

# Out in the cold

## Paul Rosser explains how a fridge landed an R&D advisor in hot water

It was back in August 2021 when a Robert Paterson, MD of James Mackie Wholesale Ltd, was contacted by the R&D advisor Stephen McCallion, owner of ZLX Ltd, to discuss the potential of James Mackie making a claim for R&D tax relief.

A meeting was arranged and on 27 August Paterson and McCallion had an hour-long discussion, at the end of which McCallion informed Paterson that a claim for R&D tax relief could be made in relation to the installation of a new refrigeration unit James Mackie had undertaken in 2018/19.

The exact details of the hour-long discussion are in dispute. If we believe Paterson, then he informed McCallion that the refrigeration unit “had merely been purchased off-the-shelf from a specialist contractor” and he “spent no more than about 15 minutes in selecting, purchasing and arranging the installation of the refrigeration unit”.

If, however, we believe McCallion’s version of events, then the conversation went into great detail with regards to how this new type of refrigeration unit would be used to extend the shelf life of products.

In either case, Paterson said that whilst he was initially sceptical, McCallion was insistent and persuasive that the refrigeration unit install would meet the criteria for an R&D claim, and so Paterson agreed to proceed.

Also in dispute is McCallion’s claims that a follow up meeting was then held at ZLX’s office, which included two other ZLX employees who, when questioned, McCallion couldn’t remember the names of, and at which the specifics of the R&D claim were presented to Paterson, in the form of a ‘storyboard’.

Paterson, however, says that this meeting did not take place and that he only met McCallion once, on 27 August, and the next contact after this meeting was when he was emailed a client pack in November of 2021 by McCallion.

The client pack Paterson received contained various documents, including a contract stating that James Mackie would engage ZLX to assist with an R&D claim for a fee of 30% of the benefit generated, on a ‘no win, no fee’ basis, which Paterson initially agreed to and digitally signed the documents.

A few weeks later, Paterson spoke to his accountant, Craig Butler of Milne Craig (now part of Azets), who informed him that he was not eligible to claim R&D tax relief due to the refrigeration unit merely being a standard purchase, and because the unit itself was not innovative in any way and was commonly supplied to other wholesalers of fresh produce.

Several months then passed, and in June of 2022 ZLX emailed Paterson to request that he provide them with financial information so that they could progress his R&D claim.

As Paterson had been warned by his accountant that if his R&D claim was submitted and HMRC deemed it to be invalid this could lead to a financial penalty being imposed, along with the potential of reputational damage, Mr. Paterson replied to ZLX stating that he no longer wished to proceed with an R&D claim.

This should have been the end of this story. However, a month later ZLX sent a letter to Paterson informing him that by refusing to allow ZLX to submit an R&D claim he may be in breach of contract.

Then the following month ZLX wrote to notify Paterson of its decision to terminate the parties’ contract and demanded payment of a ‘cancellation fee’ in the amount of £8,000 plus VAT.

After speaking to his legal advisors, Paterson refused to pay the cancellation fee and ZLX proceeded to take the case to court.

The case was heard in court on 23 August 2024 in Glasgow where the judge ruled in favour of James Mackie Wholesale Ltd, stating “the ‘cancellation fee’ charged by the pursuer is an unenforceable penalty at common law”.

How many other clients of ZLX were issued a cancellation fee after realising their proposed R&D claim may be invalid and simply paid up, we have no way of knowing.

It seems McCallion is no stranger to the courtroom, as around the same time ZLX also attended court with regards to a case brought against them by a William Gray, who claimed that McCallion had agreed to give him shares in ZLX, which McCallion disagreed with.

What’s interesting in the Gray case is that McCallion himself says that whilst working on behalf of ZLX, Gray failed to “have claim forms signed by clients; have the figures he submitted to HM Revenue & Customs approved by clients; attach accurate tax computations to clients’ claim forms; comply with HMRC standards for tax agents”.

Whilst the James Mackie court case was only in relation to the validity of the £8,000 cancellation fee, it was of great interest to other R&D advisors, some of whom wrote about the case on social media. Rufus Meakin, who writes the R&D Tax Credit Insider blog, stated: "What is astonishing – and inexplicable – is why ZLX would risk bringing the wider attention this case has drawn".

Seeming unappreciative of their new found popularity, ZLX did attempt to silence those writing about the court case via their solicitors, Jones Whyte, but these attempts were, unfortunately for them, unsuccessful.

With regards to the validity of the R&D claim for the refrigeration unit, if we discount that the judge stated "Mr Paterson impressed me as candid, careful and plainspoken. I preferred his recollection of events where it conflicted with that of Mr McCallion" and instead believe McCallion's version of events, it would still not have been possible for ZLX to establish that James Mackie Wholesale Ltd could make a valid claim for R&D tax relief.

The simple reason for this is that at no stage did anyone speak to the company who provided the refrigeration unit to James Mackie, ISD Solutions. As neither Paterson nor McCallion could be considered a 'competent professional' with regards to refrigeration technology, they would not have been able to ascertain if the development had the mandatory technological uncertainty, or if the advance being sought was valid.

We also have to consider that even if the project did meet the technical requirements for an R&D claim, Paterson had just told ISD Solutions that he wanted a refrigeration device which could extend the shelf life of products, without placing a pre-order, or entering into any contract. Then it would in fact be ISD Solutions who should make the R&D claim and not James Mackie.

As a closing warning, if you are going to try to convince companies to submit invalid R&D claims, then get rumbled by their accountants, whatever you do, don't then pursue a bogus cancellation charge all the way to court, as that would be bonkers...

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