

The new regime of super-deduction of R&D expenses (Law no. 146/2021)



Focus on

Art. 6 of Law Decree no. 146 dated 22 October 2021, as amended by art. 1, para. 10 of Budget Law 2022, repealed the “old” Patent Box regime and substituted it, with effect from tax period 2021, with a 110% increase in the deduction for IRES (corporate income tax) and IRAP (regional production tax) purposes of research and development (R&D) costs borne for the creation and development of eligible intangible assets (hereinafter “New Regime”).

With Order dated 15 February 2022, the Italian Revenue Office provided the implementing provisions of the new favourable tax regime, which - it is reminded - is subject to the exercise of an option for the duration of 5 tax periods, irrevocable and renewable, in the income tax return for the relevant tax period.

Subjects which can exercise the option to apply the New Regime

All legal persons generating corporate income can opt for the application of the New Regime, provided that:

- titolari del diritto allo sfruttamento economico they hold the right to the economic use of the eligible intangible assets; and that
- they make investments in R&D activities within their business operations, bearing the relevant costs, taking on the relevant risks (according to the principles and criteria under chapters I and VI of the OECD Transfer Pricing Guidelines) and benefitting from the possible relevant economic results.

Without prejudice to the above, and similarly to the previous Patent Box regime, all subjects directly or indirectly using the eligible intangible assets (against payment of a consideration) can benefit from the favourable New Regime.

Eligible intangible assets

Intangible assets to which the New Regime can be applied are:

- copyrighted software;
- industrial patents - including patents for inventions, biotechnological inventions and the relevant supplementary protection certificates - utility model patents, as well as plant breeders' and topographies of semiconductor products' certificates and patents;
- protected designs and models.

The Italian Revenue Office Order clarified that the abovementioned intangible assets fall within the scope of application of the favourable tax regime also in case two or more of them are complementary related so that the realisation of a product or family of products, or a process or a group of processes, is subject to their joint use.

For the purpose of defining the eligible intangible assets and the necessary requirements for their existence and protection, the Order makes generic reference to the domestic, EU and international norms and to those contained in UE regulations and international treaties and conventions for the protection of industrial and intellectual property applicable in the relevant territory.

R&D activities whose costs can benefit from the New Regime

R&D activities eligible to benefit from the New Regime are:

- industrial research and experimental development pursuant to art. 2, letter b) and c) of the Decree of the Ministry of Economic Development dated 26 May 2020 on tax credit for R&D activities (so called “MISE Decree”);
- technological innovation pursuant to art. 3 of MISE Decree;
- design and aesthetic creation pursuant to art. 4 of MISE Decree;
- protection of rights pertaining to intangible assets.

The R&D activities above are relevant for the purposes of the New Regime even if carried out through research contracts entered into with independent third parties (universities, research centres, etc.) upon condition that they are carried out - under the technical supervision of the taxpayer opting for the favourable New Regime - in labs or structures located in Italy, in EU States or in States of the European Economic Area with whom Italy has an information-sharing agreement in place.

Should R&D activities be carried out by contractors or sub-contractors, these have to be resident for tax purposes in the abovementioned States.

R&D activities carried out based on agreements with related parties are excluded for the application of the New Regime.

Eligible R&D expenses

R&D expenses to which the 110% increase applies are the following:

- expenses for employees or self-employed or workers hired with a relationship other than an employment agreement, directly involved in the performance of R&D activities;
- amortisation charges, principal of financial lease payments, operating lease payments and other expenses relevant to mobile equipment and intangible assets used in the performance of R&D activities;
- expenses for consulting services and similar services relevant to R&D activities only;
- expenses for materials, supplies and other similar products used in R&D activities;

- expenses related to the maintenance of rights on eligible intangible assets, their renewal upon expiration and their safeguard, also in an associated form, and those relevant to counterfeiting prevention activities and management of litigations aimed at protecting said rights.

The order further provides that:

- without prejudice to the general principles of effectiveness, pertinence and consistency, R&D expenses are relevant for the purposes of the 110% increase for their tax-deductible amount and are posted for each tax period in compliance with art. 109, para. 1 and 2 of TUIR (Income Tax Consolidated Text), regardless of the accounting regime and of the accounting principles adopted, as well as of their possible capitalisation;
- the effects originating from possible revaluations or realignments are not relevant;
- the expenses under points (1), (2), (3) and (4) above are to be considered for the relevant portion only, should they not be exclusively referable to the eligible intangible assets;
- in case of work performances directly referable to R&D activities provided by directors, shareholders, by family members of the entrepreneur, of the shareholders or of the directors, the relevant expenses are eligible only within set limits and the relevant 110% increase is subject to the issuance of a statement by the company's legal representative attesting the actual participation of the abovementioned subjects in the R&D activities and the consistency of the consideration granted with the amount of work rendered, their technical know-how, as well as the considerations and salaries granted to the other subjects involved in the same R&D activities.

The recapture mechanism for R&D expenses

The Order provided indications also on the recapture mechanism introduced by Budget Law 2022, allowing to recapture the tax benefit not used with reference to R&D expenses borne in order create eligible intangible assets over the eight FYs preceding the one in which the certificate of industrial property right was obtained.

To this end, for the sole purposes of the application of the recapture mechanism, it is specified that:

1. in addition to the R&D activities above, the following are also to be considered: (i) basic research activities pursuant to art. 2, letter a) of MISE Decree; (ii) design and development of copyrighted software. No further definition is provided by the Order on this point;
2. among the costs borne for R&D activities are included: (i) all R&D expenses listed above, with the exception of those under point (5) (i.e. expenses related to the maintenance of rights on eligible intangible assets, their renewal, their safeguard and those relevant to counterfeiting prevention activities and management of litigations aimed at protecting said rights); (ii) – expenses necessary for the obtainment of the certificate of industrial property right.

The Order clarifies that in case of extraordinary operations which entail the transfer of the business or business unit which the R&D costs benefitting from the recapture mechanism refer to, the owner of said business or business unit in the FY in which the certificate of industrial property right was obtained will have the right to benefit from the 110% increase.

Documentation required to benefit from the penalty protection

Upon tax inspection, in case of adjustment of R&D costs benefitting from the 110% increase, the application of administrative fines for inaccurate tax return ex art. 1, para. 2 of Legislative Decree no. 471/1997 (from 90% to 180% of the higher tax due or of the difference of the tax credit used) is excluded provided that the company has drafted documentation containing all necessary information to assess the legitimacy of the tax benefit deriving from the application of the New Regime, as well as the calculation of the 110% increase.

In this regard, the Order provides guidelines on the content and structure for the abovementioned documentation to be considered suitable to guarantee the application of the penalty protection to the taxpayer. More in detail, the documentation must be prepared for each tax period in which the favourable New Regime is applied and must be structured in two sections: the first containing information on the taxpayer and the R&D activities carried out, the second containing all information useful to determine the basis for calculating the 110% increase. Micro-enterprises and small medium sized enterprises can draft these sections in a simplified format, providing equivalent information to those indicated above, consistently with the size of their organisational and operational structure.

The formalities to be complied with in drafting the documentation and filing it with the Tax Authorities are similar to those provided for the transfer pricing documentation.

In case of missing documentation or missing electronic signature or of partial or total misrepresentation of the information provided, the Order provides for the total recovery of the tax benefit granted, with the subsequent application of interest and fines.

Transitional regulation under art. 6, para. 10 of Law Decree no. 146/2021

Those taxpayers who, with reference to tax periods up to FY 2020 (included), filed a request to access (or renew) the procedure under art. 31-ter of Presidential Decree no. 600/1973 for the application of the old Patent Box regime, can alternatively chose to apply the favourable New Regime, prior to notification to the competent Revenue Office where the procedure relevant to the previous regime procedure is pending, to be submitted via certified email (PEC) or registered letter with return receipt. The Order further clarifies that:

- taxpayers who opted for the old Patent Box regime through self-assessment can continue to benefit from said regime up to the regular expiration of the five-year option, without the need to express a yearly option upon submitting their tax return;
- Taxpayers who opted for the application of the old Patent Box Regime without submitting an advance agreement request and without opting for the self-assessment can choose to apply the New Regime simply by selecting the relevant option in the income tax return. The previous option will be automatically revoked

Right to file a request for a ruling

Lastly, the Order granted the possibility to file a request for an ordinary ruling in case of objective uncertainties.



Our professionals remain available for any further information requests.



Grant Thornton

[bgt-grantthornton.it](https://www.bgt-grantthornton.it)

© 2022 Bernoni & Partners. All rights reserved.

"Grant Thornton" refers to the brand under which the Grant Thornton member firms provide assurance, tax and advisory services to their clients and/or refers to one or more member firms, as the context requires. "GTIL" refers to Grant Thornton International Ltd (GTIL). GTIL and the member firms are not a worldwide partnership.

Bernoni Grant Thornton (Bernoni & Partners) is a member firm of GTIL. GTIL and each member firm is a separate legal entity. Services are delivered by the member firms. GTIL does not provide services to clients. GTIL and its member firms are not agents of, and do not obligate, one another and are not liable for one another's acts or omissions.