

**Mansell, Ken**

---

**From:** Kris Gale [[krisg@mjassoc.com.au](mailto:krisg@mjassoc.com.au)]  
**Sent:** Thursday, 18 October 2007 1:10 PM  
**To:** Unlimited Amendment Period  
**Subject:** Review Of Unlimited Amendment Periods In The Income Tax Laws

18 October 2007

General Manager  
Tax System Review Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Dear Sir/Madam

**Submission by Michael Johnson & Associates Pty Ltd – Review Of Unlimited Amendment Periods In The Income Tax Laws**

I refer to the current Treasury review of unlimited periods in the Income Tax laws. This submission is concerned with the following section of the Treasury discussion paper released earlier this year:

### Example: Research and Development Tax Concession

The Research and Development (R&D) Tax Concession provides eligible companies with an accelerated rate of deduction (generally 125 per cent) for expenditure on R&D activities. Subsection 170(10A) provides an unlimited amendment period for the Commissioner to amend an assessment to increase an assessment in respect to concessions claimed for R&D activities under sections 73B, 73BH, 73BA, 73BF, 73BM, 73C, 73CB, 73I and 73Y of the ITAA1936.

This unlimited amendment period exists primarily for cases where an entity has claimed the R&D Tax Concession but at a later time has the deduction denied through a decision of the Industry Research and Development Board (IRDB). In these cases the IRDB gives the Commissioner a certificate that deems the deduction not to be allowable, and never to have been allowable, in respect of the R&D expenditure claimed by that company.

Due to the long lead times in R&D activities (some R&D activities may go on for decades), the issue of the certificate to deny deductions by the IRDB may occur years after the expenditure was claimed. Under the law, however, the deductions are deemed never to have been allowable and therefore the Commissioner requires an extended time to amend assessments back to the first year in which expenditure was claimed under the R&D Tax Concession. A contingent amendment period, commencing when the IRDB issues or revokes a certificate denying deductions, would enable the Commissioner to amend the relevant assessments without the need for an unlimited amendment period. As the certificate is issued directly from the IRDB to the Commissioner, there would be no requirement for the taxpayer to provide notification.

Michael Johnson & Associates Pty Ltd (MJA) is a specialist service provider in the area of government support for research and development. Founded in 1983, MJA has continuously assisted Australian companies of all sizes in preparing claims for the R&D Tax Concession since its inception in 1985. Our clients include large organisations in fields such as resources, telecommunications, manufacturing and information technology. We have been the authors of the R&D section of CCH's Federal Tax Reporter from 1986 to the present day.

In summary, we disagree with the reasoning set out in the discussion paper for the need to provide the Commissioner with an unlimited amendment period with respect to the R&D provisions. In fact, we submit that it becomes increasingly difficult to assess the eligibility of R&D activities under the legislation as time passes. We submit that the R&D provisions should be brought in line with other provisions and that a time limit should be imposed on the Commissioner in this area.

In our view, the original rationale for the inclusion of R&D in Section 170 of the *Income Tax Assessment Act 1936* was that the provisions were in a new area for tax law and both taxpayers and the Australian Taxation Office (ATO) were to be given an opportunity to come to grips with the program elements. The identified learning curve was complicated by the involvement of a third party, the Industry Research & Development Board (now Innovation Australia), and the subsequent introduction of AusIndustry.

By 1995, the awareness of the provisions was widespread and the rationale was no longer justified. There was a concern that the ability for taxpayers to make retrospective claims back to 1985 was focusing companies too much on the past at the expense of future R&D activity. It was in that environment that the 1995 Innovation Statement introduced strict time limits for the registration of R&D activities by companies. We do not recall any specific commentary at the time as to why the Commissioner continued to be afforded the unlimited amendment power.

Moving to the current day, taxpayers have to make assessments about eligibility as they occur. The R&D planning element is part of the definition of R&D and bears out that eligibility can and has to be determined contemporaneously. Innovation Australia and AusIndustry are equipped to make assessments in the same way as taxpayers and the concept of "lead times" as necessary in order to assess R&D activities is indefensible. Activities are eligible because of their inherent nature at the time they are conducted. They do not become eligible with hindsight. There is no currency to the view that taxpayers should continuously review previous claims because activities self-assessed as eligible at the time will be shown to be ineligible at a later date.

The current unlimited amendment power is primarily a concern because of the lack of time limits on a number of aspects of the assessment processes that apply to the R&D Tax Concession. For example, no time limits apply to AusIndustry in conducting risk assessments under the Compliance Monitoring Framework. Experience has shown that, with respect to large company matters, the AusIndustry assessment team has great difficulty in completing its work in a commercially sensible timeframe.

By way of example, MJA currently has four audit matters with AusIndustry relating to Section 39L of the *Industry Research & Development Act 1986*. They relate to the following tax periods: 1/1/99 – 31/12/01; 1/7/98 – 30/6/01; 1/7/99 – 30/6/03; 1/1/99 – 30/0/05. The most recent of these commenced some eighteen months ago. The other three have been going on for several years. Delays are not attributable to the taxpayers. Rather, AusIndustry points to staff changes and difficulties in obtaining independent expert opinions as sources of delay. Should Innovation Australia ultimately make an adverse finding in a particular case, the taxpayer goes to the next step knowing that the potential interest bill (assuming no penalties apply) should it ultimately be denied the deduction will be continuing to mount up. Time limits only commence to apply after the first decision has been made.

Further, in practice, assessments as to eligibility (which we have contended is a contemporaneous process) become increasingly difficult with the passage of time. The taxpayer establishes eligibility through a combination of original and purpose-generated documentation, along with access to personnel involved with the project. Currently, these records need to be retained indefinitely (in contrast to other tax records) and institutional knowledge of the project needs to be carefully managed. The mobility in the labour market means that technical personnel often leave companies within a year or two of the activities being claimed and finding technical staff directly involved in a project becomes more and more difficult as each year passes. In 2007, the company having key technical staff available to discuss a project claimed in 1998 and 1999 is the exception rather than the rule. The difficulty is compounded by the fact that the main effect of hindsight is that a project that was eligible at the time tends to look more straightforward as time marches on and the public stock of knowledge grows.

It is for these reasons that we submit that the Commissioner be subjected to a time limit in the area of R&D. This will bring discipline to the timeframe of the assessment work performed both by AusIndustry and the ATO.

The straightforward choice would be the four year limit operating elsewhere in the Australian tax regime. We note, however, that shorter timeframes apply to the government in assessing/challenging R&D eligibility in other jurisdictions such as the United Kingdom and Canada.

MJA wishes to thank the Treasury for the opportunity to make this submission. Kris Gale can be contacted via the below details should any further assistance be required.

**Michael Johnson & Associates Pty Ltd**  
10 Darling St BALMAIN, NSW 2041  
Tel: 02 9810 7211 Mobile: 0411 171 596 Fax: 02 9818 2297  
Email: [krisg@mjassoc.com.au](mailto:krisg@mjassoc.com.au)  
WWW: <http://www.mjassoc.com.au>

---

CONFIDENTIALITY NOTICE: This e-mail may contain information which is commercially sensitive and/or subject to legal privilege. If you are the intended recipient you must treat this information accordingly. If you are not the intended recipient, you must not disclose, copy, or use any part of this correspondence. If you receive this correspondence in error, please advise us immediately by return e-mail and delete the message and any attachments from your system.