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HMRC internal manual

Corporate Intangibles Research and Development Manual

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CIRD210120 - Patent Box: qualifying companies: exclusive licence: meaning of 'exclusive licence'

Introduction

A patentee may decide that, instead of producing the patented goods or applying the patented process itself, it will authorise another company to do so under a licence agreement.

A licence in its simplest terms is a contractual arrangement between the owner of a right, who is

the licensor, and someone who wishes to do something which, if done in the absence of a licence, would render that person liable to a suit for infringement of the right.

There are many reasons why a patentee may wish to grant a licence. It may not have the capacity to produce the patented goods in quantity, or may wish to limit its own exploitation of the patent to a field of use or territory with which it is familiar, leaving others to exploit it in other fields or territories.

Exclusivity in licensing is the legal basis for beneficial ownership of a right by the licensee since it transfers to the licensee some of the patentee's monopoly rights. Without those rights the licensee is unlikely to invest in the patented innovation. Exclusivity is a condition for accessing benefits under the Patent Box because of this connection between holding monopoly rights and investing in the underlying technology.

In the case of an exclusive licence, the licensee becomes the only person entitled to make use of the patent in the fields specified in the licence. The patent holder themselves will also be excluded, although they may collect royalties. This is to be contrasted with a sole licence where the licensor is also permitted to exploit the patent in competition with the licensee. Typical clauses found in an exclusive licence may limit the use of the patent to particular territories and fields of use. In addition they will normally be time-limited, explain how royalties are to be determined and set out who has responsibility for enforcing patent rights in the event of an alleged infringement. 'Exclusive' may not necessarily mean that there is only one licence granted but only that the licensor agrees not to grant other licences that have the same rights in respect of the IP within the scope or field covered by the exclusive licence.

For Patent Box purposes, the licence must grant exclusive rights in respect of the patentee's underlying rights. These rights must be real and substantial.

Where patented goods are sold by a patentee, then the purchaser can on-sell those goods to a third party without requiring the patentee's consent. The first sale of the patented product exhausts the patentee's rights and so the rights do not extend to any subsequent resale of the product. No licence (exclusive or otherwise) is required for the subsequent resale and accordingly HMRC's view is that a licence with the patentee that gives the licensee no more than an exclusive right to purchase and sell a patentee's products, is not an exclusive licence in respect of an IP right.

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Parallel imports

In some cases, EU or domestic competition laws may prevent a company from being able to enjoy full exclusive enjoyment of a right ostensibly conferred by a licence. For instance, it may be the case that a company's competitors may be able to acquire patented items from an EU country in competition with the company's rights under an exclusive licence. HMRC's view is that this will not in itself prevent the licence being an exclusive one.

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CTA10/S357BA

An 'exclusive licence', in relation to a right ('the principal right') means a licence which is granted by the person who holds either the principal right or an exclusive licence in respect of that right, and confers on the person holding the licence ('the licensee'), or on the licence holder and persons authorised by it, the following rights:

- The licensee must have one or more rights in the patented invention to the exclusion of all other persons, and that right must extend throughout at least an entire national territory.

Where the invention is a product, the right will most commonly be the right to develop and exploit the patent by making and selling the product, or by employing it innovatively in making new products.

“And either of the following:”

- the licensee must be able to bring infringement proceedings to enforce its rights in the patented invention,

“or”

- if the patent owner retains control over proceedings brought in respect of any infringement of the patent the licensee must be entitled to most of the damages for any infringement.
- The right to bring infringement proceeding must not be conditional upon the consent of the licensor. In practice this condition will still be met even if the licensor has priority in deciding whether to take action, provided that in the event that it decides not to, the licensee is permitted to take the action.

A licence of a process

A licence of a process protected by a patent can be included in the Patent Box, but sales of the products (except to the extent of a notional royalty ([CIRD220250 \(https://www.gov.uk/hmrc-internal-manuals/corporate-intangibles-research-and-development-manual/cird220250\)](https://www.gov.uk/hmrc-internal-manuals/corporate-intangibles-research-and-development-manual/cird220250) in some circumstances) created by that process will only generate qualifying income where that patent includes a relevant product by process claim. This requires the product to be novel rather than of a generic nature.

Groups

Arrangements within groups may not mirror licence agreements involving third parties. For

administrative convenience, groups may sometime document their internal licensing agreements in a single group policy document. Provided these clearly and accurately set out the actual licence terms, they will be accepted by HMRC for determining whether the licences are exclusive ones.

This section has been updated to provide further clarification for exclusive licences held within groups.

For instance, one company in the group may own a portfolio of patents while another exploits them. If one member of a group holds either a right to which the Patent Box applies, or an exclusive licence in respect of such a right and confers all of its rights, apart from those described below, onto one or more group companies, those other group companies are treated as holding an exclusive licence in respect of that right, but they still need to meet exclusivity within that territory or field of use.

In these circumstances it is not necessary for the group company which is conferring the rights to also confer the right to enforce, assign or grant a licence on its fellow group company or companies (CTA10/S357BA(5)).

It is also not necessary for all of the rights held by the owner (or licence holder) of the qualifying IP rights (apart from those described above) to be conferred within the licence (or sub licence). It may be that the licence terms do not completely cover the actual arrangement between the licensee and licensor group companies. As long as the evidence available, including the substantive underlying activity, can show that all of the rights held by the qualifying IP owner (licence holder), including monopoly rights, were conferred on the licensee (or sub licensee) group company for that territory or field of use at the outset of the agreement, then there is no additional requirement for the licence to confer the right of exclusivity as well. Examples are provided in [CIRD210145](#) (<https://www.gov.uk/hmrc-internal-manuals/corporate->

[intangibles-research-and-development-manual/cird210145](#)).

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