Member State or the United Kingdom.

### ***Relevant Period***

“relevant period” is the period for which the incremental expenditure on research and development is to be calculated. Generally the first relevant period will be the period of one year ending at the end of the first common accounting period of the member companies of the group that commences on or after 1 January 2004 (paragraph (i) of the definition).

A special rule applies to cover a situation in which there are no common accounting periods (paragraph (ii)). In this case the companies must jointly elect which

accounting date is to be taken for the purposes of the relief. The first relevant period is then the first one year period ending on that date that commences on or after 1 January 2004.

Once the first relevant period is determined, each subsequent one year period will be a relevant period.

### ***R&D Activities***

“research and development activities” requires a systematic, investigative or experimental approach to be taken in a field of science or technology. The definition explicitly covers the full range of R&D activities from basic research and applied research to experimental development.

Basic research is defined as experimental or theoretical work undertaken primarily to acquire new scientific or technical knowledge without a specific practical application in view. For companies this is research with a longer-term focus and is furthest from the market and consequently carries very significant risk.

Applied research is defined as work undertaken in order to gain scientific or technical knowledge and directed towards a specific practical application. This also requires a systematic, investigative or experimental approach to be taken in a field of science or technology in order to acquire new knowledge. It is, however, directed towards a specific practical application.

Experimental development is defined as work undertaken which draws on scientific or technical knowledge or practical experience for the purpose of achieving technological advancement and which is directed at producing new, or improving existing, materials, products, devices, processes, systems or services including incremental improvements thereto.

There are two fundamental tests, which are applied in this definition to determine if an activity is “research and development”. The first requires that the activity must seek to achieve scientific or technological advancement. This is a fundamental requirement of research and development activity. Simply solving technical problems or trouble shooting using generally available scientific or technological knowledge or experience does not meet this test. The work must be undertaken with the intention of advancing the underlying science or technology. This test also recognises that research and development is a risky activity and may or may not succeed and consequently it is recognised that the desired outcome to any research project may not be achieved. Consequently the requirement is that the activity must seek to achieve as opposed to succeed in achieving scientific or technological advancement. This test may also be passed even where the outcome of the research determines that a hypothesis is incorrect as this also adds to the stock of scientific knowledge. Similarly, in experimental development, discovering that a certain methodology does not work adds to the technological knowledge base and may be considered to be scientific or technological advancement.

The second test is that the activity must involve the resolution of scientific or technological uncertainty. This uncertainty is what a research and development programme or project would aim to resolve. This can relate to uncertainty as to whether a particular objective can be achieved at all or uncertainty as to how it might be achieved. If, on the basis of generally available scientific or technological knowledge or experience such uncertainty exists, research and development activity would aim to remove that technological or scientific uncertainty through basic, applied and/or experimental development activity. This test is also important in deciding when a research and development activity ceases and the normal activity associated with commercial exploitation begins. Generally that point is reached when the scientific or technological uncertainty has been resolved.

For the purposes of further clarity the Minister for Enterprise, Trade and Employment, in consultation with the Minister for Finance, may make regulations for the purposes of this section providing that such categories of activities as may be specified in the regulations are or are not research and development activities. (6)

### ***Research and Development Centre***

“research and development centre” means a fixed base or bases, established in buildings or structures, which are used for the purpose of the carrying on by a company of research and development activities.

### ***Specified Amount***

“specified amount” means the following:

An amount—

- (i) paid by the Revenue Commissioners in accordance with **section 766(4B)**, or
- (ii) surrendered in accordance with **subsection (2A)**,

and a claim in respect of a specified amount shall be construed accordingly.

### ***Threshold Amount***

“threshold amount” is defined in relation to a relevant period of a group of companies. It is the amount of expenditure on research and development in a base period (the threshold period) which is compared with the expenditure on research and development in the relevant period in order to determine the level of incremental expenditure. The base period is 2003. (1)(a)

Where a company is a member of a group for a proportion only of the threshold period expenditure is counted only if it was incurred at a time when the company was a member of the group. (i)

Where at any time during the threshold period, a group of companies carried on research and development activities in more than one research and development centre and each centre is in a separate geographical location, and at a time (referred to in this section as the ‘cessation time’) after the end of the threshold period, a research and development centre ceases to be used for the purposes of a trade by a company which is a member of the group of companies and is not so used by any other company which is a member of the group, then expenditure incurred in relation to that research and development centre shall not be taken into account in calculating the threshold amount in relation to any relevant period which commences after the cessation time. This refers only to accounting periods commencing on or after 1 January 2010. (ii)

“university or institute of higher education” can be in the State or in an EEA Member State or the United Kingdom. Certain payments to such institutions can qualify for the credit subject to certain conditions.

In the case of institutions in the State, they must either provide courses approved by the Minister for Education and Science in relation to higher education grants or operate in accordance with standards approved by the Minister for Education and Science for the purposes of *section 473A* (which is concerned with tax relief for fees paid for third level education). (i)

In the case of universities and institutions in EEA Member States or the United Kingdom other than the State, such institutions must be maintained or assisted by relevant grants out of public funds from any EEA Member State or the United Kingdom or the institution concerned must be accredited as a university or institute of higher education in the EEA Member State in which it is located, or in the United Kingdom. (ii)

### ***Membership of a Group of Companies***

Companies will be regarded as members of a group if one is a 51 per cent subsidiary of the other or both are 51 per cent subsidiaries of a third company. In determining whether this is the case, ownership of shares by a company dealing in the shares (i.e. where a profit on sale of the shares would be treated for tax purposes as a trading receipt) is to be ignored (under clause (I)), as is indirect ownership of shares which are directly owned by a company dealing in the shares (under clause (II)). (I)(b)(i)

In addition, any holding must be a “real holding”. *Sections 412 to 418* are applied for the purposes of this section. Those sections require that in order to be regarded as having a certain percentage holding in a company, the person concerned must be entitled to not only that percentage of the shares, but also of any profits of the company for distribution and any share of the company’s assets in the event of its winding up. *Sections 412 to 418* are constructed around a 75 per cent holding level. They are adapted for this section so as to apply to a 51 per cent holding level. *Section 411(1)(c)* is disapplied for the purposes of this section to ensure that its scope is not limited to companies resident in EEA Member States. (I)(b)(ii)

For the purposes of the R&D credit scheme a company and all its 51 per cent subsidiaries are to be regarded as forming a group. However, if within a 51 per cent group there are 51 per cent subgroups, the group for the purpose of this section will be the bigger group. A company that is not a member of a group can be regarded as a group consisting only of itself. This ensures that the credit is available to such a company if it meets the conditions of the section. (I)(b)(iii)

A group in the threshold period will be designated as the same group as the group in the relevant period even though there may not be a perfect match of companies. The key issue is whether the group is under the control of any person or group of persons at both times. (I)(b)(iv)

### ***Grants***

Expenditure shall not be regarded as qualifying expenditure where it has been or is to be met directly or indirectly by grant assistance or any other assistance from the State or Relevant Member State or any board established by statute, any public or local authority or any other agency of the State, another Relevant Member State, the European Commission or any other State. (I)(b)(v)

### ***Expenditure incurred prior to trading***

Expenditure incurred by a company on research and development prior to the carrying on of any trade may qualify for the credit. A claim in respect of this expenditure must be made within 12 months from the end of the accounting period commencing on the date the company first commenced to trade. The amount of such credit is calculated as if the company had been trading when the expenditure was incurred. (1)(b)(vi)

The company would not be in a position to use the credit until it commences to have a corporation tax liability. It will, however, be entitled to carry the credit forward for offset against its liability in future accounting periods.

#### ***Payments to Universities and Third-level Educational Institutes***

Certain payments by a company to a university or third level educational institute may be treated as expenditure incurred by the company on research and development activities carried out by it. Where the company incurs expenditure on research and development and pays a sum to a university or third level educational institution for it to carry out research and development activities, the sum paid to the university or higher educational institution can be treated as research and development expenditure by the company up to an amount equal to 15 per cent of the company's own expenditure on research and development activities carried on by it. The expenditure which can qualify for the credit is increased to the greater of the relevant 15 per cent or up to €100,000 as matched by the company's own R+D expenditure. (1)(b)(vii)

#### ***Payments to Other parties***

Payments by companies to other parties to carry out research and development work qualify, in respect of expenditure incurred on or after 1 January 2007, under the tax credit scheme up to a limit of 15% of expenditure on research and development activities of the company in any one year. This applies where the sub-contractor carrying out the research and development is not connected with the company and does not claim a tax credit in respect of such expenditure. A company must notify the subcontractor in advance of payment or on the date of payment if they intend to make a tax credit claim in respect of such expenditure. This measure is in addition to the provision in respect of research and development work carried out for the company by universities. The expenditure which can qualify for the credit is increased to the greater of the relevant 15 per cent or up to €100,000 as matched by the company's own R+D expenditure. (1)(b)(viii)

A research and development centre used by a company which is a member of a group of companies will be treated as being in a separate geographical location to another research and development centre used by the company or another company which is a member of the group, if it is not less than a distance of 20 kilometres from the other research and development centre. (1)(b)(ix)

#### ***Relevant micro or small sized company***

(1)(c)

A 'relevant micro or small sized company' means a company which is a micro or small sized enterprise within the meaning of Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and mediumsized enterprises

#### ***The Credit***

Corporation tax of an accounting period of a company can be reduced by 25 per cent of so much of the incremental expenditure of the group on R&D as has been allocated to the company. Specifically, the subsection refers to 25 per cent of (2)

“qualifying expenditure attributable to the company as is referable to the accounting period”. Corporation tax of an accounting period of a relevant micro or small sized company can be reduced by 30 per cent of so much of the incremental qualifying R&D expenditure attributable to the company as is referable to the accounting period

***Key employee relief***

This section provides for a company to surrender all or part of the R+D tax credit (2A) that would be available to the company to one or more key employees as the company may specify and up to the amount of the credit that is available.

The amount surrendered may not exceed the Corporation Tax liability for that(2B) accounting period.

This surrendering process cannot take place if the company has a current Corporation(2C) Tax liability.

***Meaning of “Qualifying expenditure attributable to a company as is referable to an accounting period”***

The incremental expenditure will be determined on a group basis by reference to a relevant period. A relevant period will generally coincide with the accounting period of companies within a group. However, in some cases it may not.

The qualifying expenditure on research and development which is attributable to a (3)(a) company, is the proportion of the group incremental expenditure on research and development, that is allocated to a member company of the group. That company can claim the credit in respect of the expenditure so apportioned to it. The members of the group that incur expenditure on research and development in the relevant period may allocate the expenditure between them in such manner as they wish. Any such allocation is to be specified in notice in writing given to the inspector of taxes.

A fallback allocation rule provides for a situation in which the companies do not give any notice in writing. This involves allocating the incremental expenditure between the companies in proportion to the research and development expenditure by each of them in the relevant period. This is done by way of a formula. Under the formula the incremental expenditure (Q) is multiplied by the research and development expenditure by the company concerned (C) and divided by the group research and development expenditure in the relevant period (G). The result is the amount, which attracts a 25 per cent credit for the company concerned.

Where the relevant period and the accounting period do coincide, the full amount of (3)(b) expenditure attributed to a company for a relevant period will be the amount referable to the company’s accounting period.

Where the relevant period and the accounting period do not coincide, the amount of (3)(c) expenditure attributed to a company for a relevant period is to be apportioned to the accounting periods that fall wholly or partly into the relevant period. Any amounts so apportioned to an accounting period will be regarded as being referable to the accounting period.

***Carry forward of excess credit***

Where in an accounting period the amount by which the company is entitled to reduce corporation tax of the accounting period exceeds the corporation tax for the accounting period, the excess is to be carried forward for offset against corporation tax payable in the following accounting period. Unused credits can be carried forward indefinitely. The amount of unused credits that may be carried forward excludes any amount which has already been used by virtue of **subsection (4A)** to reduce the corporation tax of an earlier accounting period, or by virtue of subsection (4B), paid by the Revenue Commissioners. (4)

**Options for use of excess credits**

In respect of expenditure incurred in an accounting period which commenced on or after 1 January 2009, if the amount of the credit exceeds the corporation tax for the accounting period, the company may make a claim to offset any unused tax credit against the corporation tax of the preceding accounting period. (4A)(a)

The preceding accounting period must be a period equal in length to the accounting period in which the expenditure was incurred. (4A)(b)

In respect of expenditure incurred in an accounting period which commenced on or after 1 January 2009, where a claim has been made to offset any unused credit against a previous accounting period, or where no corporation tax arises in that previous period, the company may make a claim to have the amount of any remaining tax credit paid to them by the Revenue Commissioners. (4B)(a)

Subject to the limits imposed by **section 766B**, on receipt of a claim, the amount of the tax credit to be paid by the Revenue Commissioners will be paid in 3 instalments. (4B)(b)

The first instalment which shall be equal to 33 per cent of the unused credit, will be paid to the company by the Revenue Commissioners, no earlier than the specified return date for the company's corporation tax return, for the accounting period in which the R&D expenditure giving rise to the excess was incurred. (4B)(b)(i)

Any remaining excess will then be used to reduce the corporation tax for the accounting period following the accounting period in which the expenditure was incurred. If there is any further remaining excess the Revenue Commissioners will pay a second instalment equal to 50% of that remaining amount. The second payment will be paid not earlier than 12 months after the date referred to in **subsection (4B)(b)(i)**. (4B)(b)(ii)

Where any excess remains it will be used to reduce the corporation tax for the second accounting period following the accounting period in which the expenditure giving rise to the excess was incurred. If any excess still remains the Revenue Commissioners will pay a third instalment equal to that remaining amount. The third payment will be made not earlier than 24 months after the date referred to in **subsection (4B)(b)(i)**. (4B)(b)(iii)

Where a company that has made a claim ceases to carry on a trade and another company commences to carry on that trade and the R&D activities, then the successor company may claim any R&D tax credit amounts not used by the predecessor company provided both companies were members of the same group at the time of the transfer, and (4C)

On or at any time within 2 years after the event the trade and the research and development activities are not carried on otherwise than by the successor, then the successor may, to the extent that the predecessor has not used an amount to reduce the corporation tax of an accounting period in accordance with *subsection (2)*, surrendered an amount in accordance with *subsection (2A)* or made a claim under *subsection (4A)* or *(4B)*, carry forward any excess that the predecessor would have been entitled to carry forward in accordance with *subsection (4)*.

All claims made under this section on or after 1 January 2009, must be made within 12 months from the end of the accounting period in which the expenditure on research and development was incurred. (5)

### ***Consulting with experts***

The Revenue Commissioners may, in relation to a claim by a company under this section or *section 766A*, consult with any person who in their opinion may be of assistance to them in order to determine whether the expenditure incurred by the company was incurred by it in the carrying on by it of research and development activities. (7)(a)

Before disclosing information to such experts, the Revenue Commissioners must make known to the company the identity of the person who they intend to consult and the information they intend to disclose to such person. Where the company shows to the satisfaction of the Revenue Commissioners, or on appeal to the Appeal Commissioners, that disclosure of such information to that person could prejudice the company's business, then, the Revenue Commissioners will not make such disclosure. (7)(b)

### ***Treatment by Revenue of amounts paid to the company***

Any amount payable by Revenue by virtue of *subsection (4B)* will not be income of the company, or another company for any tax purpose. (7A)

Any amount payable by the Revenue Commissioners as to the company or another company by virtue of *subsection (4B)* shall be deemed to be an overpayment of corporation tax, for the purposes only of *section 960H(2)*. (7B)(a)

Any claim in respect of a specified amount or an amount in respect of *section 766C(4)* shall be deemed for the purposes of *section 1077E* to be a claim in connection with a credit and, for the purposes of determining an amount in accordance with *section 1077E(11)* or *1077E(12)*, a reference to an amount of tax that would have been payable for the relevant periods by the person concerned shall be read as if it were a reference to a specified amount. (b)(i)

Any claim in respect of *section 766(4B)*, *766A(4B)* or *766C(4)* that remains unpaid shall be deemed for the purposes of *section 1077E* to be a claim in connection with a credit and, for the purposes of determining an amount in accordance with *section 1077E(11)* or *1077E(12)*, a reference to an amount of tax that would have been payable for the relevant periods by the person concerned shall be read as if it were a reference to an amount so claimed (b)(ii)

Where a company makes a claim in respect of a specified amount and it is subsequently found that the claim is not as authorised by this section or by *section 766A*, as the case may be, then the company may be charged to tax under Case IV of Schedule D for the accounting period in respect of which the payment was made or the amount surrendered, as the case may be, in an amount equal to 4 times so much of the specified amount or 4 times so much of an amount pursuant to *section 766C(4)* as is not so authorised. (c)(i)



For accounting periods commencing on or after 1 January 2014, where a company makes a claim under subsection (2A) to surrender an amount to a key employee and it is subsequently found that the claim has been deliberately false or overstated and that the claim is not as authorised by this section, then paragraph (i) shall not apply and the company shall be charged to tax under Case IV of Schedule D for the accounting period in respect of which the amount was surrendered in an amount equal to 8 times so much of the key employee amount as is not so authorised. (c)(ii)

Where an amount is charged to tax under this paragraph then no loss, deficit, expense or credit shall be allowed to shelter the liability raised, this Case IV amount will not form part of the close company surcharge calculation. (c)(iii)

Where in accordance with *paragraph (c)* an inspector makes an assessment in respect of a specified amount, the amount so charged shall for the purposes of *section 1080* be deemed to be tax due and payable and shall carry interest as determined in accordance with *subsection (2)(c) of section 1080* as if a reference to the date when the tax became due and payable were a reference to the date the amount was paid by the Revenue Commissioners, or a reference to the date the corporation tax of the company for the accounting period in respect of which the amount was surrendered, was payable, as the case may be. (d)

#### ***Claw-back of the credit***

In relation to a research and development centre, where at any time after the cessation time (as referred to in the definition of “threshold amount”) – (7C)(a)

That research and development centre is used for the purposes of a trade by any company which is a member of the group, or (i)

The research and development activities, which were carried on in that centre in the 48 months immediately preceding the cessation time, are carried on by any company which is a member of the same group, then – (ii)

- the research and development expenditure incurred in the threshold period in respect of that centre, shall no longer be ignored in the calculation of qualifying group expenditure on research and development, for that relevant period and all subsequent relevant periods, and (7C)(b)
- a clawback will apply in respect of the company referred to in (i) or (ii) above, as the case may be. That company will be charged to tax under Schedule D Case IV on an amount equal to the aggregate amount by which the qualifying group expenditure on research and development has been increased for all relevant periods, as a result of a reduction in the threshold amount.

A further clawback is provided as follows: (7C)(c)

- where expenditure on research and development has been ignored by virtue of *subparagraph (ii)* of the definition of ‘threshold amount’ in the calculation of qualifying group expenditure on research and development for a relevant period, and (i)
- at any time in the period of 10 years after the cessation time (as referred to in the definition of ‘threshold amount’, no company which is a member of the group remains within the charge to corporation tax, (ii)

then the last company to be within the charge to corporation tax shall be charged to tax under Schedule D Case IV on an amount equal to the aggregate amount by which the qualifying group expenditure on research and development has been increased for all relevant periods, as a result of a reduction in the threshold amount, as reduced by any amount already charged to tax in accordance with the first clawback.

Any functions in relation to consultation with experts under **subsection (7)** to be performed or discharged by the Revenue Commissioners may be performed or discharged by an authorised officer of the Revenue Commissioners and any references to the Revenue Commissioners will be construed as including references to the authorised officer. (8)

## **766A Tax credit on expenditure on buildings or structures used for research and development**

### **Summary**

This section provides for a tax credit on expenditure on the construction of a qualifying building. The section provides that expenditure on the construction of a qualifying building is to qualify for a credit of 25 per cent of the expenditure (net of grants) which can be offset against corporation tax payable by the company. If the building or structure is sold or ceases to be used within 10 years for the purposes of research and development, or for the purpose of the same trade that was carried on at the beginning of the specified period, no further credit or payment is to be given. Any credit already given is to be withdrawn and any payments already made recovered.

### **Details**

#### **Definitions**

“qualifying building” is defined as a building or structure, where for the specified relevant period not less than 35% of its use is attributable to the research and development activities carried on by the company in a relevant Member State. (1)(a)

“qualified company”, “relevant Member State” and “research and development activities” all have the same meanings as in **section 766**.

“refurbishment” is defined as work of construction, reconstruction, repair or renewal and as including the provision of water, sewerage or heating facilities in the course of restoration of a building or structure.

“relevant expenditure” is the expenditure which qualifies for the tax credit under the section. It is defined as expenditure on the construction of a “qualifying building”. The expenditure only qualifies for the credit if it qualifies for capital allowances under **Part 9**. However, it will not qualify for the credit if it can qualify for tax relief in a territory other than the State. **Paragraphs (i) to (iii)** set out the ways in which it could qualify for such tax relief.

“specified relevant expenditure” where the qualifying building is not used by the company wholly and exclusively for the purpose of research and development, specified relevant expenditure is the proportion of “relevant expenditure”, as the research and development activities carried on by the company in that building or structure, bears to all activities carried on in that building or structure for that period.

“specified time” refers to a building or structure and it defines it as period of 10 years commencing at the beginning of the accounting period in which the predecessor incurs relevant expenditure on that building or structure.

“specified relevant period” defines the period of 4 years over which the proportion of use of the building or structure attributable to research and development activities carried on by the company is measured, for the purposes of determining whether or not it is a “qualifying building”. In the case of the construction of a qualifying building it is the period of 4 years, commencing with the date on which the building or structure is first brought into use for the purpose of a trade.

In the case of refurbishment of a qualifying building it is the period of 4 years, commencing with the date on which the refurbishment is completed or, such earlier period of 4 years as the company may elect, beginning not earlier than the date on which the refurbishment commences.

### **Exclusions**

Expenditure will not be regarded as qualifying expenditure for the purpose of the tax credit where it has been met directly or indirectly by grant assistance or any other assistance from the EU, European Economic Area, the Irish State, the European Commission or any other State. **(1)(b)(i)**

Any reference to expenditure incurred on the construction of a building or structure is to be regarded as covering the refurbishment of a building or structure. However, such references do not include expenditure on land costs, machinery or plant, or expenditure on research and development that qualifies for a credit under **section 766**. **(1)(b)(ii)**

### **Part of a building used for R&D**

Prior to the changes introduced by the Finance (No. 2) Act 2008, to qualify for the credit the building or structure was required to be used wholly and exclusively for research and development purposes. However where a building or structure to be used for research and development forms part of a building or structure, or is one of a number of buildings in a single development, the credit could be claimed in respect of that part or building so used. Such apportionments of the expenditure as may be necessary are to be made. **(1)(b)(iii)**

In relation to expenditure to which section 36 of the Finance (No. 2) Act 2008 applies, where a single building or structure to be used for research and development forms part of a building or structure, or is one of a number of buildings in a single development, it is sufficient that not less than 35% of the activities carried on therein, during the specified relevant period are research and development activities of the company. Such apportionments of the expenditure as may be necessary are to be made.

### **Membership of a group of companies**

The rules in **section 766(1)(b)(i) to (iii)** which set out the circumstances in which companies are to be regarded as being members of a group, apply also for the purposes of this section. **(1)(b)(iv)**

### **The credit**

Where a qualified company incurs relevant expenditure the corporation tax of the company may be reduced by 25 per cent of the specified relevant expenditure **(2)**

### **Claw-back of the credit**

Subject to **subsection (3A)** a claw back of the credit will apply if within 10 years of the beginning of the accounting period in which the expenditure was incurred. A building or structure in respect of which a credit was given or a payment was made by the Revenue Commissioners- **(3)(a) to (c)**

- is sold, or
- ceases to be used by the company for research and development or for the purpose of the same trade that was carried on by the company at the beginning of the “specified relevant period”, in connection with which the research and development activities were carried on.

Where such an event occurs —

- the company, or another company will not be entitled to any further reduction in corporation tax for any accounting period ending after the time at which any one of these events occur. (3)(c)(i)
- any earlier reduction in corporation tax and any payments already made by the Revenue Commissioners in accordance with **subsection (4B)** is to be clawed-back. This is to be done by assessing the company under Case IV of Schedule D on an amount equal to 4 times the earlier reduction in corporation tax. That amount will then be taxed at 25 per cent. (3)(c)(ii)

Where an event referred to in **section 766(4C)** occurs and- (3A)

- in connection with the event the predecessor transfers to the successor a building or structure in respect of which—
  - (i) the predecessor had made a claim under this section,
  - (ii) the transfer is a transfer to which **section 617** applies, and
  - (iii) at the time of the transfer either or both the specified relevant period and the specified time had not expired,
- on, or at any time within 2 years after, the event, the trade and research and development activities are not carried on otherwise than by the successor, and (b)
- the building or structure in respect of which relevant expenditure was incurred by the predecessor— (c)
  - in a case where the specified relevant period had not expired, would continue to be a qualifying building if a reference, in the definition of ‘qualifying building’ to activities carried on by the company were construed as a reference to activities carried on by the company and the successor, and (i)
  - continues to be used by the successor throughout the remainder of the ‘specified time’ for the purposes of research and development activities, (ii)

then—

- **subparagraphs (i) and (ii) of subsection (3)** shall not apply in relation to the transfer by the predecessor, (I)
- the successor may, to the extent that the predecessor has not used an amount to reduce the corporation tax of an accounting period in accordance with **subsection (2)** or made a claim under **subsection (4A) or (4B)** carry forward any excess that the predecessor would have been entitled to carry forward, in accordance with **subsection (4)**, and (II)
- **subsection (3)** shall have effect as if a reference to the company in **subsection (3)(c)** and thereafter in **subsection (3)** were a reference to the successor. (III)

Any excess of the amount by which corporation tax of an accounting period may be reduced over the corporation tax of the accounting period, can be carried forward (4)(a),(b) and (c)

- Any amount already used to reduce corporation tax liability of a previous accounting period,
- Any amount payable by the Revenue Commissioners under **subsection (4B)**,
- Any amount surrendered to another group company.

### ***Options for use of excess credits***

Where the amount of the credit exceeds the corporation tax for the accounting period, the company may make a claim to offset any unused tax credit against the corporation tax of the preceding accounting period. (4A)(a)

The preceding accounting period must be a period equal in length to the accounting period in which the expenditure was incurred. (4A)(b)

Where a claim has been made to offset any unused credit against a previous accounting period, or where no corporation tax arises in that previous period, the company may make a claim to have the amount of any remaining tax credit paid to them by the Revenue Commissioners. (4B)(a)

Subject to the limits imposed by **section 766B**, on receipt of a claim, the amount of the tax credit to be paid by the Revenue Commissioners will be paid in 3 instalments. (4B)(b)

The first instalment which shall be equal to 33 per cent of the unused credit, will be paid to the company by the Revenue Commissioners, no earlier than the specified return date for the company's corporation tax return, for the accounting period in which the expenditure giving rise to the excess was incurred. (4B)(b)(i)

Any remaining excess will then be used to reduce the corporation tax for the accounting period following the accounting period in which the expenditure was incurred. If there is any further remaining excess the Revenue Commissioners will pay a second instalment equal to 50% of that remaining amount. The second payment will be paid not earlier than 12 months after the date referred to in **subsection (4B)(b)(i)**. (4B)(b)(ii)

Where any excess remains it will be used to reduce the corporation tax for the second accounting period following the accounting period in which the expenditure giving rise to the excess was incurred. If any excess still remains the Revenue Commissioners will pay a third instalment equal to that remaining amount. The third payment will be made not earlier than 24 months after the date referred to in **subsection (4B)(b)(i)**. (4B)(b)(iii)

All claims made under this section on or after 1 January 2009, must be made within 12 months from the end of the accounting period in which the expenditure on research and development was incurred. (5)

### ***Use of Apportionments***

Any apportionment used to calculate "specified relevant expenditure" or to determine if a building is a qualifying building, must appear to the inspector (or on appeal to the Appeal Commissioner) to be just and reasonable. (6)(a)

If at any time such apportionment is no longer just and reasonable, any necessary adjustments should be made, which may result in an assessment or repayment. (6)(b)

### ***Treatment by Revenue of amounts paid to the company***

Any amount payable by Revenue by virtue of **subsection (4B)** shall not be income of the company or another company for any tax purpose. (7)

Any amount payable by Revenue by virtue of **subsection (4B)** shall be deemed to be an overpayment of corporation tax, for the purposes only of **section 960H(2)**. (8)

### ***Commencement***

By virtue of the Finance Act 2004 (Section 33) (Commencement) Order 2004, SI No. 425 of 2004, the amendments for **sections 766** and **766A**, as introduced by section 33 of the Finance Act 2004, came into effect from 1 January 2004.

Other than the time limit inserted by subsection (5) all changes introduced by Finance (No.2) Act 2008 (Section 36) came into operation on 24 September 2009 by virtue of Statutory Instrument No. 392 of 2009 as respects expenditure incurred after that date and in accounting periods commencing on or after 1 January 2009.

These various provisions apply in respect of accounting periods commencing on or after 1 January 2012, with the exception of the provisions relating to payments to unconnected parties and third level education institutions which apply in respect of accounting periods ending on or after 1 January 2012.

## **766B Limitation of tax credits to be paid under section 766 or 766A**

### **Summary**

The section places a limit on the amount of credit that can be paid to a company under *sections 766(4B)* and *766A(4B)*.

### **Details**

#### **Definitions**

- “payroll liabilities” are defined as- (1)
- the amount of income tax which the company is required, by or under *Chapter 4* (1)(a) of *Part 42*, to remit to the Collector-General for that period in respect of emoluments, as defined in *section 983*, paid to, or on account of, all employees and directors, and
  - the amount of Pay Related Social Insurance Contributions in respect of the (1)(b) reckonable earnings and reckonable emoluments of all directors and employees which the company is required to remit to the Collector-General for that period by or under the Social Welfare Acts, and
  - any other levies the company is required to remit to the Collector-General, for that (1)(c) period, in respect of directors and employees.
- For the purpose of *subsection (1)* Pay Related Social Insurance is further defined to (2) include Pay Related Social Insurance Contributions payable under the Social Welfare Acts, Health Contributions payable under the Health Contributions Act 1979, and levies payable under the National Training Fund Act 2000.
- Where a company makes a claim under *section 766(4B)* or *section 766A(4B)* the (3) amount that can be paid by the Revenue Commissioners under those sections is restricted to the greater of:
- The corporation tax payable by the company for accounting periods ending in the (3)(a) 10 years prior to the period for which the company can make a claim under *sections 766(4A)* and *766A(4A)*, or
  - The payroll liabilities for the aggregate of the period in which the expenditure (3)(b) giving rise to the claim under *sections 766(4B)* and *766A(4B)*, is incurred and the immediately preceding accounting period.
  - For a relevant micro or small sized company twice, the payroll liabilities for each (3)(c) income tax month which forms part of the relevant accounting period in which the R&D expenditure was incurred.

## **766C Tax credit for research and development expenditure for smaller companies**

### **Summary**

The section provides for a research and development tax credit for pre-trading for micro or small companies which can be offset against payroll taxes or vat liabilities in the same period.

### Details

#### *Definitions*

“tax liability” is defined as-

- the amount of payroll taxes collected other than pay related social insurance for each income tax month and (1)
- the VAT liability for each taxable period, in which the expenditure on research and development was incurred.

#### *Application of the section*

This section applies to a relevant micro or small sized company which may make a claim where they exist to carry on a trade but have not yet started to trade. (2)

This pre-trading expenditure on R&D is allowable to calculate the R&D tax credit in the same method as *section 766(2)*. This tax credit is not allowed for the purposes of calculating the key employee surrender amount or a repayable tax credit amount. (3)

The tax credit calculated can be offset against corporation tax of the company for that period, or it may be offset against the payroll tax liabilities (excluding PRSI) and VAT liabilities in the same accounting period. Where an offset against tax liabilities results in an overpayment, this amount may be refunded to the company. (4)

Where emoluments to which the payroll liabilities relate remain unpaid 3 months after the relevant accounting period than these shall not be allowed. (5)

A claim must be submitted within 12 months of the end of the accounting period. (6)

A company must reduce the pre-trading expenditure calculated in line with *section 766(1)(b)(vi)* by the amount utilised to shelter corporation tax, payroll taxes and VAT under this section. The formula to calculate same is (A-B), where A is equal to the total expenditure on qualifying research and development activities before commencing to trade and B is the amount of tax sheltered under subsection (4) divided by .30 to obtain the amount of qualifying expenditure utilised to shelter the tax liabilities. (7)

### **767 Payment to universities and other approved bodies for research in, or teaching of, approved subjects**

This section was repealed by section 45 of the Finance Act 2001 with effect from 6 April 2001. The relief which was provided for in this section is now contained in *section 848A*.

## CHAPTER 3

### *Know-how and certain training*

### **768 Allowance for know-how**

#### *Summary*

The section provides for a deduction against trading income of the cost of acquiring technical know-how for use in a trade. The allowance is not available in the case of know-how acquired for use in a profession. No relief is available where the seller and the purchaser are connected. The deduction is only available where the know-how is purchased for genuine commercial reasons.

The section also provides a deduction for expenditure on know-how in circumstances where a company acquires a trade and a connected company acquires know-how used in the trade. The deduction will cover the cost of the know-how acquired in the year it is incurred and will be allowed against profits of the trade, defined as a ‘relevant trade’, in which the know-how is then used by the company acquiring it. However, it will not be allowed against any other income or profits. Where a deductible amount exceeds the profits of the relevant trade before applying the deduction, any excess will be carried forward and allowed as an amount deductible for succeeding chargeable periods.

Anti-avoidance provisions are included to deal with contrived arrangements between connected persons and provision is made to withdraw relief which is subsequently found not to have been due.

The section allows the Revenue Commissioners to consult with an expert who in their opinion may be of assistance to them in ascertaining the extent to which the expenditure is incurred on know-how.

Finally, relief under this section is being discontinued for companies following the introduction, in the Finance Act 2009, of the scheme for the acquisition of specified intangible assets [see section 291A]. However, provision is made to allow a company to claim relief under this section, on making an election to this effect, for expenditure incurred by it on know-how after 7 May 2009 and before 7 May 2011.

## Details

### *Know-how*

Know-how is defined as industrial information and techniques likely to assist in the (1) manufacture or processing of goods or materials or likely to assist in agricultural, forestry, fishing or mining operations

### *The deduction*

Expenditure incurred by a person on know-how used in a trade carried on by that person can be deducted (unless it is otherwise allowed to be deducted) as an expense in calculating trading profits. The deduction extends also to expenditure on know-how which is incurred before the setting up of a business. (2)

### *Acquisition of know-how*

No deduction is allowed for the purchase of know-how as part of the purchase of a business. (3)(a)

However, the subsection provides a deduction for expenditure on know-how in circumstances where a person acquires a trade or part of a trade and a connected person acquires know-how used in the trade or the part of the trade. The deduction is provided for the cost of the know-how acquired in the year it is incurred and is allowed against profits of the trade in which the know-how is then used by the acquiring company – the relevant trade - but not against any other income or profits. In the absence of such a provision, expenditure on know-how would not be deductible for tax purposes since the expenditure is of a capital nature. (3)(b)



The subsection denies a tax deduction for any royalty or other payments made by the person who acquired the trade or part of the trade in respect of the know-how acquired by the connected person, and also disallows a deduction where the trade or part of the trade is transferred from the person who acquired it to the person who acquired the know-how.

Where a deductible amount exceeds the profits of the relevant trade before applying the deduction, any excess shall be carried forward and allowed as an amount deductible for succeeding chargeable periods. This means that any such excess cannot be used to claim loss relief against profits of the current or preceding chargeable period or for the purposes of obtaining group relief against profits of other companies in a group. (3)(c)

#### ***No relief***

There is no deduction for expenditure on know-how where the seller and purchaser are closely connected. This is to ensure that collusive arrangements are ruled out. (4)

#### ***Consulting with experts***

The Revenue Commissioners may, in relation to a claim for a deduction, consult with an expert who in their opinion may be of assistance to them in ascertaining the extent to which the expenditure is incurred on know-how. (5)

Before disclosing information to an expert, the Revenue Commissioners must make known to the claimant the identity of the expert who they intend to consult and the information that they intend to disclose to the expert.

Where the claimant shows to the satisfaction of the Revenue Commissioners, or on appeal to the Appeal Commissioners, that disclosure of such information to that expert could prejudice the claimant's trade, then the Revenue Commissioners will not make such disclosure.

#### ***Withdrawal of relief***

Provision is made to withdraw relief claimed under this section which is subsequently found not to have been due. (6)

#### ***Discontinuance of relief for companies***

Subject to the transition period provided for in **subsection (8)** this section shall not apply to a company within the charge to corporation tax. (7)

#### ***Election by companies to claim relief***

Notwithstanding the discontinuance of relief under this section for companies, this subsection allows a company to claim relief, on making an election to this effect, for expenditure incurred by it on know-how after 7 May 2009 and before 7 May 2011. The election must be made on the company's statutory return for the accounting period of the company in which the expenditure is incurred and must be made not later than 12 months from the end of the accounting period in which the capital expenditure, giving rise to the claim, is incurred. (8)

### **769 Relief for training of local staff before commencement of trading**

The section provides for an allowance in respect of the cost of recruiting and training staff (all or a majority of whom must be Irish citizens) for a business in advance of the business starting to trade. The allowance is available in the case of a trade consisting of the production for sale of manufactured goods and is spread over the first 3 years of trading. Where profits are insufficient to absorb the allowance, it may be carried forward and set against future profits.

The allowance does not extend to any expenditure incurred which would not be allowed as a deduction if incurred when a trade had commenced. This, for instance, rules out capital expenditure and also ensures that only expenditure connected with the trade qualifies. Only expenditure net of any State grant or subsidy qualifies for the recruitment and training allowance. The claim for the allowance is to be included in the claimant's annual statement of profits or gains of the person's trade.

## CHAPTER 4

### *Transmission Capacity Rights*

#### **Overview**

This Chapter provides capital allowances for expenditure incurred by companies on the purchase of long-term rights to use advanced communications infrastructure. Capital allowances are already available in respect of investments in the physical infrastructure such as cabling and equipment. The purpose of the Chapter is to extend allowances to expenditure incurred on long-term rights to use assets owned by others to facilitate the growth in electronic commerce.

The allowances apply to long-term rights to use wired, radio or optical transmission paths for the transfer of data and information. These rights, known as indefeasible rights of use, or IRU's, typically span periods of 10 to 25 years and are generally purchased by means of a lump-sum payment made in advance. The chapter provides that expenditure incurred by a company on such rights can be written off over the life of the agreement relating to the use of the rights, subject to a minimum write off period of 7 years. The measure applies to expenditure incurred on or after the 1st of April, 2000. However, the allowance does not apply to expenditure incurred on or after 6 February 2003 on the acquisition of a licence issued on or after that date by the Commission for Communications Regulation under —

- (a) the Wireless Telegraphy Acts 1926 to 1988, or
- (b) the Postal and Telecommunications Services Act 1983.

A series of anti-avoidance measures are also provided so as to ensure that entitlement to the allowances cannot be artificially created by a sale of capacity rights within a group of companies. Without these provisions a licence could be purchased from the Commission for Communications Regulation and sold on to a group company, thus creating an entitlement by that second company to the allowances.

The general provisions relating to the granting of capital allowances contained in **Chapter 4** of **Part 9** are applied, and adapted, as necessary for the purposes of the allowances provided by this Chapter, by virtue of **section 769E**.

#### **769A Interpretation (Chapter 4)**

This section gives the meaning of certain terms and provides rules for the construction of certain references used in this Chapter. The following terms are defined:

“capacity rights” means the right to use wired, radio or optical means for the transfer of voice, data or information.

“control” has the same meaning as in **section 432**.

“qualifying expenditure” means capital expenditure incurred on capacity rights excluding expenditure incurred on or after 6 February 2003 on licences issued on or after that date by the Commission for Communications Regulation under —

- (a) the Wireless Telegraphy Acts 1926 to 1988, or

(b) the Postal and Telecommunications Act 1983.

“writing-down period” is as defined in *section 769B(2)*.

***Grant or acquisition of licence to use capacity rights***

The grant or acquisition of a licence to use capacity rights is to be regarded as a sale (2) or purchase of a part of the rights. However, where the terms of a licence are such that the licensee is to have the sole use of the capacity rights to the exclusion of the grantor and all other persons for the remaining life of the rights, the grant of the licence is to be treated as equivalent to the sale by the grantor of the whole of the capacity rights.

**769B Annual allowances for capital expenditure on purchase of capacity rights**

This section provides that capital allowances are available in respect of qualifying expenditure incurred by a company on or after 1 April, 2000 on the acquisition of capacity rights. The qualifying expenditure is written off by equal annual instalments over a period of 7 years or, over the life of the purchasing agreement, where it exceeds 7 years.

***Writing-down allowances***

Writing-down allowances are made available for qualifying expenditure incurred on (1) or after 1 April, 2000 by a company on the purchase of capacity rights. The allowances are only given, however, in taxing a company’s trade or where a company is liable to tax in respect of the income from the capacity rights.

***Writing-down period***

Allowances are available over a writing-down period of 7 years or, if greater, over (2)(a) & the number of years for which the capacity rights are purchased, beginning with the (b) chargeable period in which the expenditure is incurred. Allowances are given in equal instalment over the writing-down period.

***Pre-trading expenditure***

Pre-trading expenditure is to be treated as incurred on the first day on which trading (2)(c) commences unless before that day the company concerned has sold all the capacity rights on which that expenditure was incurred.

***Restriction on allowances***

The writing down allowance is denied to a company which incurs qualifying (3) expenditure on transmission capacity rights from another group company unless that second company had been entitled to an allowance itself in respect of those rights. This prevents the allowance being artificially created within the group.

A “group of companies” is defined as a company and all other companies of which it has control or with which it is associated.

A company is associated with another if it could reasonably be considered that —

- (I) the activities carried on by both companies are or can be directed by the same person or by broadly the same group or groups of persons, or
- (II) the same person or broadly the same group or groups of persons exercise or can exercise control over both companies.

### **769C Effect of lapse of capacity rights**

Where a company has incurred qualifying expenditure on the purchase of capacity rights, the grant of the writing-down allowances provided for in **section 769B** would, if continued for the whole of the writing-down period, completely write off that expenditure. It may happen, however, that before the end of that period is reached the rights are allowed to lapse, or the company enjoying the annual allowances in respect of the expenditure in question may sell part or the whole of the rights acquired by incurring that expenditure. This section provides for certain adjustments in such circumstances.

#### ***Stop on further allowances***

If, before the end of the writing-down period — (1)

- capacity rights cease completely to exercised or come to an end without any prospect of their being renewed at a later time,
- the rights are sold, or
- part of the rights are sold and the proceeds are not less than the amount of qualifying expenditure remaining unallowed,

the company is to receive no further writing-down allowance in respect of the expenditure.

#### ***Balancing allowances***

Where, before the end of the writing-down period, the capacity rights cease to be exercised by the company which incurred the qualifying expenditure on the purchase of the rights, or the rights are finally ended, or the company sells those rights and the net proceeds of the sale are less than the amount of the qualifying expenditure remaining unallowed (see **subsection (5)**), a balancing allowance is given. The amount of the balancing allowance is equal to the amount of the qualifying expenditure remaining unallowed or, in the case of a sale, the amount of the qualifying expenditure unallowed less the net proceeds of the sale. (2)

#### ***Balancing charges***

Where a company which incurred qualifying expenditure on the purchase of the rights sells those rights and the net proceeds of the sale exceed the amount of the qualifying expenditure remaining unallowed (see **subsection (5)**), if any, a balancing charge is made equal to the amount of the excess or, where the qualifying expenditure remaining unallowed is nil, the net proceeds of the sale. (3)

#### ***Part-sale***

Where there is a sale of part only of the capacity rights but a balancing charge does not apply because the proceeds of sale are less than the amount of the qualifying expenditure remaining unallowed, no balancing allowance is made. In addition, future writing-down allowances for the seller (who retains part of the rights) over the remaining writing-down period are to be adjusted. They are to be computed by deducting the proceeds of sale from the amount of expenditure unallowed and dividing by the number of years of the writing-down period remaining. (4)

#### ***Expenditure remaining unallowed***

The expression “expenditure remaining unallowed” is defined as the original qualifying expenditure, less the writing-down allowances already made and less also the net proceeds of any previous sale of a part of the capacity rights on the acquisition of which the original qualifying expenditure was incurred. (5)

## **Miscellaneous**

No balancing allowance is to be granted except where a writing-down allowance has been or could have been made. This ensures that balancing allowances are granted only to the companies mentioned in **section 769B**, namely, trading companies and other companies liable to Irish tax on income derived from the use of the capacity rights in question. Also, there is the usual stipulation restricting the amount on which a balancing charge may be made to the aggregate of the allowances already enjoyed in respect of the qualifying expenditure (in so far as those have not been withdrawn by any previous balancing charge). (6)

### **769D Manner of making allowances and charges**

An allowance or charge is to be made to or on a company in taxing the company's trade (that is in computing trading income for corporation tax purposes) if the capacity rights in question are owned by that company for the purpose of a trade which that company is carrying on. (1)

Where an allowance is to be made to a non-trading company, it is made by way of discharge or repayment of tax in the normal way and is available only against income from the use of capacity rights. However, the effect of the next section is that in so far as an allowance cannot be given effect because of insufficient income from the use of capacity rights in the year of claim, it can be set against the company's other income for that year and, where necessary, it can be carried forward for offset against income from the capacity rights in subsequent years. (2)

### **769E Application of Chapter 4 of Part 9**

This section applies to the Chapter the provisions of **Chapter 4 of Part 9** which contains a number of general provisions supplementing the legislation on capital allowances. Thus, any references in the Tax Acts to capital allowances given by means of discharge or repayment and available against certain income only are to include references to allowances given under **section 769D(2)**. The effect of this, for instance, is that **section 308** is applied to ensure that, where there is insufficient income from capacity rights to absorb allowances in a year, any excess can be set against the company's other income in that year and, where necessary, carried forward for offset against income from capacity rights in subsequent years. (1)

The section also applies a specific provision of **Chapter 4 of Part 9** in a modified way to ensure a particular application in the case of capacity rights. Thus, in the application of section 312 (special provisions as to certain sales) to capacity rights, where the seller and buyer of capacity rights are under common control, the seller and buyer may make a joint election in writing to the inspector to have the sale of the rights treated as if it were made at the amount of the qualifying expenditure (on the acquisition of the rights) remaining unallowed instead of the open market price. (2)

Such an election may only be made where the tax written-down value of the asset is less than the open market price and the sale is not a sale the sole or main benefit of which is to obtain a capital allowance. In any such case, the seller will not have a balancing charge and the buyer will effectively be granted capital allowances on a reduced amount over the remainder of the writing-down period of the capacity rights. However, in computing any future balancing charge to be made on the buyer in respect of the capacity rights, account will be taken not only of the capital allowances granted to the buyer but also of the capital allowances granted to the seller.

A joint election to have the sale of capacity rights treated as if it were made for the amount of the qualifying expenditure remaining unallowed may not be made if, at the time of the sale, any of the parties to the sale are not resident in the State. This rule will not apply, however, if the non-resident party or parties is or are entitled to a capital allowance, or subject to a balancing charge, as a result of the sale. This would arise where a non-resident company is carrying on a trade in the State through a branch or agency.

#### **769F Commencement (Chapter 4)**

This Chapter comes into effect on the date of passing of the Finance Act 2003 (28 March 2003).

## CHAPTER 5

### *Taxation of companies engaged in knowledge development*

#### **Overview**

This Chapter provides for a regime for the taxation of income which arises from patents, copyrighted software and, in relation to smaller companies, other intellectual property that is similar to an invention which could be patented. The regime is only available to companies which carried out the research and development which led to the creation of the patent, copyrighted software or IP equivalent to a patent.

A company which qualifies for the regime will be entitled to a deduction equal to 50 per cent of the qualifying profits in computing the profits of a specified trade.

#### **769G Interpretation and general**

This section gives the meaning of certain terms and provides rules for the construction of certain references used in this Chapter.

The following are the main definitions: (1)

*'acquisition costs'* as the amount incurred on buying intellectual property or where the transaction is between related parties, it is the market value of that intellectual property;

*'group'* as a company and all of its 51% subsidiaries;

*'group outsourcing costs'* as amounts paid to a group member to carry out R&D activities, amounts incurred by the company in carrying on R&D outside of the EEA and amounts incurred by the company in carrying on R&D in the EEA if tax relief was available for that expenditure in that EEA country;

*'intellectual property'*, being the assets to which this Chapter can apply, as—

- (a) a computer program, or a portion of a computer program that represents a derivative work or an adaptation of the original work, or
- (b) an invention protected by —
  - (i) a qualifying patent,
  - (ii) certain supplementary protection certificates;

*'marketing-related intellectual property'* as including trademarks, brands, image rights and other intellectual property used to market goods or services;

*'overall expenditure on the qualifying asset'* is the total of qualifying expenditure, acquisition costs and the group outsourcing costs relating to that qualifying asset, incurred in any accounting period;

*'overall income from the qualifying asset'* is any royalty, any embedded royalty, any license fee for the use of the qualifying asset or any amount of insurance or compensation relating to that asset, where those amounts are taxable as profits of the trade;

*'qualifying asset'* is intellectual property, other than marketing related intellectual property, which is the result of research and development activities;

*'qualifying patent'* is either-

- (a) a patent granted following substantive examination for novelty and inventive step, or
- (b) a full term patent, where a search report has been carried out and either:
  - (I) the patent was granted prior to 1 January 2016, or
  - (II) the patent was granted between 1 January 2016 and 1 January 2017and a patent agent certifies that, in his or her opinion, such a patent would have been granted had a substantive examination been carried out;

*'relevant company'* means a company which carries on a specified trade, either by itself or in partnership, and is within the charge to tax in the State;

*'research and development activities'* has the same meaning as in **section 766**;

*'up-lift expenditure'* for each qualifying asset is the lower of-

- (a) 30 per cent of the qualifying expenditure, or
- (b) the aggregate of acquisition costs and group outsourcing costs.

This subsection defines *'qualifying expenditure'*. (2)

This paragraph provides the starting point for determining what expenditure can be included as qualifying expenditure, which is then subject to some specific exclusions set out in **paragraph (b)**. Based on the wording of **section 766(1)(a)**, only expenditure incurred by a company, in any accounting period, wholly and exclusively in the carrying on by it of research and development activities in the EEA where those activities lead to the development, improvement or creation of the qualifying asset can be qualifying expenditure. The amounts specifically allowed are those which are deductible in computing the profits of the trade and those expended on plant and machinery. Where an amount is treated as expended on plant and machinery under **section 291A**, then it is not allowable expenditure if it was acquired from a group member. Where a non-group company is engaged to carry out R&D on behalf of the company, that non-group company can be located anywhere in the world. (a)

This paragraph lists a number of items which cannot be included in qualifying expenditure — (b)

- (i) acquisition costs,
- (ii) interest paid or payable,
- (iii) amounts paid to group members to carry on research and

development activities, whether under a cost sharing arrangement or otherwise,

- (iv) amounts paid in excess of an arms length price in relation to 3<sup>rd</sup> party outsourcing,
- (v) any margin retained by a group member who organises 3<sup>rd</sup> party outsourcing on behalf of the company, or
- (vi) any amount that is a tax deductible expense, qualifies for capital allowances or is otherwise allowed for tax purposes elsewhere in the EEA.

This subsection defines a ‘*specified trade*’. (3)

A specified trade means a trade, that is not an excepted trade within the meaning of **section 21A**, which consist of one or more of the following– (a)

- (i) the managing, developing, maintaining, protecting, enhancing or exploiting of intellectual property,
- (ii) the researching, planning, processing, experimenting, testing, devising, developing or other similar activity leading to an invention or creation of intellectual property, or
- (iii) the sale of goods or the supply of services that derive part of their value from activities described in **subparagraphs (i) and (ii)**, where those activities were carried on by the relevant company.

If only part of a company’s trade meets the conditions set out in **paragraph (a)**, then that part shall be a specified trade (b)

Any pre-trading expenditure will be deemed to be incurred in the year the company commences its trade. (4)

### **769H Family of products and assets**

This section provides for the application of this Chapter to families of assets, rather than to each individual asset, in certain circumstances.

If a number of qualifying assets are interlinked, such that it would be impossible to identify the qualifying expenditure or the overall income from each asset without making arbitrary apportionments, then the Chapter can apply to a family of assets. (1)

The chosen family of assets must be the smallest grouping of assets for which the expenditure and income can reasonably be identified. (2)

The company can opt for the Chapter to apply to a family of assets, rather than to each individual asset. (3)

### **769I Corporation tax referable to a specified trade**

This section sets out how to calculate the relief available to a company which meets the conditions set out in this chapter.

**The formula** (1)

The formula by which the ‘*qualifying profits*’ (being the amount with reference to which the relief is calculated) are calculated is:



$$\frac{QE + UE}{OE} \times QA$$

OE

where –

QE is the qualifying expenditure on the qualifying asset,

UE is the uplift expenditure,

OE is the overall expenditure on the qualifying asset, and

QA is the profit of the specified trade relevant to the qualifying asset before taking account of the deduction available under subsection (5).

***Making a claim*** (2)

Where a relevant company (as defined) makes qualifying profits (as defined) in the course of a specified trade (as defined), then that company may make a claim in its CT1 in relation to a qualifying asset (or family of assets as appropriate). (a)

Such a claim must be made only once in respect of each qualifying asset and must be made within 24 months from the end of the accounting period to which the claim relates. (b)

The claim is a lifetime claim, in that it continues until such time as the invention underlying the qualifying asset is disposed of or ceases to be used. (c)

***The profits of the specified trade***

A specified trade must be treated for the purposes of this Chapter, **Chapter 2 of Part 8, Chapter 3 of Part 12 and Part 41A**, as a separate trade distinct from any other trade carried on by the company. (3)

The overall income from qualifying assets is the income of the specified trade. (4)(a)

Any expenses laid out or expended in earning the overall income from the qualifying assets must be attributed to the specified trade. This will require that certain apportionments are made. These should be done in such a way as to treat the specified trade as a separate and distinct trade carried on by a company dealing at arm's length.

The methods of apportionment should be consistent, taking one year with another. (b)

A company entitled to claim relief under this Chapter gets an allowance calculated as 50% of its qualifying profits. This allowance is the last allowance given as a trading expense in computing the profits of the trade subject to corporation tax (that is, after capital allowances etc.) (5)

***Using an expert***

Revenue may consult with an expert on whether or not: (6)(a)

- (I) expenditure is qualifying expenditure on the qualifying asset;
- (II) expenditure is overall expenditure on the qualifying asset;
- (III) income is overall income from the qualifying asset;
- (IV) intellectual property is, or forms part of, a qualifying asset;
- (V) any apportionment is done on a just and reasonable basis;
- (VI) arm's length values have been correctly determined; or
- (VII) a patent granted without a substantive examination meets the patentability criteria and would have been granted had such an examination been carried out.

Certain taxpayer protections are included in relation to Revenue’s right to consult an expert. Before disclosing information to any expert, notice must be given to the company of– (b)

- (I) the intention to disclose information to an expert,
- (II) the information that will be disclosed,
- (III) the identity of the expert whom the officer intends to consult, and the company has a period of 30 days after the date of the notice to show that disclosure of the information could prejudice the company’s trade or business. If an officer is not satisfied that the disclosure would be prejudicial, that officer can give the company 30 days notice of the officer’s intention to consult the expert. A company can appeal that decision to the Appeal Commissioners within 30 days from the date of that decision.

### **769J Interaction with 766, 766A and 766B**

The amount of the payable R&D tax credit must be calculated before taking a deduction for an allowance under this Chapter.

### **769K Adaptation of provisions relating to relief for relevant trading losses and relevant charges on income**

#### *Summary*

Losses and charges which represent the same portion of the loss of the specified trade as the profits which would have qualified for KDB treatment will only be available for use against the other profits of the company on a value basis.

#### *Details*

The same formula which was applied to the profit of the specified trade in determining the qualifying profits should be applied to any relevant trading losses or relevant charges on income arising from the specified trade. The formula is: (1)

$$\frac{QE + UE}{OE}$$

where –

QE is the qualifying expenditure on the qualifying asset,

UE is the uplift expenditure, and

OE is the overall expenditure on the qualifying asset.

The reduced relevant trading loss or relevant trading charge can then be relieved, on a value basis, under section 243A, 396A, 420A, 243B, 396B or 420B. The value basis is achieved by reducing the loss or charge by 50%. (2)

Where subsequent claims are made, the amount available for relief should be reduced by 200%. (3)

### **769L Documentation**

#### *Summary*

In order to be in a position to make a claim under this Chapter, the company must have tracked and traced all expenditure and income and linked those to the qualifying

asset.

### *Details*

A relevant company that claims relief under this Chapter must have available such records as may reasonably be required to determine whether the qualifying profits has been computed in accordance with this Chapter. (1)(a)

The records must demonstrate that each of the following had been tracked- (b)

- (i) overall income from the qualifying asset,
- (ii) qualifying expenditure on the qualifying asset and
- (iii) overall expenditure on the qualifying asset

The documentation must also demonstrate how those expenditures and income are linked to the qualifying asset.

An additional documentation requirement is placed on a company which is applying the Chapter to a family of assets. Those companies must also have records that support the reasonableness of the ‘family’ that they chose. Where relevant, they must have records that support (c)

- (i) the commonality of scientific, technological or engineering challenges underlying the research and development activities which were undertaken and which resulted in the qualifying assets;
- (ii) the consistency of the chosen method of grouping with the organisation of research and development activities carried on by the relevant company;
- (iii) the creation of a nexus between expenditures and a family of assets; or
- (iv) the choice of a family of assets with which to create that nexus.

An additional documentation requirement is placed on a company which is claiming relief in respect of a derivative work or an adaptation. These companies must also have records which: (d)

- (i) identify the original work and the derivation or adaptation therefrom,
- (ii) the costs associated with both the original work and the derivative work or the adaptation, and
- (iii) support any method of apportionment of income between the original work and the derivative work or adaptation.

These tracking and tracing requirements do not apply to expenditures incurred prior to 1 January 2016. (2)

The documents must be prepared on a timely basis and the obligations in section 886 to keep and retain records and linking documents apply to these documents. (3)

The documentation must be kept for a period of 6 years from the end of the accounting period in which the return for the last accounting period in which that asset was a qualifying asset is filed. (4)

A Revenue officer may require a relevant company to furnish the officer with such information or particulars as may be necessary for the purposes of giving effect to this Chapter. (5)

Revenue may make regulations for the purposes of enabling a company fulfil its obligations under this Section or to facilitate the operation of the Chapter in an (6)

efficient manner

Failure to have the documentation required under this Section available will result in a company not being a relevant company and not being entitled to claim relief under this Chapter. (7)

### **769M Anti-avoidance**

Qualifying expenditure and overall income from the qualifying asset do not include any amount unless that amount is expended or received for bona fide commercial purposes and is not part of a scheme or arrangement the main purpose, or one of the main purposes, of which is the avoidance of tax.

### **769N Application of Part 35A**

Large companies, being companies to which the provisions of the transfer pricing rules in Part 35A apply, must apply the OECD guidance in documenting and substantiating the arm's length nature of any price and any apportionments of income or expenses. (1)(a)

### **769O Transitional measures**

#### *Summary*

The tracking and tracing rules in section 769L do not apply to expenses incurred prior to 1 January 2016. Therefore, in order to calculate the formula for section 769I in relation to qualifying assets developed or bought before that date, transitional measures are required.

#### *Details*

The following rules apply when determining the costs relating to an accounting period that begins on or after 1 January 2016 and on or before 31 December 2019: (1)

- acquisition costs in relation to a qualifying asset includes any acquisition costs ever incurred in relation to the asset. (a)
- group outsourcing costs includes any group outsourcing costs ever incurred, and if those costs were incurred prior to 1 January 2016 and related to more than one qualifying asset, those costs can be apportioned on a just and reasonable basis. (b)
- qualifying expenditure on the qualifying asset is calculated with reference to the 4 year period ending on the last day of the accounting period. Any amounts incurred after 1 January 2016 must be tracked and traced, and any amounts incurred before that date can be an apportionment of the total qualifying expenditure on qualifying assets. (c)

The following rules apply when determining the costs relating to an accounting period that begins on or after 1 January 2020 - (2)

- acquisition costs, in relation to a qualifying asset, includes any acquisition costs ever incurred in relation to the asset.

- group outsourcing costs includes any group outsourcing costs ever incurred, and if those costs were incurred prior to 1 January 2016 and related to more than one qualifying asset, those costs can be apportioned on a just and reasonable basis.
- qualifying expenditure on the qualifying asset does not include any amount incurred prior to 1 January 2016.

A company must have records available to show that they have complied with the requirements of this section. (3)

A company that can track and trace the pre 1 January 2016 expenditure with the same level of precision and certainty that is required of post 1 January 2016 expenditure may use those actual expenses rather than the transitional arrangements outlined in this section. (4)

### **769P Time limits**

#### *Summary*

Granting a patent following a substantive search and examination for inventive step may, in certain cases, take a number of years. Therefore, provision is made for the overriding of the time limits for repayment of tax in section 865 in certain circumstances.

#### *Details*

Where a company has submitted an application to a Patents Office which would result in a qualifying asset if the patent or protection sought were granted, then the company may choose to make a claim under 769I(2) either in the respect of the accounting period in which the application was submitted or the accounting period in which it was granted. (1)

- If the claim is made in the accounting period in which the application is submitted but that application is subsequently refused then the company shall amend each return in which a deduction under **section 769I(5)** was claimed, and pay any additional tax and interest due accordingly. (a)
- If the claim is made in the accounting period in which the patent is granted, then a Revenue officer shall amend the assessments for each accounting period in which overall income from a qualifying asset arose, and any tax paid shall be repaid accordingly. No interest arises on payments relating to prior years. (b)

Where a company intends to wait and claim the relief once a patent is granted, then each year when a patent is pending the company must make a ‘protective claim’. (2)

### **769Q Application**

This chapter only applies to accounting periods which commence on or after 1 January 2016 and before 1 January 2023. No provision is made for accounting periods which straddle 1 January 2016.

### **769R Companies with income arising from intellectual property of less than €7,500,000.**

#### *Summary*

Companies who meet certain size criteria and who have intellectual property which is not protected by a patent may be able to benefit from relief under this chapter in relation to a third category of assets pursuant to this section.

### Details

#### Definitions (1)

‘average overall income from intellectual property’, for each accounting period, is the lower of–

- (a) the overall income from intellectual property (as defined) for an accounting period, or
- (b) an amount calculated as:

Average Monthly Income X N

where -

Average Monthly Income is the average monthly overall income from intellectual property for the last 60 months, and

N is the number of months in the accounting period;

‘company threshold amount’ means €7,500,000, reduced proportionately where an accounting period is shorter than 12 months;

‘intellectual property for small companies’ means intellectual property in the nature of assets that are certified by the Controller of Patents, Designs and Trade Marks as being novel, non-obvious and useful;

‘overall income from intellectual property’ is similar to the definition of ‘overall income from qualifying assets’ contained in **section 769G** except that the amounts arise from intellectual property, in its normal meaning, rather than from qualifying assets (as defined);

‘turnover threshold amount’ means €50,000,000, reduced proportionately where an accounting period is shorter than 12 months;

A company which wishes to make a claim pursuant to this section must meet the following conditions: (2) (1)

- (i) the company has average overall income from intellectual property not in excess of the company threshold amount,
- (ii) where that company is a member of a group, the group has turnover not in excess of the turnover threshold amount, and
- (ii) the company is a micro, small or medium sized enterprise within the meaning of the State Aid law.

Where a company meets the conditions set out in subsection (2), then Chapter 5 applies to that company as if the definition of ‘intellectual property’ in section 769G(1) also included ‘intellectual property for small companies’. (3)

Additional documentation obligations are placed on a company which is claiming relief on intellectual property for small companies. Such a company must have documentation to support its contention that it is a company to which this section applies. (4)

The provisions of section 769R are subject to a commencement order.