

PS LA 2009/1 - The Commissioner's discretion to issue a written notice specifying the amount of a tax offset for research and development allowable to an eligible company

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! This practice statement deals with section 731A of the *Income Tax Assessment Act 1936*, which has been repealed (refer *Tax Laws Amendment (Research and Development) Act 2011*). This repeal applies to assessments for income years commencing on or after 1 July 2011. However, section 731A can still apply in respect of income years commencing before 1 July 2011 and this practice statement continues to be relevant to those income years.

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Practice Statement Law Administration

PS LA 2009/1

This law administration practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement [PS LA 1998/1](#). ATO personnel, including non ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.

*This practice statement deals with section 73IA of the *Income Tax Assessment Act 1936*, which has been repealed (refer *Tax Laws Amendment (Research and Development) Act 2011*). This repeal applies to assessments for income years commencing on or after 1 July 2011. However, section 73IA can still apply in respect of income years commencing before 1 July 2011 and this practice statement continues to be relevant to those income years.*

SUBJECT: The Commissioner's discretion to issue a written notice specifying the amount of a tax offset for research and development allowable to an eligible company

PURPOSE: To guide staff in the exercise of the discretion contained in section 73IA of the *Income Tax Assessment Act 1936*

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STATEMENT

1. The Commissioner may, under section 73IA of the *Income Tax Assessment Act 1936* (ITAA 1936), issue a written notice to an eligible company specifying the amount of a tax offset for research and development (R&D tax offset) allowable to it under section 73I of the ITAA 1936.
2. The object of this discretion¹ is to provide objection, review and appeal rights under Part IVC of the *Taxation Administration Act 1953* (TAA) to eligible companies in respect of claims by them for the R&D tax offset, where they are dissatisfied with the amount allowed.²
3. This practice statement provides guidance to ATO personnel about the exercise of the discretion in section 73IA of the ITAA 1936.
4. It is not possible to anticipate all the circumstances in which the discretion may or may not be exercised. In each case the particular circumstances of the relevant company must be considered. However, regard should be had to the principles and examples set out in the Explanation section of this practice statement.
5. The exercise of the discretion must not be approached in a rigid or inflexible way. In forming an opinion, administrative law principles must be observed. The main obligations are as follows:
 - the issue of a section 73IA notice must be decided on the merits of the particular case, having regard to the object of the discretion
 - regard must be had to any information tendered with a request for a section 73IA notice and any other relevant matter
 - in particular, the decision must not be made in accordance with any policy (including this practice statement) without regard to all of the company's circumstances
 - all relevant considerations (including this practice statement) should be taken into account and irrelevant considerations excluded
 - the decision must be made in good faith and without bias
 - if there is material adverse to the request of which the taxpayer may not be aware, they should be made aware of it and asked to comment

¹ Subsection 33(2A) of the *Acts Interpretation Act 1901* states:

Where an Act assented to after the commencement of this subsection provides that a person, court or body may do a particular act or thing, and the word may is used, the act or thing may be done at the discretion of the person, court or body.

² See subsection 73IA(2) of the ITAA 1936 (set out in paragraph 7 of this practice statement), and more generally, paragraphs 3.5 and 3.7 of the Explanatory Memorandum to the Tax Laws Amendment (2007 Measures No. 2) Bill 2007.

- the decision must be based on evidence and not on surmise or conjecture (however, the decision may involve the drawing of reasonable inferences from that evidence, where required)
 - any procedures prescribed by the Commissioner should be followed as should relevant legislation, and any binding case law, and
 - the decision maker must not make the decision at the behest of another person. Their decision must be independent. However, they may take into account relevant matters put to them by another person, including other ATO personnel.
6. References in this practice statement to the Commissioner issuing a section 73IA notice are, for practical purposes, to the issue of this notice by an authorised officer. In audit cases this will usually involve action by the audit case officer.

EXPLANATION

Legislative background

7. Prior to the introduction of section 73IA of the ITAA 1936 concerning the R&D tax offset, there was no provision which expressly gave objection, review or appeal rights under the TAA in relation to R&D tax offsets chosen under section 73I of the ITAA 1936. Companies without an 'assessment', as defined for the 2003-04 year of income and earlier income years, generally had no such rights under Part IVC of the TAA. There are also no objection, review or appeal rights in relation to the 2004-05 year of income and later years where a company has a nil assessment (where there is no taxable income or no tax payable), where it is not seeking to increase its liability.³
8. *Tax Laws Amendment (2007 Measures No. 2) Act 2007* inserted new section 73IA into the ITAA 1936, as follows:
- Section 73IA Objections**
- (1) The Commissioner may give an eligible company a written notice specifying the amount of a tax offset allowable to the company under section 73I. The notice must specify that it was issued under this subsection and may contain such other information as the Commissioner thinks fit.
- (2) If an eligible company is dissatisfied with the notice, the company may object in the manner set out in Part IVC of the *Taxation Administration Act 1953*.
9. The section applies in relation to years of income commencing on or after 1 July 2001. It ceases to apply for years of income commencing on or after 1 July 2011.

Exercise of discretions generally

10. The issue of a notice under section 73IA of the ITAA 1936 is a discretionary one.⁴ The Commissioner is not obliged to issue such a notice just because an eligible company has made a choice under section 73I to claim the R&D tax offset. As stated in Law Administration Practice Statement PS LA 2003/3 *Precedential ATO view* at paragraph 22:

³ Subsection 175A(2).

⁴ Subsection 33(2A) of the *Acts Interpretation Act 1901* states:

Where an Act assented to after the commencement of this subsection provides that a person, court or body may do a particular act or thing, and the word may is used, the act or thing may be done at the discretion of the person, court or body.

Exercising a discretion requires a decision-maker to choose between alternative courses of action. It involves the exercise of the decision-maker's own judgment in coming to an appropriate decision and the decision must not be made at the direction of another person. Generally, it is a decision-making process in which no one consideration and no combination of considerations is necessarily determinative of the result. It requires the decision maker to consider the merits of the particular case by:

- taking into account the individual circumstances of the case
- weighing the relevant evidence, and
- taking into account any relevant guidelines.

Accordingly, a decision involving the exercise of a discretion is not one for which a precedential ATO view should be created or applied.

11. The ATO is required to ensure that the exercise of the discretion is fair and reasonable, that there is no real or perceived bias and that conflict of interest protocols are followed.

R&D tax concession provisions

12. The discretion in section 73IA of the ITAA 1936 must be exercised consistently with the object of the Division in which it is contained, which is to provide deductions for eligible companies for expenditure on research and development (R&D) activities. In particular, it is to be exercised consistently with the object of the R&D tax concession provisions, sections 73B to 73Z of the ITAA 1936.⁵
13. Prior to the introduction of the R&D tax offset provisions, the R&D tax concession provided an income tax deduction of up to 125% of relevant expenditure to eligible companies which undertook R&D activities, as defined, which had been registered with Innovation Australia (formerly the Industry Research and Development Board) under section 39J of the *Industry Research and Development Act 1986* (the IR & D Act 1986). This concessional deduction was deferred for such companies which were in a tax loss position, in the sense that the deduction would not immediately affect the liability to tax of these companies, until such time as they could derive assessable income against which the resulting carry forward loss deduction could be claimed.
14. The R&D tax offset provisions in sections 73I and 73J of the ITAA 1936 were introduced by the *Taxation Laws Amendment (Research and Development) Act 2001*. This amending legislation was introduced to enhance the existing R&D tax concession and encourage further investment in R&D.⁶ The purpose of these sections is to introduce a choice to take the R&D tax offset so that small companies, particularly those in a loss position, which meet certain eligibility requirements, can 'cash out' the equivalent of the R&D tax concession deduction. This means that these companies can now choose the R&D tax offset, which is a refundable tax offset,⁷ so that the benefit of the R&D tax concession can be accessed immediately in the form of a cash refund.⁸ The objective is to provide support, via improved cash flows, to early stage innovation companies undertaking R&D.

⁵ The object of section 73B, for example, is set out in subsection 73B(1AAA) of the ITAA 1936.

⁶ Explanatory Memorandum to the Taxation Laws Amendment (Research and Development) Bill 2001.

⁷ Refer subsection 67-25(3) of the ITAA 1997.

⁸ Taken from clause 7.21 of the Tax Laws Amendment (2007 Measures No. 2) Bill 2007.

15. Eligible companies, as defined, need to meet certain requirements to be eligible to choose the R&D tax offset. These requirements include those relevant to eligibility for the R&D tax concession generally and specific requirements under the R&D tax offset provisions. Section 73I of the ITAA 1936 states that an eligible company is able to choose the R&D tax offset, instead of a deduction under section 73B,⁹ 73BA, 73BH or 73QA, if it is eligible to make that choice under section 73J of the ITAA 1936. Section 73J outlines the eligibility requirements that need to be met by an eligible company to be able to choose the R&D tax offset. In general, a company must satisfy the following:
- the aggregate research and development amount, as defined under subsection 73B(1), must exceed \$20,000 for the year, or the company must have incurred an amount of contracted expenditure, as defined under subsection 73B(1)
 - the aggregate research and development amount of the company and its group members must not exceed \$1 million
 - the turnover of the company and its group members must be less than \$5 million
 - the ownership of the company by an exempt entity (as defined) must not be 25% or more, and
 - the company must be eligible to claim a tax deduction under certain R&D tax concession provisions (for example section 73B (except subsection 73B(14C) of the ITAA 1936). Broadly, this is met where an eligible company has, for each year of income, registered its R&D activities with Innovation Australia, has incurred R&D expenditure of at least \$20,000 (or has incurred an amount of contracted expenditure) and the expenditure has been incurred on R&D activities carried on by the company or on its behalf.
16. A dispute as to the amount of R&D tax offset allowable may arise where any of the criteria outlined above are at issue. For example, there may be questions over the registration of the R&D activities being claimed, the eligibility of activities undertaken, the amount or types of expenditure claimed, including whether the expenditure has been incurred, whether the aggregate research and development amount threshold for the R&D tax offset is met, the ownership of the company by exempt entities, or the turnover of the company and its group members exceeding the \$5 million threshold. Under the self assessment regime, a company is able to self assess each of the above criteria and choose to claim the R&D tax offset in its income tax return or by written notice within normal amendment time limits.¹⁰ Where the Commissioner concludes that any of the above criteria have not been satisfied, there would be an appropriate adjustment to the amount of R&D tax offset allowable.

⁹ Except subsection 73B(14C).

¹⁰ Under subsection 73I(2) of the ITAA 1936, an eligible company may make the choice to claim the R&D tax offset by amendment, within the following timeframes:

- if the relevant year of income commenced prior to 21 June 2007, then the choice must be made in writing given to the Commissioner before the end of the period that the Commissioner could amend an assessment made on 21 June 2007, or
- if the relevant year of income commenced on or after 21 June 2007, then the choice must be made by notice in writing given to the Commissioner before the end of the period that the Commissioner could amend an assessment for the company for the tax offset year.

17. Prior to the introduction of section 73IA of the ITAA 1936, a company dissatisfied with such a decision altering their entitlement to the R&D tax offset, may not have had any objection or appeal rights under Part IVC of the TAA. Subsection 73IA(1) now allows a company dissatisfied with such a decision to request the Commissioner to issue a section 73IA notice specifying the amount of R&D tax offset allowable to the company in the relevant year of income. Subsection 73IA(2) of the ITAA 1936 then allows an eligible company which is dissatisfied with such a notice to object in the manner set out in Part IVC of the TAA.

Exercise of the section 73IA discretion

18. Section 73IA of the ITAA 1936 does not prescribe any circumstances that the Commissioner must or may take into account in exercising the discretion. Case law indicates that where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of that discretion are similarly unconfined, except in so far as there may be found in the subject matters, scope and purpose of the statute some implied limitation to the factors to which the decision maker may legitimately have regard.¹¹
19. The fact that the decision to issue a section 73IA notice has been made the subject of a discretion indicates that there is a choice to be made between those situations in which issue of the notice is appropriate and those where it is not. This requires an officer delegated with the responsibility of exercising the Commissioner's discretion to turn their mind to the issue of the notice. The decision of whether or not to issue the notice is to be decided on a case by case basis, having regard to the object of providing objection rights in those cases where an eligible company is dissatisfied with the amount of the R&D tax offset allowed to it.
20. The purpose of the introduction of section 73IA of the ITAA 1936 was to extend the appeal and review rights to companies claiming the R&D tax offset in circumstances where previously such rights did not exist.¹² This purpose may be taken into account as a factor supporting a decision to exercise the discretion favourably where it is reasonably open on the particular facts to do so.
21. In general, situations in which it will be appropriate to issue a notice under section 73IA of the ITAA 1936 are those where otherwise the company in question would have no objection rights at all in relation to their claim for the R&D tax offset. The need for the issue of the notice may be one identified by the company, and communicated to the Commissioner, or it could be identified by the Commissioner. Where the company has requested a notice under section 73IA of the ITAA 1936, then the Commissioner must have regard to this fact, as well as to any reasons contained in the request.
22. A notice will generally be issued where it can reasonably be concluded that ATO action concerning an eligible company's claim for the R&D tax offset is likely to mean it will be dissatisfied with the outcome.

¹¹ See Gummow J in *Bond Corporation Holdings Ltd v. Australian Broadcasting Tribunal* (1988) 84 ALR 669 which was supported by the High Court in *R v. Australian Broadcasting Tribunal; Ex Parte 2HD Pty Limited* (1979) 144 CLR 45. See also *Water Conservation and Irrigation Commission (NSW) v. Browning* (1947) 74 CLR 492 at 505; and *Samad & Ors v. District Court of New South Wales & Anor* [2002] HCA 24 at [32].

¹² Explanatory Memorandum to Tax Laws Amendment (2007 Measures No. 2) Bill 2007 at paragraph 3.5 and Table 'Comparisons of key features of new law and current law'.

23. The Commissioner may consider whether the company has claimed a deduction under the R&D tax concession provisions and/or whether the company has made a choice to claim the R&D tax offset. An amount specified on a notice under section 73IA of the ITAA 1936 will be the amount of R&D tax offset that the Commissioner considers the company is entitled to under section 73I of the ITAA 1936. The issue of a notice under section 73IA of the ITAA 1936 allows the taxpayer to object to the amount of R&D tax offset stated in the notice in the manner provided for in Part IVC of the TAA.

Factors that may be considered

24. It is not possible to identify every factor that might be relevant in considering whether the exercise of the discretion is appropriate, or prescribe how one factor should always be considered. Clearly, each individual case will present a unique mix of circumstances that need to be considered and weighed in forming an opinion about whether or not a notice under section 73IA should be issued. Some relevant factors to consider, however, are listed below.

Circumstances in which a section 73IA notice would generally not be issued

Threshold entitlement to the R&D tax offset not satisfied – no choice made

25. As outlined in paragraph 15 of this practice statement, section 73I of the ITAA 1936 allows an eligible company to choose the R&D tax offset, instead of a deduction under section 73B, if it is eligible to make that choice under section 73J of the ITAA 1936. Where a company has not made such a choice then the first condition for entitlement to the R&D offset under section 73I has not been met. In such circumstances a section 73IA notice would generally not be issued. Where a company has not made the choice to claim the R&D tax offset in its income tax return, or an income tax return and/or R&D tax concession schedule has not been lodged, then it can be established immediately that it has no entitlement under section 73I. There would be little point issuing a notice under section 73IA, until such time as this first condition for entitlement had been met. A company which has not made such an initial choice in its income tax return would need to make such a choice by amendment, as contemplated in subsection 73I(2) of the ITAA 1936. A company will be subject to the standard time limits for requesting an amendment to an assessment as outlined in section 170 of the ITAA 1936.
26. An exception to this practice may occur in the event that a company states a choice has been made under section 73I of the ITAA 1936, but the ATO does not accept that a valid choice has been made. Here, the company will be dissatisfied with the decision made by the Commissioner about its claim for an R&D tax offset amount and there will be the suggestion of a clear dispute over facts or issues. In such cases the Commissioner may issue a notice under section 73IA of the ITAA 1936 in order to give the affected company an avenue to lodge an objection to resolve the validity of choice dispute. However, such a notice will be issued subject to the reservation that the Commissioner does not, at this time, accept that a valid choice under section 73I of the ITAA 1936 has been made by the company.

No registration with Innovation Australia and ineligible R&D activities

27. The Commissioner may have regard to whether the company has registered its R&D activities with Innovation Australia. A company is required under subsection 73B(10) of the ITAA 1936, to obtain registration in relation to the year of income and to specific activities, in order for its expenditure in respect of these activities to be the subject of allowable deductions for that year under section 73B and related provisions. Another condition for entitlement to the R&D tax offset is that the expenditure which gives rise to the offset be first deductible under section 73B (except subsection 73B(14C)), or another specified provision.¹³ Where registration has not been obtained for the year under consideration and for the activities being claimed as R&D activities, no amount of R&D tax offset is allowable to the company. A notice under section 73IA of the ITAA 1936 would not generally be issued where registration had not occurred, as this condition of entitlement was not satisfied, and there would be no practical utility in the company lodging an objection (for an exception to this, see paragraph 41 of this practice statement).
28. The Commissioner will need to consider whether Innovation Australia has issued a certificate under section 39L of the IR & D Act 1986 in relation to some or all of the company's registered activities (for the current or previous years of income), stating that they are not 'research and development activities' within the meaning of subsection 73B(1) of the ITAA 1936. In such cases, the Commissioner is bound to accept the determination of Innovation Australia and has no power to allow the R&D tax offset in respect of expenditure on the activities subject to any adverse determination (that is, a determination that certain registered activities are not 'research and development activities').¹⁴ The timing of when a notice under section 73IA of the ITAA 1936 will be issued in these circumstances is discussed in paragraphs 42 and 43 of this practice statement.

'Repeat' notices

29. Where a section 73IA notice has issued, the relevant company dissatisfied with such a notice has objected to it, and a decision on that objection has been made, any request for a subsequent section 73IA notice would generally be refused. If the company is still dissatisfied with the ATO decision in respect of its claim for the R&D offset, it has other avenues to pursue this, besides repeating the objection process, which any issue of another section 73IA notice in respect of the same claim would entail.

Objection determined previously

30. The Commissioner may also need to consider whether objection rights are available already to the eligible company. In general, where the company has already had an objection determined under Part IVC of the TAA in relation to the amount of R&D tax offset allowed to it, it will not be appropriate to give a notice under section 73IA of the ITAA 1936.

¹³ Sections 73BA, 73BH or 73QA of the ITAA 1936 (subsection 73I(1)).

¹⁴ Eligible companies affected by an adverse certificate under section 39L of the *Industry Research and Development Act 1986*, have rights of review and appeal under sections 39S and 39T of that Act.

Circumstances in which a section 73IA notice would generally be issued

31. Where the Commissioner amends a relevant assessment to disallow an R&D offset amount, this may give rise to objection rights under Part IVC of the TAA pursuant to section 175A of the ITAA 1936. Notwithstanding these existing Part IVC rights, the Commissioner may issue a section 73IA notice in certain circumstances (see paragraph 37 of this practice statement).
32. In relation to whether existing objection rights are available, the following considerations may also be relevant:
 - the eligible company has obtained, or has applied for, a private ruling on the subject of the amount of R&D tax offset allowable. Where this is the case, consideration of whether the company has, or will have, the right to object to the private ruling and whether this is a more appropriate dispute avenue will be required. (A taxpayer cannot object against a private ruling if there is an assessment for the income year to which the ruling relates: paragraph 359-60(3)(a) of Schedule 1 to the TAA. However, subsection 175A(2) of the ITAA 1936 prevents a taxpayer from objecting to a 'nil assessment', except to increase its liability. Therefore, even a company which has received a private ruling may not have any objection rights without issue of a notice under subsection 73IA of the ITAA 1936.)
 - a notice of assessment has issued against which the eligible company is able to object in the manner set out in Part IVC of the TAA under section 175A of the ITAA 1936 (note paragraph 37 of this practice statement).

Delay in request for a section 73IA notice

33. The time elapsed between the making of a relevant assessment or decision in relation to the amount of the R&D tax offset allowable for the year of income and the date of the request for issue of the notice under section 73IA may be taken into consideration. The determination of what is a reasonable delay and whether any explanation for the delay is satisfactory will need to be assessed based on the circumstances of each case.

Lost notices

34. Where a company has made the choice to claim the R&D tax offset and a notice issued under section 73IA of the ITAA 1936, if this notice is lost or misplaced, any request for a duplicate section 73IA notice would generally be met. However, the date of issue of the notice would remain unchanged for the purposes of determining whether any objection to it is 'in time' for the purposes of Part IVC of the TAA.

Appropriate reasons for requesting section 73IA notice

35. A company that requests a notice under section 73IA of the ITAA 1936 will need to provide appropriate reasons. The reasons contained in the request for the notice will need to broadly outline the basis of its dissatisfaction with the R&D tax offset amount it has claimed or the amount the Commissioner has advised it is entitled to under section 73I of the ITAA 1936. Reasons for request of a section 73IA notice will be considered on the merits of each case.

36. Although the company does not need to state its grounds of objection 'fully and in detail' at this stage, it is expected that it will be able to provide broad details of which elements in the calculation of the R&D tax offset amount in question are incorrect, as well as why the creation of objection rights flowing from the issue of the notice is appropriate. These details need only be set out in summary form. A mere vague explanation that the company expects to be reviewing its claim in the future, is not considered to be a sufficient basis on which to exercise the discretion under section 731A of the ITAA 1936.
37. The reasons provided by a company for requesting a section 731A notice may include reference to circumstances where it already has the right to object in the manner set out in Part IVC of the TAA. It would be expected that in such a case it would be able to show that the objection rights under section 731A of the ITAA 1936 are the more specific or appropriate ones.
38. Where no reasons are provided by the company requesting the section 731A notice, and the Commissioner has not adjusted the R&D tax offset amount claimed, no notice would generally be issued as there would be no basis on which to infer any possible dissatisfaction on the part of the company with the amount of the R&D tax offset claimed.

Timing of issue of a section 731A notice

39. There is no express or implied time limit as to when a taxpayer can request the Commissioner to exercise the discretion to issue a written notice under section 731A of the ITAA 1936. However, the decision by the Commissioner to exercise the discretion in section 731A of the ITAA 1936 will be influenced by practical considerations of timing. That is, the decision is not whether or not a section 731A notice will be issued but rather **when** it will be appropriate for such a notice to issue. A range of factors in which this question may arise are outlined generally below.
40. The Commissioner may have regard to whether the amount allowable for the R&D tax offset for the relevant year(s) is the subject of a ATO review or audit. If this is the case, then depending on the circumstances, a notice under section 731A of the ITAA 1936 would generally not be issued until the completion of the review or audit. The reasons for this include giving the eligible company proper opportunity to frame its grounds of objection when lodging its notice of objection against the notice issued under section 731A of the ITAA 1936.¹⁵
41. As noted in paragraph 27 of this practice statement, the Commissioner may consider whether the company has obtained registration of its R&D activities with Innovation Australia under section 39J of the IR & D Act 1986. Generally, where registration had not been obtained a notice under section 731A of the ITAA 1936 will not be issued. However, there may be circumstances where registration is delayed or incorrect and the issue of a section 731A notice would be appropriate at a later point in time once the registration issue has been resolved. Examples of this include:
 - the 10 month timeframe to lodge registration has expired but there is a late application for registration which involves 'exceptional circumstances', which can be considered by Innovation Australia
 - registration of R&D activities has been obtained but the incorrect entity has been registered, and action is underway to rectify this, or
 - a group of companies undertake R&D activities and the R&D tax offset claim is chosen by the wrong claimant but action is underway to rectify this.

¹⁵ Refer to section 14ZU of Part IVC of the TAA concerning the requirement to state 'fully and in detail, the grounds that the person relies on'.

42. An eligible company which has made a claim for the R&D tax offset may become subject to a certificate issued by Innovation Australia under section 39L of the IR & D Act 1986, stating that some, or none of the activities it has registered are 'research and development activities' as defined. The certificate is binding on the Commissioner and at some stage an adjustment may need to be made to the company's R&D tax offset claim. The timing of such an adjustment and its amount may be affected by whether the company avails itself of separate review and appeal rights under the IR & D Act 1986, concerning the section 39L certificate.
43. If the R&D tax offset claim is adjusted and a section 73IA notice issued (as would usually be the case), but the company also avails itself of these separate review and appeal rights, it will need to carefully consider the timing and content of any objection it may lodge against the section 73IA notice. There are potential procedural difficulties in attempting to pursue rights of review and appeal under both the IR & D Act 1986 and the TAA at the same time. It may be necessary on occasion to discuss with the company such difficulties to ensure it understands them, and can make an informed decision about whether to pursue both review and appeal avenues at the same time.
44. If a section 73IA notice is requested as a result of a taxation decision, the Commissioner may take into account the lapse of time (however short) between the taxation decision and the request for the notice. This is particularly so in cases where the availability of documentation and evidence to substantiate the request for a variation to the adjusted amount is scarce.

Documenting the decision and review rights

45. Any notice issued under section 73IA of the ITAA 1936 is required to:
 - be in written format
 - specify that it is issued under subsection 73IA(1) of the ITAA 1936
 - specify the amount of R&D tax offset allowable for the year of income, and
 - may contain such other information as the Commissioner thinks fit.
46. A taxpayer who is not satisfied with a decision on the exercise of the discretion made by the Commissioner can request an informal review of that decision under the Taxpayers' Charter.
47. There is a requirement for the Commissioner to record the reasons for the exercise of the discretion in section 73IA of the ITAA 1936, whether it is favourable or unfavourable. This is required because a taxpayer who is not satisfied with a decision on the exercise of the discretion made by the Commissioner can request an informal review of that decision under the Taxpayers' Charter. In addition, the decision may be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.
48. This means that an ATO officer responsible for the issue of a section 73IA notice is required to ensure that the notice and any corresponding documentation is captured on the appropriate ATO system.¹⁶ This should include the request for the section 73IA notice (including the reasons for the request where applicable), a copy of the notice issued, factors considered by the decision maker including what is being relied upon for the decision and finally, the reasons for the exercise of the discretion.

¹⁶ Refer, for example, to those case management systems listed in Law Administration Practice Statement PS LA 2002/16 *Mandatory use of Information Technology systems for interpretative work - inclusion in performance agreements*.

Examples illustrating how the discretion may be exercised

49. The following examples are provided as a general guide on how the exercise of the discretion might be approached in various situations. They are not exhaustive or prescriptive. Actual decisions will depend on all the facts of each particular case. These examples are illustrative only and are not a substitute for the exercise of judgment in the light of all the facts. Unless otherwise stated, it is assumed that each company is an eligible company as defined, satisfies the requisite criteria to be eligible to claim the R&D tax concession and is eligible to make the choice to claim the R&D tax offset under section 731 of the ITAA 1936 (as highlighted at paragraph 15 of this practice statement).

Example 1

50. Company A self assesses that it is entitled to a deduction for expenditure incurred on R&D activities registered with Innovation Australia. It makes a valid choice to claim the R&D tax offset instead of an R&D deduction under section 731 of the ITAA 1936 in its income tax return. It lodges its income tax return and corresponding R&D tax concession schedule, which are processed by the ATO.
51. There is no tax raised in the initial income tax assessment of Company A and an amount equal to the R&D tax offset is refunded to Company A. Subsequently, the Commissioner adjusts the R&D expenditure claimed by Company A downwards so that the R&D tax offset amount that Company A is entitled to is less than the amount initially claimed by it. The ATO issues a notice under section 8AAZN of the TAA to recover the amount paid to Company A to which it is not entitled. This is referred to as a notice of administrative overpayment (AMOP). Company A wants to object to the decision made and requests a section 731A notice.
52. The AMOP notice does not constitute an assessment to which the Company would acquire objection rights under Part IVC of the TAA. A section 731A notice would generally be issued in these circumstances to allow the company to pursue its disputed entitlement to the R&D tax offset.

Example 2

53. Company B is eligible to choose to claim the R&D tax offset under section 731 of the ITAA 1936. Under self assessment it lodges its company income tax return and corresponding R&D tax concession schedule. These are processed by the ATO and Company B receives a refund for the amount of R&D tax offset allowable.
54. Subsequently, Company B requests a section 731A notice specifying the amount of R&D tax offset that Company B is entitled to. Company B is currently reviewing its R&D expenditure claims over the last few years. The reason given for wanting the section 731A notice is that Company B may want to alter the amounts claimed once the review is finalised. Company B intends to make any favourable change to their income tax return and R&D tax concession schedule by making relevant amendments to the figures shown on these forms.
55. In these circumstances the adequacy of the reasons provided to support the request for the section 731A notice will need to be examined. The Commissioner will need to consider whether it is appropriate for a section 731A notice to be issued in view of the vague nature of the dissatisfaction with the R&D tax offset claimed by Company B. Without more, a notice ought not to be issued.

Example 3

56. Company C chooses to claim the R&D tax offset under section 731 of the ITAA 1936. Company C lodges its company income tax return and corresponding R&D tax concession schedule and at the point of lodgement it is noted that there is no registration number on the R&D schedule. As a result, the company's claim for the R&D tax offset is disallowed because the company is not registered with Innovation Australia.
57. Registration by Innovation Australia of R&D activities for each year of income is required and there is no eligibility to the R&D tax concession in the event that registration is not obtained. Where registration had not been obtained a notice under section 731A of the ITAA 1936 will not be issued as one of the threshold conditions for claiming the R&D tax concession has not been met and any rights of objection would be of no value.
58. However, as noted at paragraph 41 of this practice statement, there may be circumstances where registration is delayed and the issue of a section 731A notice would be appropriate at a later point in time once the registration issue has been resolved.
59. Prior to deciding not to issue the notice the relevant ATO officer would need to confirm that:
- no registration application has been lodged with Innovation Australia
 - the ten month timeframe to lodge the registration has expired, and
 - there is no late application for registration which comes under exceptional circumstances of an unforeseeable occurrence; or a circumstance outside the control of the applicant company; or an external impediment, which causes the application to be dispatched late or not received on time.

Example 4

60. Company D chooses to claim the R&D tax offset under section 731 of the ITAA 1936. It lodges its company tax return and R&D tax concession schedule for the year of income in question and a deemed assessment results. Subsequently, Innovation Australia issues a certificate under section 39L of the IR & D Act 1986 stating that some or all of Company D's registered activities undertaken for the relevant year of income are not eligible R&D activities as defined under subsection 73B(1) of the ITAA 1936.
61. In such cases the Commissioner is bound to accept the determination of Innovation Australia and has no power to allow the R&D tax offset in respect of expenditure on the ineligible activities. As noted at paragraphs 42 and 43 of this practice statement, the certificate is binding on the Commissioner, and at some stage an adjustment may need to be made to the company's R&D tax offset claim if the section 39L certificate is not overturned.
62. If the R&D tax offset claim is adjusted,¹⁷ and a section 731A notice issued (as would usually be the case), but the company also avails itself of separate review and appeal rights under the IR & D Act 1986, it will need to carefully consider the timing and content of any objection it may lodge against the section 731A notice. As already noted, there are potential procedural difficulties in attempting to pursue rights of review and appeal under both the IR & D Act 1986 and the TAA at the same time.

¹⁷ For administrative purposes, though there is still an unlimited time period to amend an assessment to give effect to a certificate issued under section 39L of the IR & D Act 1986, the R&D tax offset claim would generally be adjusted at this time.

Amendment history

Date of amendment	Part	Comment
14 May 2014	Paragraphs 9, 25, 39 & new paragraph 44	Updated to include time limits and periods of application.
	Contact details	Updated.
2 July 2013	Generally	Updated to current corporate publication style.
	Contact details	Updated.
21 October 2011	Inserted text box page 1	Section 73IA of the <i>Income Tax Assessment Act 1936</i> , which has been repealed (refer <i>Tax Laws Amendment (Research and Development) Act 2011</i>).

Subject references	Commissioner's discretion research and development research and development tax concession research and development tax offset
Legislative references	Acts Interpretation Act 1901 33(2A) Administrative Decisions (Judicial Review) Act 1977 Industry Research and Development Act 1986 39J Industry Research and Development Act 1986 39L Industry Research and Development Act 1986 39S Industry Research and Development Act 1986 39T ITAA 1936 73B to 73Z ITAA 1936 73B ITAA 1936 73B(1) ITAA 1936 73B(1AAA) ITAA 1936 73B(10) ITAA 1936 73B(14C) ITAA 1936 73BA ITAA 1936 73BH ITAA 1936 73I ITAA 1936 73I(1) ITAA 1936 73I(2) ITAA 1936 73IA ITAA 1936 73IA(1) ITAA 1936 73IA(2) ITAA 1936 73J ITAA 1936 73QA ITAA 1936 175A ITAA 1936 175A(2) ITAA 1997 67-25(3) TAA 1953 Pt IVC TAA 1953 14ZU TAA 1953 8AAZN TAA 1953 Sch 1 359-60(3)(a) Tax Laws Amendment (Research and Development) Act 2001 Tax Laws Amendment (2007 Measures No 2) Act 2007
Related practice statements	PS LA 2003/3 Precedential ATO view PS LA 2002/16 Mandatory use of Information Technology systems for interpretative work - inclusion in performance agreements
Case references	Bond Corporation Holdings Ltd v. Australian Broadcasting Tribunal (1988) 84 ALR 669 R v. Australian Broadcasting Tribunal; Ex Parte 2HD Pty Limited (1979) 144 CLR 45. Samad & Ors v. District Court of New South Wales & Anor [2002] HCA 24 Water Conservation and Irrigation Commission (NSW) v. Browning (1947) 74 CLR 492
Other references	Tax Laws Amendment (2007 Measures No. 2) Bill 2007 Explanatory Memorandum to Tax Laws Amendment (2007 Measures No. 2) Bill 2007 Explanatory Memorandum to Taxation Laws Amendment (Research and Development) Bill 2001

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