



POLICY AND REGULATORY STEWARDSHIP

Tax policy report: Due date for R&D loss tax credit applications

Date:	17 November 2022	Priority:	High
Security level:	In Confidence	Report number:	IR2022/513

Action sought

	Action sought	Deadline
Minister of Revenue	<p>Agree to recommendations</p> <p>Authorise the lodgement of the attached Cabinet paper</p> <p>Refer a copy of this report to the Minister of Research, Science and Innovation</p>	24 November 2022

Contact for telephone discussion (if required)

Name	Position	Telephone
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17 November 2022

Minister of Revenue

Due date for R&D loss tax credit applications

Purpose

1. This report briefs you on an issue regarding the application deadlines for the R&D loss tax credit (R&DLTC) and seeks your agreement to our recommended solutions.
2. To resolve this issue, we recommend making amendments to the current due date settings in primary legislation. We also recommend making an Order in Council to extend the due date for applying for R&DLTCs for the 2021–22 tax year. We also seek authorisation to issue a drafting instruction to the Parliamentary Counsel Office to draft the Order.
3. Given tight timeframes, we have attached a draft Cabinet paper in advance of the Order in Council being drafted. This report seeks authorisation to lodge this Cabinet paper with the Cabinet Office.
4. This issue only relates to R&DLTCs and is not relevant to the R&D Tax Incentive, which is entirely separate.

Background

5. Under the R&DLTC regime, loss-making taxpayers undertaking R&D can “cash out” their losses. This provides a timing benefit only, as receiving R&DLTCs means the taxpayer cannot carry forward those cashed-out losses to lower their taxable income in future years (once they are profitable). However, R&DLTCs provide short-term cashflow assistance during the start-up phase of a business undertaking R&D.
6. A business must file a statement to apply for R&DLTCs each year. The current issue regards the due date for that statement. Under the existing law, the R&DLTC statement is due by the earlier of:
 - 6.1 The day a taxpayer files their income tax return; and
 - 6.2 The income tax return due date.
7. Under current settings, the due date for the R&DLTC statement is usually the date a taxpayer files their income tax return. This date can be well in advance of the due date for the return because taxpayers may file their returns and R&DLTC statements early so they can cash out their losses sooner.
8. This creates a problem when a taxpayer files their R&DLTC statement after their income tax return. Current law would require Inland Revenue to decline the taxpayer’s application, even if both the return and the statement were filed well before the return due date.
9. s 9(2)(g)(i)

10. After identifying the issue in October 2022, Inland Revenue changed its administrative approach to be consistent with the law. However, this new approach means that some taxpayers will no longer receive R&DLTCs when they were expecting to, despite following the same filing process as in previous years.
11. Several external stakeholders have raised concerns with Inland Revenue's new approach and have called for flexibility and/or legislative solutions. These issues may be raised at the Chartered Accountants Australia and New Zealand conference on 24–25 November 2022.
12. The R&DLTC was introduced in the 2015–16 income year, so Inland Revenue has more familiarity with taxpayer behaviour now compared to when the rules were being developed. Given the recent change in administrative approach, it is timely to consider whether the current legislative settings are appropriate.
13. We recommend that changes are made to primary legislation in response to this issue, and that you also recommend an Order in Council to extend the due date for taxpayers currently affected. We set out these recommendations below.

Changes to primary legislation

14. The existing requirement to file an R&DLTC statement by the date a taxpayer files their income tax return is difficult and obscure. It is unusual to pin the deadline for doing something on the date that an income tax return is filed rather than the date that the return is due.
15. We recommend making the following changes:
 - 15.1 **Removing the requirement that a statement be filed before or on the date a taxpayer files their income tax return.** We recommend making this change retrospectively, to remove the legal uncertainty concerning R&DLTCs that have been incorrectly paid out to date.
 - 15.2 **Changing the due date for R&DLTC statements going forward, so that a taxpayer's R&DLTC statement is due 30 days after their income tax return due date.** We recommend making this change prospectively from the 2022–23 income year.
 - 15.3 **Changing the due date for R&DLTC statements in prior years to 31 March in the year following the relevant income year.** We recommend making this change retrospectively up until the 2021–22 income year. This would legitimise the previous losses cashed out to businesses for which their R&DLTC statements had been accepted after the income tax return due date but before the relevant 31 March date.
16. These amendments will make the due date settings for applying for the R&DLTC more intuitive and fairer for taxpayers, as well as giving certainty for taxpayers and Inland Revenue regarding losses already cashed out. The proposed due date going forward would also match the equivalent setting for the R&D Tax Incentive, which is more convenient for taxpayers. Many taxpayers are registered for both regimes.
17. We recommend that these amendments be included in the Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Bill (No 2), which is currently being considered by the Finance and Expenditure Committee. This would mean the amendments would be in force as early as March 2023.

Order in Council

18. If changes to primary legislation are not enacted until March 2023, the current issue remains until that date. For the 2021–22 tax year, some taxpayers have now filed

their income tax returns without having filed their R&DLTC statements, despite intending to claim R&DLTCs for the year. In previous years, Inland Revenue would still have approved these applications, but now no longer will.

19. This R&DLTC regime is intended to encourage and incentivise R&D expenditure by businesses, including loss-making start-ups. Taxpayers that did not submit R&DLTC statements prior to filing their income tax returns for the 2021–22 tax year would fail on a minor procedural ground rather than a substantive requirement, which we consider undermines the policy intent of the regime.
20. The Tax Administration Act 1994 contains a broad power to extend the time for doing something under the Act. This would include extending the deadline for businesses to submit an R&DLTC statement.
21. To ensure taxpayers are not unexpectedly disadvantaged by Inland Revenue’s change in administrative approach, we recommend that you make an Order in Council extending the deadline for submitting an R&DLTC statement for the 2021–22 tax year until 30 April 2023. This would allow businesses to still receive their R&DLTCs for the 2021–22 tax year even if they had failed the filing requirements on a minor procedural ground. Affected taxpayers would still be required to file a statement before being allowed R&DLTCs.
22. If this Order in Council is not agreed to, affected taxpayers will experience a delay in receiving R&DLTCs for the 2021–22 year, or will miss out altogether if the amendments to primary legislation are not enacted. This situation is exacerbated by the fact that Inland Revenue does not have any other discretion for accepting R&DLTC statements that are filed late. Consequently, denying applications for R&DLTCs when they previously would not have been denied would be (and already has been) controversial amongst stakeholders.
23. The attached Cabinet paper recommending the Order in Council seeks agreement to a waiver of the 28-day rule for Orders in Council coming into force. This waiver is sought on the grounds that not waiving the rule will:
 - 23.1 Cause frustration for R&D businesses that are seeking R&DLTCs as soon as possible but cannot have their R&DLTC statement approved for a further 28 days, resulting in the delayed receipt of those tax credits; and
 - 23.2 Increase the processing backlog for Inland Revenue, if it cannot fully process statements filed under the extended due date for a further 28 days.

Financial implications

24. The proposed amendments to primary legislation, and the Order in Council, would not have a fiscal impact.
25. The current due date settings are not designed to increase or decrease the number of eligible taxpayers for R&DLTCs. Changing the due date settings is intended to make it easier for businesses to access R&DLTCs but is not expected to result in an increase in claims, particularly as businesses had adjusted to Inland Revenue’s original (incorrect) approach.
26. The Order in Council would only bring forward the disbursement of R&DLTCs within the same financial year.

Consultation

27. The Ministry of Business, Innovation and Employment, Callaghan Innovation, the Treasury, and the Department of the Prime Minister and Cabinet have been consulted on this report and the attached Cabinet paper.

28. This issue has been discussed with some (tax) external stakeholders, including individual taxpayers/advisors as well as groups including Chartered Accountants Australia and New Zealand.

Next steps

29. Subject to your agreement, we will prepare the amendments to primary legislation for inclusion in the officials' report on the Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Bill (No 2).
30. If authorised, we will also issue a drafting instruction to the Parliamentary Counsel Office to draft an Order in Council giving effect to an extension of the filing deadline for R&DLTC statements for the 2021–22 tax year. We will provide this Order to your office in advance of the Cabinet Legislation Committee meeting that considers this Cabinet paper on either 8 December 2022 or 15 December 2022. We will also provide you with speaking notes to accompany consideration of the attached Cabinet paper.
31. The attached Cabinet paper should be authorised for lodgement to the Cabinet Office by 10am Thursday 1 December if the Cabinet paper is considered at the Cabinet Legislation Committee meeting on Thursday 8 December. Otherwise, lodgement should occur by 10am Thursday 8 December for consideration at the Cabinet Legislation Committee meeting on Thursday 15 December.
32. Subject to your agreement, we will communicate to external stakeholders and affected taxpayers that the primary legislation changes will be included in the officials' report to the Bill to change the current due date settings. We will also communicate that an Order in Council will be recommended to extend the current deadline for the 2021–22 tax year.

Recommended action

We recommend that you:

33. **agree** to remove the requirement to file a Research & Development loss tax credit (R&DLTC) statement before or on the date a taxpayer files their income tax return;
Agreed/Not agreed
34. **agree** to amend the due date for filing an R&DLTC statement to the date that is 30 days after the due date for a taxpayer's income tax return;
Agreed/Not agreed
35. **agree**, for historical cases, to amend the due date for filing a R&DLTC statement to 31 March in the year following the end of the relevant income year;
Agreed/Not agreed
36. **agree**, with respect to application dates of the above recommendations, that:
- 36.1 the requirement that R&DLTC statements be filed by the date that income tax returns are filed should be removed retrospectively from the 2015–16 income year;
Agreed/Not agreed
- 36.2 the new due date for R&DLTC statements going forward, which would be 30 days after a taxpayer's income tax return due date, should apply prospectively from the 2022–23 income year;

Agreed/Not agreed

36.3 the new due date for R&DLTC statements for historical cases, which would be 31 March in the year following the end of the relevant income year, should apply for income years up until the 2021–22 income year;

Agreed/Not agreed

37. **agree** to recommend these changes as matters raised by officials in the officials' report to the Finance and Expenditure Committee on the Taxation (Annual Rates for 2022–23, Platform Economy, and Remedial Matters) Bill (No 2);

Agreed/Not agreed

38. **agree** to recommend an Order in Council that extends the deadline for filing an R&DLTC statement for the 2021–22 tax year to 30 April 2023;

Agreed/Not agreed

39. **authorise** Inland Revenue to issue a drafting instruction to the Parliamentary Counsel Office to draft an Order in Council that gives effect to this extension;

Authorised/Not authorised

40. **authorise** the lodgement of the attached Cabinet paper to the Cabinet Office;

Authorised/Not authorised

41. **agree** that Inland Revenue be able to communicate the above decisions to external stakeholders;

Agreed/Not agreed

42. **refer** a copy of this report to the Minister of Research, Science and Innovation for their information.

Referred/Not referred

s 9(2)(a)

Chris Gillion
Policy Lead
Policy and Regulatory Stewardship

Hon David Parker
Minister of Revenue
/ /2022