Docket: 2006-136(IT)I

BETWEEN:

9089-6473 QUÉBEC INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 11, 2007, at Montréal, Quebec

Before: The Honourable Justice Louise Lamarre Proulx

Appearances:

Agent for the Appellant:	Yves Bluteau
Counsel for the Respondent:	Philippe Dupuis

JUDGMENT

Upon the Respondent's application to dismiss the appeal on the basis that the purpose of the appeal is not a valid ground of appeal,

In accordance with the attached Reasons for Judgment, the appeal from the loss determination made on June 3, 2004 under subsection 152(1.1) of the *Income Tax Act* for the taxation year ended November 30, 2001, is dismissed on the basis that it has no valid purpose in law.

Signed at Ottawa, Canada, this 22nd day of January 2007.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 3rd day of August 2007.

Brian McCordick, Translator

Citation: 2007TCC44
Date: 20070122
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REASONS FOR JUDGMENT

Lamarre Proulx J.

[1] This is an appeal from a loss determination made on June 3, 2004, under subsection 152(1.1) of the *Income Tax Act* ("the Act"), in respect of the Appellant's taxation year ended November 30, 2001.

[2] The ground stated in the Notice of Appeal questions the disallowance of the scientific research and experimental development expenses, and especially, the resulting disallowance of a $9,844 refundable investment tax credit claimed in respect of that year.

[3] The Respondent filed an application to dismiss the appeal on two grounds.

[4] The first ground was that the Appellant, a corporation incorporated under Part 1A of the *Companies Act*, R.S.Q., c. C-38, was dissolved when it filed its notice of objection and Notice of Appeal. On May 7, 2004, the Registraire des entreprises had struck off the Appellant *ex officio*, thereby triggering its dissolution in accordance with section 50 of the *Act respecting the legal publicity of sole proprietorships, partnerships and legal persons*, R.S.Q., c. P-45. Since the Appellant was dissolved at the time that its notice of objection and Notice of Appeal were filed, the Appellant did not, in the Respondent's submission, have the legal capacity to sue.

[5] The second ground was that, even though the instant appeal was against a loss determination, and the amount of the loss was the only thing that could be appealed, the relief sought pertained to a refundable investment tax credit which was disallowed by another assessment that was not appealed from. Consequently, the Respondent submitted that this Court does not have the power to grant the relief requested in the Notice of Appeal.

[6] The hearing of this application was initially set for August 2, 2005. After hearing the parties summarily, the presiding judge adjourned the hearing of the appeal because Yves Bluteau, the Appellant's agent, was unable to represent the Appellant adequately that day owing to his mental health. The judge recommended that he retain counsel.

[7] The hearing of this application was rescheduled for January 11, 2007 by order of this Court dated November 24, 2006. On January 5, 2007, a few days before the hearing, Yves Bluteau, the Appellant's agent, asked for more time so that, with the help of an accountant, he could look after the formalities needed to reactivate the Appellant's status with the Registraire des enterprises.

[8] By letter dated January 8, 2007, counsel for the Respondent objected to the Appellant's application for a postponement on the following grounds:

> [TRANSLATION]
>
> . . .
>
> This letter is further to an application for a postponement which was sent to us by the Appellant in the above-cited appeal, and which pertains to the hearing of the Respondent's application to dismiss the appeal, set for January 11, 2007. A copy of the application for a postponement is attached hereto.
>
> The Respondent objects to the Appellant's application for a postponement for the following reasons.
>
> We understand that the sole ground of the Appellant's application for a postponement is that a postponement is needed in order for the Appellant to be able to complete the steps necessary to revoke the striking off of its registration and to revive its legal status in accordance with sections 54 to 57 of the *Act respecting the legal publicity of sole proprietorships, partnerships and legal persons*, R.S.Q., c. P-45.

The Respondent's application to dismiss the appeal, which was filed on July 19, 2006 and was served on the Appellant on July 20, 2006, seeks to have the appeal dismissed on two grounds:

1. Since the Appellant was dissolved at the time that its notice of objection and Notice of Appeal were filed in the Tax Court of Canada, and it has still not taken measures to reverse this dissolution, it did not have the legal capacity to lodge the instant appeal and still does not have the capacity to sue or to pursue the instant appeal.

2. Since the Appellant is not asking for any relief in this appeal that this Court has the power to grant it, this appeal has no basis and must therefore fail.

Thus, the striking off of the Appellant's registration and the resulting dissolution merely constitute the first of two grounds on which the Respondent's application relies. The Respondent's second ground is that it is impossible for the Appellant to obtain any relief whatsoever in the instant appeal. The Respondent submits that it is in all the parties' interests that this second ground be decided before the Appellant undertakes the steps and incurs the expenses necessary to have its registration restored.

This second ground is set out in paragraphs 4 to 15 of the Notice of the Application to dismiss the appeal. In summary, the Appellant appealed from a loss determination that was made at the Appellant's request on June 3, 2004, under subsection 152(1.1) of the *Income Tax Act* (hereinafter "ITA"). Such a loss determination can only pertain to the amount of a non-capital loss, net capital loss, restricted farm loss, farm loss or limited partnership loss, as the case may be, incurred by the Appellant for the taxation year in issue. The Appellant's application and the notice of loss determination have been tendered as Exhibits R-4 and R-5, respectively, in support of the sworn declaration of Gilles Bouchard dated July 18, 2006.

However, as shown by the Notice of Appeal dated January 10, 2006, the only subject of the instant appeal is the eligibility of the Appellant's scientific research and experimental development project within the meaning of subsection 248(1) of the ITA. But the sole consequence of a determination favourable to the Appellant on this issue in the instant appeal would be a $16,500 reduction of the non-capital loss in relation to the amount currently determined, as can be seen from the sworn statement of Pierre Brodeur dated July 18, 2006. The problem is that, in an appeal against a loss determination, the Court cannot order the Minister of National Revenue ("the Minister") to reduce a loss determination to an appellant's disadvantage.

The only favourable impact of a judgment on the eligibility of its scientific research and experimental development project would pertain to the refundable investment tax credit that it claimed in connection with its project. However, on

> January 21, 2003, the Minister determined, under paragraph 152(1)(*b*) and subsection 152(1.2) of the ITA, that the Appellant was not entitled to its refundable investment tax credit. The notice of determination was tendered as Exhibit R-3 in support of Gilles Bouchard's sworn declaration dated July 18, 2006. And, as that declaration states, the Appellant never objected to or appealed from the determination of January 21, 2003. Consequently, the Appellant has no right to bring an appeal before this Court concerning the refundable investment tax credit, and this Court cannot grant the Appellant the relief associated with that credit.
>
> Since the only point in issue in this appeal concerns the eligibility of the Appellant's scientific research and experimental development project within the meaning of subsection 248(1) of the ITA, and the Court cannot grant it any relief even if the judgment is favourable to it on this issue, this appeal has no basis and therefore must fail.
>
> The Respondent submits that it is in all the parties' best interests that the second ground be decided on January 11, 2006, in order to avoid any additional costs or delay. Indeed, should the Court consider the second ground meritorious, it must allow the Respondent's application and dismiss the Appellant's appeal, thereby making it pointless for the Appellant to spend more time and effort on measures to restore its registration.

[9] Later, on January 9, 2007, the Court notified the Appellant's agent as follows:

> [TRANSLATION]
>
> . . .
>
> This is regarding your letter of January 5, 2007, requesting a postponement of the hearing of the application to dismiss the appeal, scheduled for January 11, 2007, in Montréal, Quebec.
>
> Further to our telephone conversation today, this is to confirm that the Court has denied your request for a postponement. Consequently, the parties must be ready to proceed on Thursday, January 11, 2007, at 9:30 a.m., as scheduled.

[10] At the hearing, the Appellant's agent said that he did not understand the two grounds of the application, that he has no money because he was unfairly taxed, and that he still requests a postponement of the hearing of the application so that he can have the Appellant's dissolution revoked.

[11] The Court accepts the proposal made by counsel for the Respondent because it finds that it is in the interests of the administration of justice. The Court will decide the application based solely on the second point, and not on the first.

[12] Paragraphs 4 to 15 of the application read:

[TRANSLATION]

. . .

4. Moreover, since the instant appeal is from a loss determination made on June 3, 2004, under subsection 152(1.1) of the *Income Tax Act* (hereinafter "ITA"), only the amount of the non-capital loss, net capital loss, restricted farm loss, farm loss or limited partnership loss, as the case may be, incurred by the Appellant for the taxation year ended November 20, 2001, can be the subject of the instant appeal.

5. The grounds of the Appellant's appeal pertain solely to the eligibility of its scientific research and experimental development work for its taxation year ended November 30, 2001 (hereinafter "SR&ED work").

6. The only potentially favourable impact that a reassessment of the eligibility of its SR&ED work might have on the Appellant pertains to the $9,844 refundable investment tax credit that it claimed for its taxation year ended November 30, 2001.

7. However, the $9,844 refundable investment tax credit claimed by the Appellant for its taxation year ended November 30, 2001 cannot be the subject of the instant appeal, because the instant appeal is from a loss determination made in accordance with subsection 152(1.1) of the ITA.

8. Indeed, in a notice of determination sent to the Appellant on January 21, 2003, the Minister of National Revenue (hereinafter "the Minister") determined that the Appellant was not entitled to the $9,844 refundable income tax credit that it claimed for its taxation year ended November 30, 2001.

9. The Appellant did not file a notice of objection with the Minister and did not appeal to the Tax Court of Canada from the determination, notice of which was sent to the Appellant on January 21, 2003.

10. The determination, notice of which was sent to the Appellant on January 21, 2003, was made in accordance with paragraph 152(1)(*b*) of the ITA and sent to the Appellant in accordance with subsection 152(2) of the ITA, and consequently, under subsection 152(1.2) of the ITA, the Appellant had a right of objection and a right of appeal to the Tax Court of Canada from this determination, in keeping with the relevant provisions of

Divisions I and J of Part I of the ITA applicable to tax assessments, with the necessary adjustments.

11. Since the Appellant did not file with the Minister a notice of objection to the determination, notice of which was sent to him on January 21, 2003, and the Appellant did not appeal from that determination to the Tax Court of Canada, the disallowance of that refundable investment tax credit, which the Appellant claimed for its taxation year ended November 30, 2001, cannot be appealed in the instant appeal.

12. Thus, the impact of a judgment of this Court concerning the eligibility of the Appellant's SR&ED work is limited exclusively to the amount of the non-capital loss determined by the Minister in the loss determination notice dated June 3, 2004, since that determination is the only subject matter in issue.

13. The only impact of the relief sought by the Appellant concerning the evaluation of the eligibility of its SR&ED work on the non-capital loss determined by the Minister in the loss determination notice dated June 3, 2004, would be to reduce this loss by $16,500, thereby lowering it from $39,197 (where it now stands under the notice of loss determination dated June 3, 2004) to $22,697.

14. However, in a dispute concerning such an assessment or loss determination, the Court cannot order the Minister to increase an assessment or decrease a loss determination to the Appellant's disadvantage.

15. Since this Court cannot grant any relief to the Appellant, there is no basis for the instant appeal, which therefore cannot succeed.

[13] Paragraphs 4 to 10 and 12 to 15 of Gilles Bouchard's sworn declaration read:

[TRANSLATION]

4. I examined the relevant audit and objection files and some relevant electronic files at the CRA concerning the Appellant. Based on my examination, I have made the following findings.

5. The Appellant is a corporation incorporated under Part 1A of the *Companies Act*, R.S.Q., c. C-38, as shown by Exhibit R-1 of this application, the printout of the excerpt from the Registre des entreprises individuelles, des sociétés et des personnes morales concerning the Appellant.

6. On or about May 31, 2002, the Appellant filed a T2 tax return with the CRA for its taxation year ended November 30, 2001, a true copy of which is attached to this application as Exhibit R-2. In that return, the Appellant

   (a) reported a net loss of $22,967 as well as a non-capital loss of $22,697 for the year, and

   (b) claimed a refundable investment tax credit of $9,844 under section 127.1 of the *Income Tax Act* (hereinafter "ITA").

7. On January 21, 2003, in the same document, the Minister of National Revenue (hereinafter "the Minister") sent the Appellant, under subsections 152(1), 152(1.2) and 152(2) of the ITA,

   (a) a notice stating that no tax was payable for his taxation year ended November 30, 2001, as shown by Exhibit R-3 of this application, the electronic printout of the notice, and

   (b) a notice of determination by which the Minister determined that the Appellant was not entitled to the $9,844 refundable investment tax credit that it claimed under section 127.1 of the ITA for its taxation year ended November 30, 2001, as shown by Exhibit R-3 of this application, the electronic printout of the notice.

8. Despite my research and my careful examination of the relevant audit and objection files at the CRA concerning the Appellant, and of the relevant electronic records concerning the Appellant, I was unable to find any evidence that the CRA received a notice of objection or notice of appeal concerning the determination, notice of which was sent to the Appellant on January 21, 2003.

9. The Appellant never filed a notice of objection with the Minister, and never appealed to the Tax Court of Canada from the determination, notice of which was sent to the Appellant on January 21, 2003, and in which the Minister determined that the Appellant was not entitled to the $9,844 refundable investment tax credit that it had claimed for its taxation year ended November 30, 2001.

10. On or about April 26, 2004, the Appellant filed with the Minister, under subsection 152(1.1) of the ITA, a request for a determination of its non-capital loss for its taxation year ended November 30, 2001, as shown by Exhibit R-4 of this application, the true copy of the Appellant's request for a loss determination.

...

12. On June 3, 2004, the Minister sent the Appellant a notice of loss determination in which he determined that the Appellant's non-capital loss was $39,179, as shown by Exhibit R-5 of this application, the true copy of the notice of loss determination.

13. On or about July 5, 2004, the Appellant served on the Minister a notice of objection to the loss determination, notice of which was sent to the Appellant on June 3, 2004, as shown by Exhibit R-6 of this application, a true copy of the Appellant's notice of objection.

14. On October 13, 2005, the Minister confirmed the loss determination, notice of which was sent to the Appellant on June 3, 2004, as shown by Exhibit R-7 of this application, a true copy of the notification of confirmation.

15. On January 10, 2006, the Appellant filed a notice of appeal in the Tax Court of Canada from the loss determination, notice of which was sent to it on June 3, 2004, as shown by the Appellant's notice of appeal in the court file.

[14] Pierre Brodeur's sworn declaration reads:

1. I am an auditor with the Canada Revenue Agency (hereinafter "CRA") office located at 3400 Jean-Béraud Avenue, Laval, Quebec H7T 2Z2.

2. I audited the Appellant's file for its taxation year ended November 30, 2001, and therefore have personal knowledge of the Appellant's audit file relevant to the instant appeal.

3. As the auditor responsible for auditing the Appellant's file for its taxation year ended November 30, 2001, I was in charge of the Appellant's audit file relevant to the instant appeal and therefore have personal knowledge of that file.

4. On or about May 31, 2002, the Appellant filed a T2 income tax return in respect of its taxation year ended November 30, 2001, a true copy of which is attached to this application as Exhibit R-2. In that return, the Appellant

   (a) reported a net loss of $22,967 and a non-capital loss of $22,697 for the year, and

   (b) claimed a $9,844 refundable investment tax credit under section 127.1 of the *Income Tax Act* (hereinafter "ITA") that was completely attributable to scientific research and experimental development expenses.

5. Specifically, the Appellant claimed $28,125 in eligible scientific research and experimental development expenses for the purpose of calculating the investment tax credit, as shown by Exhibit R-2 of this application, the true copy of the Appellant's T2 income tax return for its taxation year ended November 30, 2001, and as detailed in Exhibit R-8 of this application, the work sheets that I prepared for the purposes of my audit.

6. On or about September 12, 2002, I began my audit of the Appellant's file in connection with its taxation year ended November 30, 2001.

7. On or about November 8, 2002, I received the report of the scientific advisor in charge of assessing the eligibility of the Appellant's scientific research and experimental development work. Following his assessment, the advisor determined that the work in issue did not constitute "scientific research and experimental development" within the meaning of subsection 2900(1) of the Income Tax Regulations (hereinafter "ITR").

8. Based on this assessment, I made the following adjustments to the amounts reported by the Appellant in the income tax return that it filed in connection with its taxation year ended November 30, 2001, as detailed in Exhibit R-8 of this application, the work sheets that I prepared for the purposes of my audit:

   (a) an increase in both the net loss and the non-capital loss reported by the Appellant for the year from $22,697 to $39,197, and

   (b) a complete disallowance of the $9,844 refundable investment tax credit claimed by the Appellant under section 127.1 of the ITA.

9. This $16,500 increase of the net loss and non-capital loss for the year results from the disallowance of the $16,500 Quebec income tax credits that the Appellant had applied to offset its scientific research and experimental development costs, as detailed in Exhibit R-8 of this application, the work sheets that I prepared for the purposes of my audit.

10. If the Appellant's scientific research and experimental development work had constituted "scientific research and experimental development" within the meaning of subsection 2900(1) of the ITR, both the net loss and the non-capital loss of the Appellant for the year would have been determined to be $22,697.

[15] The Court asked the Appellant's agent if he had filed a notice of objection to the January 21, 2003, assessment of the Appellant. He asserted strongly that he had filed such a notice. However, he submitted no document supporting this assertion.

[16] Since each of the Respondent's assertions is corroborated by a supporting document, I accept the Respondent's version of the facts.

[17] The Court also asked the Respondent for additional documents, namely the draft assessment concerning the SR&ED claim, which was sent to the Appellant's agent and president on November 15, 2002, and was produced as Exhibit I-1; and Pierre Brodeur's T2020 commencing with the opening of the file on September 12, 2002, and ending on December 19, 2002 with a last note reading: [TRANSLATION] "We have received no representations from the claimant. File closed." (Exhibit I-2).

Analysis and conclusion

[18] There are two assessments in issue in the instant case. The first was made on January 21, 2003. The second was made on June 3, 2004. The first disallowed the SR&ED project and the investment tax credit. The second determined the amount of a loss under subsection 152(1.1) of the Act. The first assessment was neither objected to nor appealed.

[19] As far as the first assessment is concerned, although the amount of tax assessed was zero, it was not a "nil" assessment within the meaning of the case law. Since the decision of this Court in *Martens v M.N.R.*, 88 DTC 1382, the courts have consistently held that an assessment in respect of a refundable tax credit can be appealed. See *Datacalc Research Corp. v. The Queen*, 2002 DTC 1479 and *Interior Savings Credit Union v. Canada*, [2006] T.C.J. No 312 (QL).

[20] It was this assessment that the Appellant should have appealed from in order to argue the points that it wished to argue. By appealing from a loss determination, the Appellant is now attempting to do indirectly that which it can no longer do directly.

[21] Unfortunately, this appeal concerning the loss determination has no valid purpose in law. The purpose of the appeal is to reduce the amount of the determined losses. However, a taxpayer has no right to launch an appeal that would increase his tax burden: *Bruner v. Canada*, [2003] F.C.J. No. 144 (QL).

Moreover, since this appeal pertains to a loss determination, it cannot result in a refundable tax credit because that issue was the subject of another assessment.

[22] The Respondent's application is allowed and the Appellant's appeal is dismissed on the basis that the appeal has no valid purpose in law.

Signed at Ottawa, Canada, this 22nd day of January 2007.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 3rd day of August 2007.

Brian McCordick, Translator

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APPEARANCES:

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Counsel for the Respondent:	Philippe Dupuis

COUNSEL OF RECORD:

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