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## HMRC internal manual

# Corporate Intangibles Research and Development Manual

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## CIRD210145 - Exclusive Licence: exclusivity requirement: further examples

Group companies can use the provisions of CTA10/s357BA(4) to apply the exclusivity requirements to their licensing arrangements. If they use this section then there is the requirement that ‘all of the rights’ have been conferred on the licensee, and not just ‘one of the rights’ which is needed for exclusive licences under CTA10/s357BA(2). ‘All of the rights’ does not include those rights removed by CTA10/357BA(5) (the right to enforce, assign or grant a licence), but

it does include the monopoly rights held by the IP owner.

It is not sufficient to look back retrospectively and claim that the arrangement was exclusive in the absence of other evidence. Note that any changes to the licence terms and conditions may result in the creation of a new qualifying IP right, falling into the new Patent Box regime.

Here are some further examples to clarify circumstances which may or may not meet the exclusivity requirements:

#### Example 5 : no licence in existence

A small company owns a patent which has been licensed to the subsidiary R&D company which then develops and manufactures a specialised product. The company operates on an exclusive basis but there has never been a formal written licence due to the size of the companies. In this case there is neither an exclusive licence nor a non exclusive licence, so the next step is to look at the factual evidence of what is actually happening. If it can be seen that there is substantive evidence of an exclusive arrangement then it can be accepted that a verbal exclusive licence has existed from the start of those arrangements. If a written exclusive licence is put in place to formalise the arrangement it should contain only terms consistent with the evidence, otherwise it may be considered to be a new licence, falling under the new Patent Box regime.

#### Example 6 : there is a licence but it is silent on exclusivity

There is a licence in place between group companies in a large group, whereby the IP holding company allows a fellow group company to use the IP to develop and manufacture patented goods. However, due to the equipment used there is no possibility of any other company using this IP so the licence which covers royalties payable is silent on the question of exclusivity. In this case, there are no facts to suggest that the arrangement

is other than an exclusive one – there is no contra evidence and, unlike the circumstances described in paragraph 2 above, there are substantive facts to fit the exclusivity requirements. The licence will be considered to be exclusive if these underlying facts, including the royalty rates, can substantiate on the balance of probability, the claim of exclusivity. If so, then it can be accepted that the licence has been exclusive since commencement, provided there had been no change in the arrangements, terms or conditions.

Example 7 : there is a licence which is worded as a non exclusive licence

There is an arrangement within a group such that the IP is licensed to several group companies in different countries. There is only one company in the UK and it develops the IP rights exclusively within the UK. However, there is specific mention within the licence that this is not an exclusive licence, either mentioning that the licence has been arranged on a non exclusive basis, or implying that it is not exclusive in any other way. In this case, the licence cannot be said to be exclusive, but the legislation may allow it to be ‘treated as’ exclusive for the purposes of the Patent Box. The group would need to show that the UK company has the certainty of monopoly rights within the UK territory, from the outset of the arrangement, conferred onto it outside of the licence and in a way that the licence wording does not overturn. (In fact it would need to show that all of the rights apart from those covered in s357BA(5) have been conferred onto the UK company either within or outside of the licence). This might be done through Board meeting minutes, underlying substantive facts, or any other evidence.

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