

France: An overview of recent news regarding the research tax credit (CIR)

The French research tax credit ("CIR") has undergone several changes recently, as a result of new French Supreme Court case law, the 2021 Finance Act and the updating of tax authorities guidelines.



1. Recent case law

The late reimbursement of a CIR claim may give rise to the payment of default interest

The French Supreme Court recently confirmed that the reimbursement of a CIR claim occurring after a rejection decision gives rise to the right to the payment of late payment interest as of the date of the reimbursement request (CE, May 11, 2021, n°441603, Sté Acofi Gestion). This applies whether the rejection decision is express or tacit, i.e. in the absence of a favorable decision within six months following the claim for reimbursement. As a reminder, the rate of late payment interest was reduced from 4.80% to 2.40% per year for interest accruing as of January 1, 2018.

Taxpayers have every interest in quickly requesting payment of the default interest due on the CIR reimbursement, because firstly, the time limit for this request is uncertain, and secondly, the claim for default interest also bears interest from the date of receipt by the administration of this request.

Research operations carried out by approved subcontractors: CIR rules are clarified by case law.

In several recent rulings, the French Supreme Court has clarified the CIR rules applicable to research operations carried out by approved subcontractors.

This case law is guided by the rationale of the CIR, which is to encourage companies to invest in research and development (R&D), by benefiting those who initiate and incur the R&D costs.

Approved subcontractors may act both on behalf of principals (when a principal outsources R&D operations to an approved subcontractor) and on their own behalf (when an approved subcontractor also carries out R&D operations at its own initiative).

With regard to outsourced expenses, provided that the conditions are met, the related CIR may only be declared by the principal, and not by the subcontractor, even if, in fact, the principal did not include in its CIR basis the expenses invoiced by the subcontractor (CE 5-3-2018 no 416836, Sté Lunalogic).

On the principal's side, it has been ruled that its CIR basis may include all expenses corresponding to necessary services for the realization of its R&D operations, that the principal carries out or outsources to a subcontractor, even if the subcontracted services, taken separately, would not

constitute R&D operations in themselves (CE 22-7-2020 no 428127, Fédération nationale des agriculteurs multiplicateurs de semences (FNAMS)).

On the subcontractor's side, the Supreme Court clarified that operations carried out on behalf of a principal must be simply disregarded in the subcontractor's CIR basis. Thus, contrary to the position of the Tax Authorities, subcontractors are neither entitled to include the related expenses, nor compelled to deduct sums invoiced to the principals (CE 9-9-2020 no 440523, Sté Takima).

On the other hand, when a subcontractor incurs research expenses on its own behalf, these are taken into account for the calculation of its CIR. This is notably the case when these expenses are incurred in the performance of services on behalf of a third party, whose purpose is not to carry out research operations. In this respect, the fact that the subcontractor has re-invoiced these expenses to the principal is irrelevant. (CE 18-6-2021 no 433319, Sté Sopra Steria Group).

2. 2021 Finance Act

For research expenses incurred as of January 1, 2022, Article 35 of the Finance Act for 2021 has abolished the rule whereby expenses must be taken into account for twice their amount in the CIR basis of principals when eligible operations are subcontracted to public or similar organizations.

It shall be noted that the 2022 Finance Bill currently provides for the introduction of a new specific 40% tax credit for R&D operations conducted through partnerships with certain public organizations. This new tax credit voted by amendment aims to compensate the end of the doubling of public R&D expenses for the research tax credit. The expenses taken into account for this new 40% tax credit could not

be taken into account for the 30% research tax credit.

3. Tax Authorities guidelines update

Other details on the alignment of subcontracting by private or public entities have been added to the tax administration doctrine.

The Tax Authorities notably clarified cascade subcontracting (following the anti-abuse rules provided by the 2020 Finance Act): a principal can take into account eligible operations that its own subcontractor has subcontracted to a second subcontractor, provided that both are approved. However, such expenses are no longer eligible if they are subcontracted to a third party subcontractor (two levels of subcontracting or more).

It may also be noted that, to identify the R&D activities eligible for the CIR, the administrative guidelines refer more and more to the OECD Frascati Manual, which defines the common guidelines for all OECD countries. A few details have also been added to the description of eligible activities.

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