



Guidelines for the determination of eligibility in terms of the Patent Box Deduction Rules, 2019

Income Tax Act (Cap.123)



MALTAENTERPRISE

1.0 Introduction

- 1.1 The Patent Box Deduction Rules, 2019, Subsidiary Legislation 123.194 to the Income Tax Act (“the Patent Box Regime”), establishes a fiscal regime for income arising from patents, similar intellectual property (IP) Rights and copyrighted software. The rules additionally provide that small companies (as defined in the said legislation) may utilise the patent box rules on income from any intellectual property based on an invention that could be patented.
- 1.2 A tax payer which qualifies for the Patent Box deduction will be entitled to deduct a percentage of its income from taxable income. This deduction will be adjusted depending on the percentage resulting from dividing the qualifying IP expenditure by the total expenditure related to the particular IP.

2. Determination of Qualifying Intellectual Property

- 2.1.1 The term “Qualifying Intellectual Property” has the meaning provided in the Rules.
- 2.1.2 Qualifying IP shall be acquired by the company after 1st January 2019 yet may be the result of R&D activity carried out before this date.
- 2.1.3 Other types of IP, including Marketing related IP such as trademarks, brands, image rights and other intellectual property used to market goods or services are not considered qualifying IP. The Corporation shall adopt the following guidelines in determining eligibility of the IP.

2.2 Patents

- 2.2.1 Where the IP right is protected by a patent the Corporation shall accept patents issued from recognised national or international bodies. Where the Corporation feels that the issuer of the patent may not have carried out a substantive examination for the novelty and inventive step required in generating the Intellectual Property, the Corporation may request evidence that such an examination was carried out and/or may request an independent review by a patent agent, a patent attorney or otherwise, in order to determine whether the novelty and inventive step was achieved.

2.3 Intellectual Property Rights regulated under International Laws and agreements.

- 2.3.1 A company may claim benefits from the patent box regime for:
- a) a utility model: documentation issued from an official IP office in a jurisdiction where utility models are recognised as IP will be accepted as proof.
 - b) an Orphan Drug: Orphan Drug Designations confirmation that the drug is recognised as such by the European Medical Agency (EMA) would be required.
 - c) Assets in respect of which protection rights are granted in terms of national, European or international legislation, relating to human and veterinary products including plants and genetic material and plant or crop protection products. The applicant must provide evidence of the R&D activity leading to the IP right using structured techniques and methodologies. The applicant should clearly demonstrate the activities undertaken that lead to the resolution of scientific and/or technological uncertainty which is addressed by the IP.

2.4 Software

- 2.4.1 Software meaning a “Computer program” that is made up of a set of instructions expressed in words, codes, schemes or in any other form, which enables a computer to perform or achieve a particular task or result, shall be considered as qualifying IP if it is the result of a research and development activity leading to the resolution of scientific and/or technological uncertainty which is addressed by the IP.
- 2.4.2 Where a computer program is a derivative or adaptation of an existing program, the portion of the computer program that represents the derivative work or the adaptation of the original work and the original work shall be considered as two separate computer programs.
- 2.4.3 For software to be considered as qualifying IP the applicant must provide confirmation from an independent system auditor who has been approved by the Malta Digital Innovation Agency, and if relevant by a technically competent third party, that based on the information provided, the software or the relevant part thereof, constitutes the applicant’s own intellectual creation, that resulted in the resolution of scientific or technological uncertainty and was developed using structured techniques and methodologies.

2.5 Intellectual Property developed by Small Entities

- 2.5.1 In respect of small entities, wishing to be eligible for the provisions of the Patent Box Regime in terms of Rule 2, the Corporation shall adopt the following procedures:
- a) The applicant will be required to provide to the Corporation clear documentation of the IP asset.
 - b) The applicant will be required to provide the results of a patent search, conducted by an independent undertaking (3rd party) competent for carrying out such searches, such as a patent agent. The documentation should attest that the invention is novel, non-obvious and useful up to and on the date it began to be used, produced or marketed.
A list of Professional Representatives before the European Patent Office can be found at:https://commerce.gov.mt/en/Industrial_Property/Industrial-Property/Pages/List-of-Professional-Representatives-before-.aspx
 - c) The applicant will be required to prove that the IP asset was developed through a structured approach typically associated to Research and Development Activities. Malta Enterprise shall refer to the definitions provided in the OECD Frascati Manual to confirm that the IP claimed was created on the basis of established research methods.

3. Qualifying IP Expenditure

- 3.1 The deduction allowable under the patent box regime is linked to real and substantial R&D activity carried out by the particular person in generating the IP. The Qualifying IP Expenditure shall consist of expenditure incurred directly by the beneficiary for or in the creation, development, improvement or protection of the qualifying IP and expenditure incurred by the beneficiary for activities related to the creation, development, improvement and protection of the qualifying IP subcontracted to persons not related to the beneficiary.
- 3.2 The Costs associated to the qualifying asset in terms of the Rule 5 sub-paragraphs (a) and (b) shall be constituted of:
- a) Personnel Costs: Wages of researchers and technicians, and other supporting staff, to the extent and for the duration that they are directly engaged on the research project;
 - b) Materials used for the particular research project;
 - c) Utilities apportioned according to a recognised methodology to account for the usage relevant to the research project;
 - d) Plant, Machinery and Equipment: Depreciation cost of Plant, Machinery and Equipment as incurred for and during the research project. The full cost may be considered in respect of any Plant, Machinery and Equipment that is used for its lifetime exclusively for the research project;
 - e) Costs related to the research project outsourced to a person who is not a related party;
 - f) Costs for validating and defending the IP Right including the cost of any necessary test and study reports in this respect. Such costs may be adjusted to reflect costs incurred over the life of the IP asset.
 - g) Any other costs that can be clearly demonstrated to be directly linked to the research activity.
- 3.3 Where expenditure is incurred in the acquisition, creation, development, improvement or protection of the qualifying IP which is not listed above the beneficiary would be required to justify such expenditure and apply the provisions of Rule 5 sub-paragraph (c).

4. Total IP Expenditure

- 4.1 The Total IP Expenditure shall be calculated as the Qualifying IP Expenditure (before including any uplift as provided by Rule 5 of the Rules) actually incurred in the development of the qualifying IP. That is, the total IP Expenditure shall also include any qualifying expenditure subcontracted to or acquired from a related company and the acquisition costs of IP assets acquired from third parties required to develop the qualifying IP asset

5. Determination of Eligibility

- 5.1 A tax payer wishing to benefit from the provisions of the Patent Box must request the determination of the Corporation. The request must be made on the appropriate application form and must include documentation confirming the research activity carried out by the applicant and the qualifying IP expenditure being claimed. The Corporation may request such further information, clarifications and documentation as it may deem fit, in order to carry out and finalise its determination.

5.2 The request for determination shall include:

- a) Documentation confirming the eligibility of the IP Asset in terms of the rules and these guidelines (specifically section 2).
- b) A breakdown of the total and eligible costs as certified by an independent Certified Public Auditor that the claimed costs represent the actual costs incurred in creating the IP Asset.
- c) Sample documentation showing that the applicant undertook a structured research and development methodology in achieving the IP Asset. This should include sample reports of tests carried out during the research cycle.

5.3 On determining eligibility the Corporation shall issue a Certificate confirming the eligibility of the IP and the qualifying expenditure. The Certificate shall have a validity of not more than 5 years (which may be extended in case of IP with a longer protection period) but in no instance shall it extend beyond the protection period of the IP.

5.4 A tax payer holding a determination of eligibility issued from the Corporation may, on an annual basis, request a revision to the value of qualifying expenditure if additional qualifying costs in relation the same (or an updated version) of the IP were incurred.

5.5 A determination issued by the Corporation shall have a validity of not more than 5 fiscal years. In no instance shall the determination exceed the beneficiary's legal right over the IP Asset.

6. Retention of Documents

6.1 Information and Documentation related to the IP Asset (including documentation on the eligible cost) must be held for at least 10 years after the Year of Assessment in which the provisions of the Regulations are last utilised in respect to that asset.

6.2 Information and documentation related to the utilisation of the provision must be maintained for 10 years.

6.3 All information and Documentation must be maintained as indicated above irrespective of any events related to the IP Asset (such as disposal or sale) or the transaction, products or services related to the transactions on which the provision was utilised.

7. Further Information

Further information on the scheme, as well as guidance on the filling in of the application form may be obtained by contacting Business First during office hours.

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