



**INFORMATION  
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# AUSTRALIAN TAX ADVISER

2308 : APRIL 2023

The IFX Legal Tax Team

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## SECTION 1 – PROFESSIONAL DEVELOPMENTS

### HAVING A CORPORATE TRUSTEE DOES NOT ENTITLE THE TRUST TO CLAIM R&D OFFSETS

For many of our readers, the research and development tax Incentive (R&D tax incentive) operates below their radar. It must be said though that in the emerging climate of fiscal restraint, the R&D concessions are uniquely generous. In a nutshell, the incentives allow taxpayers a tax offset equivalent to a deduction of more than 100% of the eligible expenditure incurred. In some cases, taxpayers can even claim a refund of that R&D tax offset from the ATO.

The way the R&D tax incentive works is that eligible R&D expenditure is treated as non-deductible, which means that they are not taken into account when calculating the entity's taxable income. Instead, eligible R&D expenses are multiplied by the relevant uplift factor and applied as a tax offset (thus reducing the entity's tax liability). In the case of small R&D entities<sup>1</sup>, any excess offset is refundable; whereas large entities (that satisfy the tax offset carry-forward rules) can carry excess offsets forward to later income years.

#### ¶8.1 Federal Court decision – R&D expenditure has to be directly incurred

One of the that apply to accessing the R&D offset is that the taxpayer must be a company – simply put, the incentive is not available to unincorporated entities such as sole traders, partnerships or trusts.<sup>2</sup> This restriction was addressed in the recent [Full Federal Court decision](#) involving a trust with a corporate trustee.<sup>3</sup> In the case, the Full Court found that a company that acted in the capacity of a trustee was not eligible for the incentive despite being a company.

In the case, the taxpayer company was the trustee of a discretionary trust that carried on the business of developing and manufacturing various commercial and residential shade solutions. The taxpayer had two ABNs: one in its capacity as a company and the other in its capacity as the trustee of the trust.

The company did not operate a bank account its own right, so payments made by clients were paid into the trust's bank account. In its income tax returns for 2011–12 and 2012–13, the taxpayer claimed notional deductions under Div 355 of the ITAA97 for R&D expenses. This resulted in the taxpayer claiming refundable tax offsets of almost \$625,000 for 2011–12 and just over \$548,000 for 2012–13. The taxpayer did not declare any income for the relevant years.

Following an audit, the ATO issued amended assessments for 2011–12 and 2012–13 disallowing the tax offsets and imposing shortfall penalties of 25%, on the basis that the taxpayer had adopted a position that was not reasonably arguable.

<sup>1</sup> Companies with an aggregated annual turnover of \$20 million or less.

<sup>2</sup> There is an exception for entities that are public trading trusts provided they have a body corporate acting as the trustee.

<sup>3</sup> *Sunlite Australia Pty Ltd v FCT*