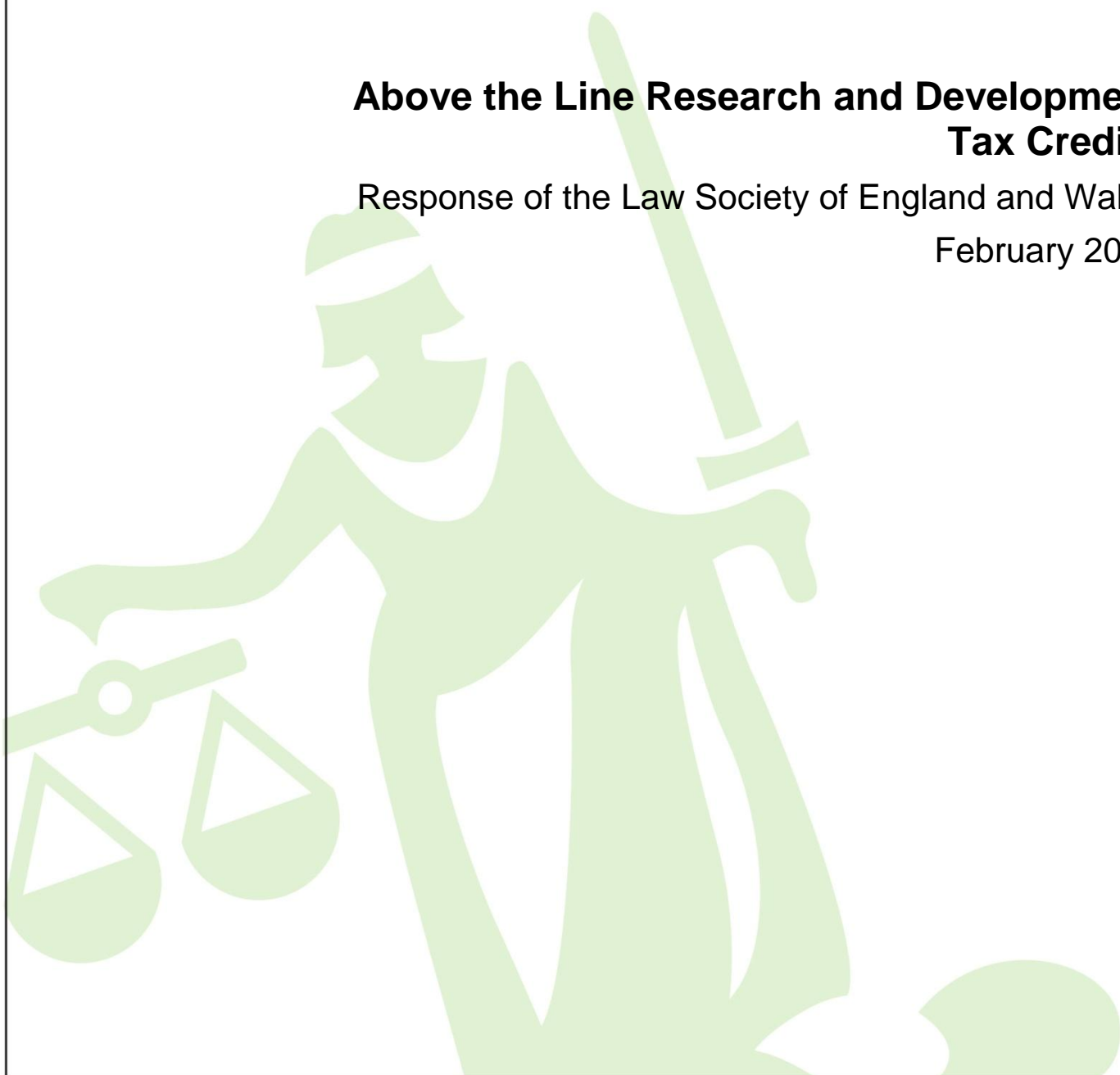




The Law Society

Above the Line Research and Development Tax Credits

Response of the Law Society of England and Wales
February 2013



Above the Line Research and Development Tax Credits

Comments of Tax Law Committee of the Law Society

Introduction

1. The Law Society is the representative body for over 166,000 solicitors in England and Wales. It negotiates on behalf of the profession, and lobbies regulators, Government and others. This response has been prepared on behalf of the Society by members of its Tax Law Committee, which is made up of senior and specialist lawyers practicing in this field.
2. The Law Society welcomes this opportunity to comment on the draft legislation published on 11 December 2012 implementing the proposals in the consultation paper published on 31 March 2012 on “Above the Line” (“ATL”) credit for research and development incurred on or after 1 April 2013.

General

3. The Law Society generally welcomes the draft legislation, since it reduces the cost of R&D in the UK and also enables companies who have been making losses to benefit from the ATL credit.

Specific comments on the legislation

4. We believe it would be useful to clarify how some aspects of the legislation works. Clause 104(1) identifies what is meant by a company’s “capped R&D expenditure” for the purposes of claiming R&D reliefs. In order to clarify the terms used in this clause we suggest inserting a suitable cross-reference. We attach suggested drafting in the appendix.
5. We believe it would be useful to have provisions dealing with the process for the surrender of tax credits and when payment of tax attributable to the surrendered refund is treated as taking place. It would also be useful to have a provision to the effect that the surrender of a tax credit is not taxable. We enclose some suggested drafting in the appendix.
6. It is our view that the language used in legislation dealing with surrenders is very important practically. The suggested amendments in the appendix are based on legislation used in other contexts by HMRC and hence we believe our proposed changes should be uncontroversial.

Questions

If you have any questions in relation to the response please contact the chairman of the corporation tax sub-committee, Lydia Challen, at lydia.challen@allenoverly.com or 020 3088 2753.

Clause 104I

Proposed amendment

Clause 104I(b) - insert the words “(within the meaning of section 104C)” after the word “R&D”.

Clause 104I(c) – insert the words “(within the meaning of sections 104J to L inclusive)” after the words “qualifying R&D expenditure” in the first line.

Proposed amendment

Insert after section 104O new sections

“104P Procedure for surrendering R&D expenditure credit to other group companies

104P(1) This section applies if a company surrenders the whole or any part of the credit under section 104O(1)(b).

104P(2) The surrender may be made only if –

- (a) the company making the surrender (“the surrendering company”) and the company to whom the surrender is made (“the recipient company”) give notice to an officer of Revenue and Customs,
- (b) the surrendering company and the recipient company are members of the same group throughout the period beginning with the start of the accounting period for which the credit is due and ending on the date on which the notice is given.

104P(3) A notice under subsection (2) must –

- (a) be given before the credit is made to the surrendering company,
- (b) be given jointly by the surrendering company and the recipient company,
- (c) specify the amount to be surrendered, and
- (d) be in such form as the Commissioners for Her Majesty’s Revenue and Customs may required.

104P(5) For the purposes of this section two companies are members of the same group if (and only if) they would be for the purposes of Part 5 (group relief).

104Q Effects of surrender of tax refund

104Q(1) This section makes provision about the effect of the surrender under section 104O of a tax refund due for an accounting period.

104Q(2) So far as the company to which the surrender is made (“the recipient company”) is concerned, the effect of the surrender is that –

- (a) the company is treated for all corporation tax purposes, except the one mentioned in subsection (3), as if it had paid an amount of corporation tax for the accounting period equal to the amount specified in the notice under section 104P(2) (the “surrendered amount”), and
- (b) the payment is treated for those purposes as if it had been made on the relevant date.

104Q(3) For the purposes of working out the amount of any penalty to which the recipient company is liable under paragraph 18 of Schedule 18 to FA 1998 (failure to deliver return: tax-related penalty), the recipient company is treated as having paid the amount of corporation tax on the day on which the notice under section 104P(2) is given (and not on the relevant date).

104Q(4) So far as the company by which the surrender is made (“the surrendering company”) is concerned, the effect of the surrender is that –

- (a) the company is treated for corporation tax purposes as if it had received a repayment of tax equal to the surrendered amount, and
- (b) the repayment is treated for those purposes as if it had been received on the relevant date.

104Q(5) If the tax refund surrendered is a repayment of corporation tax, any interest relating to it which has been paid by the surrendering company is treated as if it had been paid by the recipient company.

104Q(6) For the purposes of this section “**the relevant date**”, in relation to a tax refund, means –

- (a) so far as it consists of a repayment of corporation tax paid by the surrendering company after the date on which it became due and payable under section 59D or 59E of TMA1970, the day on which it was paid by the surrendering company, and
- (b) otherwise, the date on which corporation tax for the accounting period of the surrendering company became due and payable.

104R Interest on tax overpaid or underpaid

104R(1) This section applies if –

- (a) a company has surrendered an amount under section 104P; and
- (b) there is, as a result of any of subsections (7A) to (7C) of section 826 of ICTA, a period for which the whole or any part of the surrendered amount would not have carried interest under that section if the refund had been made to the surrendering company (“the interest-free period”).

104R(2) The interest-free period is excluded from any period for which any refund made because of section 104Q(2) to the recipient company in respect of some or all of the surrendered amount or, as the case may be, that part of it is to carry interest under section 826 of ICTA.

104R(3) The interest-free period is excluded from any period for which a sum representing some or all of the surrendered amount or, as the case may be, that part of it would otherwise be treated (as a result of section 104Q) as not carrying interest under section 87A of TMA 1970.

104R(4) The following assumption is to be made in determining for the purposes of this section –

- (a) which part of any amount is applied in discharging a liability of the recipient company to pay corporation tax, and
- (b) which part is represented by a refund to the recipient company.

104R(5) The assumption is that the part in relation to which there is a period which would not have carried interest under section 826 of ICTA is applied in preference to any other part of that amount in or towards discharging the liability.

104S Payments for surrendered tax refunds

104S(1) This section applies if –

- (a) companies give a notice under section 104P(2) in pursuance of an agreement, and
- (b) the company to which the surrender is made makes a payment under the agreement to the company by which the surrender is made that does not exceed the amount specified in the notice.

104S(2) The payment –

- (a) is not to be taken into account in determining profits or losses of either company for corporation tax purposes, and
- (b) is not to be regarded for the purposes of the Corporation Tax Acts as a distribution.