Indexed as:

CCLC Technologies Inc. v. Canada

Between
Her Majesty the Queen, appellant, and
CCLC Technologies Inc., respondent

[1996] F.C.J. No. 1226

[1996] A.C.F. no 1226

139 D.L.R. (4th) 765

205 N.R. 249

96 D.T.C. 6527

66 A.C.W.S. (3d) 379

Court File No. A-801-95

Federal Court of Appeal
Vancouver, British Columbia

Hugessen, Strayer and Desjardins JJ.

Heard: September 19, 1996
Oral judgment: September 19, 1996

(5 pp.)

Appeal against a judgment of the Trial Division dated November 10, 1995. Trial Division File No. T-3457-90, [1995] F.C.J. No. 1510.

Income tax -- Income from a business or property -- Income - - Government assistance.

This was an appeal of a tax assessment. The trial judge found that government financial support for the respondent corporation, CCLC, did not constitute income for the purposes of calculating income tax. CCLC received the financial support as part of an experimental research agreement. The gov-

ernment received an equity interest in CCLC if the experimental project was successful. The government was required to sell any equity stake it acquired. The applicant government argued that the support was taxable income. CCLC contended that the payments were made in the acquisition of property by the province and were exempt from inclusion as taxable income.

HELD: The appeal was allowed. The trial judge erred in finding that the provision of financial aid was an ordinary business arrangement. The money was not advanced to further the province's business interests. The payment qualified as government assistance which was included as taxable income under the Income Tax Act. The payments were not made to acquire an interest in property.

Statutes, Regulations and Rules Cited:

Income Tax Act, ss. 12(1)(x)(iv), 12(1)(x)(viii), 127(11.1), 127(9).

Counsel:

L.P. Chamber Q.C., for the appellant.
Lorne Green and S.M. Cook, for the respondent.

The judgment of the Court was delivered orally by

1 STRAYER J.:-- The appeal raises two questions.

> (1) Were the amounts provided by the Government of Alberta to the respondent "assistance" as a
>
> > grant, subsidy, forgiveable loan, deduction from tax, investment allowance or as any other form of assistance. . . .
>
> within the language of both subparagraph 12(1)(x)(iv) of the Income Tax Act, defining income, and of subsections 127(11.1) and 127(9) defining investment tax credits?
>
> (2) If the answer to the first question is in the affirmative, should such amounts nevertheless be excluded from income pursuant to subparagraph 12(1)(x)(viii) as a
>
> payment made in respect of the acquisition by the payor . . . of an interest in the taxpayer, his business or his property . . . ?

2 With respect to the first question, we are of the view that the sums provided to the respondent amounted to government assistance. This Court in The Queen v. Consumers Gas Company Ltd.[1] contrasted "government assistance" to payments made by public authorities

> in exactly the same way for exactly the same reasons as payments made by private business, that is, for the purpose of advancing the interests of the payor.

In this context it is clear that the Court was speaking of payments made for advancing the business interests of the payor.

3 In the present case the learned trial judge quoted and applied this passage as authority that the statutory language concerning "government assistance" has no application to "ordinary business arrangements". He found the scheme in question here to involve such business arrangements. We are respectfully of the view that in doing so he misconstrued the Coal Research Agreement under which the payments were made by the Government of Alberta to the respondent and erred in the application to it of the relevant provisions of the Income Tax Act. These are matters on which this Court may properly intervene.

4 The agreement does not in our opinion establish an ordinary business arrangement between the parties. For its part the Government of Alberta undertook to provide technology and to pay money to the respondent. While in the short term the government obtained an equity interest, if the project were to prove commercially successful the Government would be obliged to sell its interest to the respondent, the price being simply the return of its money contribution plus its interest costs in having made that contribution. If the project did not prove to have commercial value, as in fact it did not during the period in question, the Government was entitled to nothing except an equity interest in a technology demonstrated not to have present commercial value. We find it impossible to characterize this as an ordinary business arrangement. Whatever public policy merits the agreement may have had from the standpoint of Alberta, it does not amount to an arrangement that a business would enter into to advance its business interests. A business which invested money in ventures on the basis that it could not receive any net profit if the venture succeeded, and would gain an equity interest only if the venture proved uncommercial, would not long survive.

5 In the language of the Income Tax Act, subparagraph 12(1)(x)(iv), and the definition of "government assistance" in subsection 127(9), the government payments under the Coal Research Agreement became, in the circumstances of non-commercialization of the technology, a grant, subsidy, a forgivable loan, or similar form of assistance.

6 Nor are we persuaded that the various forms of surveillance of, or participation in, the management of the project by the Government's representatives as contemplated by the agreement, indicate any commercial role of the Government. In our view that surveillance and participation was at least equally consistent with the role of a prudent grant-giver assuring itself that its contribution was being spent as intended.

7 The second question to be considered is whether for the purposes of subparagraph 12(1)(x)(viii) these payments should be regarded as having been made in acquisition of an interest in property. It will be noted that this subparagraph includes as income any payment which "may not reasonably be considered to be made in respect of the acquisition" of the taxpayer's property. We are unable reasonably to consider the provisions of the Coal Research Agreement to be designed for the purpose of the Government of Alberta acquiring an interest in the respondent's property. As noted above, had the project been successful the Government of Alberta would have acquired no lasting property rights in a going concern: in that circumstance it would instead have been obliged to sell its interest for merely a return of its money contributions plus interest. In the event of there being no commercial success, which was the case during the period in question, the Government was left with a half-share in a technology without demonstrated commercial value. In these circumstances its contribution if anything became of the nature of a grant, subsidy, or forgivable loan and cannot reasonably be considered a payment for the purpose of acquisition of property.

8 The appeal will therefore be allowed with costs, the judgment of the Trial Division will be set aside, and the action will be dismissed with costs.

STRAYER J.

qp/d/hbb/DRS

1 (1986) 87 D.T.C. 5008 at 5011.