



[2022] 2 F.C.R. D-4

## INCOME TAX

### INCOME CALCULATION

Appeal from Tax Court of Canada (TCC) judgment (2020 TCC 47) dismissing appellant's appeal of Minister of National Revenue's assessment denying appellant tax credits it claimed for scientific research, experimental development (SR&ED) under *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1, s. 248(1) — TCC finding that appellant had not shown on balance of probabilities that appellant's project qualified as SR&ED under Act, s. 248(1) since not meeting criteria set out in *Northwest Hydraulic Consultants Ltd. v. The Queen*, [1998] 3 C.T.C. 2520, 1998 CanLII 553 (TCC) — TCC drawing from *CW Agencies Inc. v. Canada*, 2001 FCA 393 criteria to be applied in this case (1. Was there technological risk or uncertainty which could not be removed by routine engineering or standard procedures? 2. Whether person claiming to be doing SR&ED formulating hypotheses specifically aimed at reducing or eliminating that technological uncertainty? 3. Whether procedure adopted accorded with total discipline of scientific method including formulation, testing, modification of hypotheses? 4. Whether process resulted in technological advancement? 5. Was detailed record of hypotheses tested, results kept as work progressed?) — TCC finding that appellant satisfied first requirement but failed to meet remaining four criteria under test — Appellant contended that TCC made legal errors in its understanding of Act, s. 248(1), made palpable, overriding errors in assessment of evidence respecting appellant's project, misunderstood burden of proof on taxpayer in proceedings before TCC, erred in ruling expert report tendered by appellant to be inadmissible — Whether TCC erred in understanding of Act, s. 248(1) — Pursuant to Act, s. 248(1), SR&ED entailing systemic investigation, by means of experiment or analysis, into scientific or technological innovations — Appellant arguing in particular that criteria in *Northwest Hydraulic* are mere guidance, not mandatory prerequisites for SR&ED eligibility — Appellant focussing on third requirement, i.e. that scientific method be followed; stressing that not requirement for SR&ED eligibility found in s. 248 — Court previously affirming that *Northwest Hydraulic* criteria are appropriate interpretation of definition of scientific research, experimental development in Act, s. 248(1) — Argument that *Northwest Hydraulic* criteria are inconsistent with revised Canada Revenue Agency (CRA) guidance on SR&ED eligibility rejected — While CRA guidance is useful context in understanding purpose, intent of particular provision, guidance not binding on court — Court is guided by rules of statutory interpretation and by precedent — TCC not erring in relying on criteria in *Northwest Hydraulic* — Appellant's argument proceeding on misunderstanding of relationship between courts, legislation — Criteria relied on by TCC not *ultra vires* s. 248(1); rather reflecting court's understanding of what Parliament intended by s. 248(1) — TCC also not adopting restrictive approach to what constitutes

scientific method; found that activities in applied sciences constituted SR&ED in context of technological as opposed to pure scientific development — Although TCC referenced “scientific method”, no indication its understanding of requirements of s. 248(1) was unsuitable for applied sciences — TCC not taking narrow or restrictive approach to what evidence might be encompassed by scientific method — Regarding burden of proof, TCC not erring in requiring appellant to establish, at trial, that its activities qualified as scientific development under s. 248(1) — Appellant had burden of proving its case — Here, Minister assumed that appellant’s project not constituting SR&ED; pleaded to this effect in reply — Concerning TCC’s understanding of evidence, TCC’s reasons demonstrating careful regard to evidence — TCC finding on evidence that appellant not conducting its work in methodical manner, not keeping adequate records — There was no palpable, overriding error in TCC’s findings thereon — As to TCC’s decision to exclude expert testimony, (expert report, testimony of appellant’s proposed expert witness), TCC found report not complying with *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, nor paragraphs 3(d),(e), (g), (h) of Code of Conduct for Experts — Proposed report not setting out proposed evidence in full, not identifying source of facts, assumptions, and not including source material — TCC also holding report not satisfying threshold criteria for admissibility — TCC not erring in making that conclusion — TCC also determining that report failed at second stage of inquiry into whether to admit expert report — Given that expert witness not impartial, report proffered opinion on question of law, TCC deciding, on balance, not to admit report — Absent error in principle, material apprehension of evidence or unreasonable conclusion, decision of trial judge not to admit expert evidence will not be reversed on appeal — Appeal dismissed.

NATIONAL R&D INC. V. CANADA (A-231-20, 2022 FCA 72, Rennie J.A., reasons for judgment dated May 3, 2022, 11 pp.)