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## Supreme Court Declines Immunovaccine SR&ED Case Bad News for SR&ED Claimers with Government Loans

In November 2014 Immunovaccine Technologies Inc. made application to the Supreme Court of Canada for leave to appeal decisions against it by the Tax Court of Canada and the Federal Court of Appeal with respect to ITCs that the CRA had disallowed for SR&ED claims the company had made for taxation years 2005, 2006, 2007 and 2008.

Although the eligibility of the claimed R&D work as SR&ED was not disputed, the CRA reduced the "total qualified expenditures" eligible to attract SR&ED ITC's by \$3.8M in loans that Immunovaccine had received from a quasi-government funding agency known as "ACOA" (Atlantic Canada Opportunities Agency).

The Supreme Court has now declined that application and the decisions made by the TCC and FCA against Immunovaccine will stand. In those decisions the courts ruled that because the loans contained certain "social good" clauses, not likely to be found in a strictly commercial loan agreement, the lent funds are caught as "assistance" under (subsection 127(9)) and thereby act to reduce SR&ED. In this case the "social good" clauses encompassed generous conditional repayment terms (see item 51 of the TCC ruling) and requirements that the company create and/or retain jobs, expand facilities, or commercialize technologies in Canada (see items 49 & 50 of the TCC ruling).

Immunovaccine had argued that its SR&ED total qualified expenditures should not have been reduced since the loans were interest bearing and repayable.

The implications of these rulings for companies in the manufacturing and technology sectors that make SR&ED claims are rather more broad than might appear at first glance.

Consider the following:

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First, while SR&ED is being reduced (budget 2012) the Canadian Government has announced its intention to offer new non-taxation "loan-like" initiatives to incent R&D and productivity; many of these will overlap activity historically claimed as SR&ED. Some existing examples of such loan-like programs include FEDEV (manufacturing), Ontario's HTX / HTCP (biotech), Investissement Québec, and the Automotive Innovation Fund. Historically many of these initiatives have been purposely structured as business loans to avoid any dilution of the recipient's SR&ED benefits. However, with the FCA and TCC decisions on Immunovaccine left standing, many deals framed under these programs could well end up reducing the recipient's SR&ED claims – perhaps even retroactively – because of either non-commercial repayment terms and/or "social good" clauses.

Second, although in theory the SR&ED benefit lost in the year that the loan is received can be recovered if/when the loan is repaid, such recovery from Canada is only a non-refundable ITC, even if the benefit forgone by the taxpayer when the loan was received would have been a cash refund. In some cases however, refundable provincial benefits may be recovered as a cash refund.

With any uncertainty on the TCC and FCA rulings now removed, it seems likely that the CRA will commence greater scrutiny on loan-like government funding arrangements. Given the way SR&ED works (i.e. retrospective claims often coming to audit 3 to 5 years after the fact) this could leave some SR&ED claimants in line for unfortunate surprises in the near future.

## Learn More

Read the Immunovaccine rulings here:

TCC:

[http://www.scitax.com/pdf/Dckt\\_2011-245-IT-G\\_10-Apr-2013.pdf](http://www.scitax.com/pdf/Dckt_2011-245-IT-G_10-Apr-2013.pdf)

FCA:

[http://www.scitax.com/pdf/Dckt\\_A-171-13\\_11-Sep-2014.pdf](http://www.scitax.com/pdf/Dckt_A-171-13_11-Sep-2014.pdf)

## About Scitax

Scitax Advisory Partners LP is a Canadian professional services firm with specialist expertise in all aspects of planning, preparing and defending Scientific Research and Experimental Development (SR&ED) tax credit claims.

We offer a multi-discipline team of engineers, chartered accountants and tax lawyers to ensure that your SR&ED issues are covered from every angle.

While we normally work in concert with our client's existing accountants, our affiliated tax-dedicated chartered accounting firm – Cadesky and Associates LLP – is an expert resource for advice on any taxation matter such as may arise either during the planning and preparation of your claim or while dealing with CRA afterwards.

In addition to planning and preparing new claims, we also engage on claims that have been challenged by CRA auditors or that have received negative assessments for either scientific or expenditure eligibility. If a satisfactory settlement cannot be achieved with CRA at the local office level, we will appeal your assessment through either Notice of Objection or Tax Court of Canada procedures with the assistance of our affiliated firm of tax lawyers.



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