Canalerta Technologies Inc. v. Minister of National Revenue

Rip, T.C.C.J.

Judgment: December 24, 1992
Docket: Court File No. 90-1129

1 Canalerta Technologies Inc. (”Canalerta”) has appealed assessments issued in accordance with Part VII of the *Income Tax Act* , R.S.C. 1952, c. 148 (am. S.C. 1970-71-72, c. 63) (the “Act”) denying its request for refunds of tax (”Part VII refund”) as set out in the corporation’s Part VII Tax Returns for 1986 and 1987. The Minister of National Revenue (”Minister”), the respondent, determined the appellant’s Part VII refunds, as defined by subsection 192(2), and its refundable Part VII tax on hand, as defined by subsection 192(3), to be nil since expenditures incurred by the appellant in 1986 and 1987 were not “qualified expenditures” within the meaning of subsections 127(9) and 37(1) of the Act. In the respondent’s view, the appellant, at the relevant times, did not carry on “scientific research and experimental development” within the meaning of subsection 2900(1) of the Regulations to the Act (”Regulations”).[1]

2 The appellant claimed it carried out research and experimental development in two areas. The first area was with respect to application of electromagnetic radiation to pre-impregnated matrix materials to effect rapid and uniform curing of polyester and other resin plastics. Fibreglass matting, for example, would be pre-impregnated with an epoxy resin in a manner that such matting could be moulded readily and easily into thicker structural components and then cured uniformly and quickly on a production basis by the application of electro-magnetic radiation directly to the pre-impregnated fibreglass matting. This technology would avoid difficulties encountered in moulding and curing on a uniform basis, without damage, bulky fibreglass composite resin parts. I refer to this area as **“electro-magnetic radiation”**.

3 The second area of research claimed by the appellant was in the technology of electro-muscular stimulation and transcutaneous nerve stimulation towards the advancement of new therapeutic applications. I refer to this area of activity as **“muscle and nerve therapy”.**

Preliminary matters

4 At the commencement of the trial in these appeals, counsel for the Minister acknowledged that in relation to the first area, electro-magnetic radiation, Canalerta did conduct scientific research and experimental development within the meaning of section 2900 of the Regulations. However, the parties could not agree as to the allocation of the expenditures attributable to each project.

5 Counsel for the appellant, Richard B. Jones, then applied to the Court to allow the appeals on the basis that the concession by the Minister put him in an untenable position: the pleadings do not refer to any allocation of expenditures and he was not prepared to lead evidence as to such allocation. In Mr. Jones' view, the appeals are "all or nothing" appeals and since the Minister conceded on the electro-magnetic radiation issue the appellant's appeals must succeed on the muscle and nerve therapy issue as well.

6 I rejected appellant's application. Litigation is not a "gotcha" contest where a concession by a party of one issue affects his or her ability to defend his or her position on another issue unless, of course, the two issues are related, which is not the situation at bar. To have allowed such an application would destroy any willingness by a party to an appeal to consider any settlement of litigation and would promote unnecessary litigation.

7 It is clear from the pleadings and the evidence that in assessing, the Minister considered only whether or not Canalerta carried on "scientific research and experimental development" within the meaning of section 2900 of the Regulations. No consideration was given to allocating expenses between the electro-magnetic radiation and the muscle and nerve therapy activities the appellant claims it carried on; that was not an issue until trial.

8 If I find the muscle and nerve therapy activity constituted scientific research and experimental development the matter will be concluded. The assessments were wrongly made and the appellant will have the right to a refund of Part VII tax. However, at trial I informed counsel that if I find the muscle and nerve therapy activity was not scientific research, the proper course would be to allow the appeals and refer the assessments back to the Minister to consider the allocation of the expenses between the two activities, which he had never done, and to reconsider the calculation of the Part VII refund on the basis that the electro-magnetic radiation was scientific research. (See *Kit-Win Holdings (1973) Ltd. v. The Queen*, [1981] C.T.C. 43, 81 D.T.C. 5030 at page 46 (D.T.C. 5031-32), per Cattanach, J. where pleadings were accordingly amended with an analogous result.) I informed counsel that if the appellant did not agree with the respondent's allocation of expenses I would hear evidence on this matter at a later date. However, the parties should bear in mind that David Walter Horst ("Horst"), the appellant's only witness, testified in cross-examination that he could neither remember nor estimate the expenses for each of the two areas and all he could do was to "guesstimate" an allocation.

Evidence

9 The issue before me is to determine whether any muscle and nerve therapy activity carried on by the appellant constituted scientific research and experimental development within the meaning of section 2900 of the Regulations to the Act.

10 Horst is a building contractor in Waterloo, Ontario. In the course of discussing a potential construction project in 1985 he was introduced to one Dr. Mario d'Alerta ("d'Alerta"), a "technical person" employed by or associated with the potential client. The project was not proceeded with but d'Alerta discussed with Horst the work he was to have undertaken and his background. Horst was impressed with d'Alerta's background.

11 In his resumé d'Alerta claimed to be a medical doctor, receiving a degree from the University of Havana, Cuba, who had practised in Miami, Florida. He informed Horst that he

was also an American citizen and had worked as a consultant to the U.S. National Aeronautics and Space Agency (”NASA”). His resumé also states that he is a professional engineer and had received Ph.D. degrees in cybernetics from University of Havana, in Motion Pictures from University of Notre Dame, Paris, France and in Education from the National University of José Marti, Havana.

12 D’Alerta claimed he had developed novel theories in the two areas of electro-magnetic radiation and rehabilitation and proposed Horst and his associates, who included a professional engineer, finance the research of his theories. Horst and his associates agreed to finance the research and at the end of August, 1985 caused the appellant, 635816 Ontario Inc., to be incorporated to be used as the vehicle by which d’Alerta would carry on his research. By Articles of Amendment dated September 12, 1985, the name of the corporation was changed to Canalerta Technologies Inc. The shareholders of the appellant were the source of the appellant’s funds to carry on the activities.

13 On September 10, 1985 the appellant entered into an employment contract with d’Alerta, conditional upon him receiving a work permit. D’Alerta agreed to devote his full time and attention “to the business of the company being in charge of all research and development activities”. He also had a right to acquire up to 40 per cent of the issued shares of the appellant, the same amount as Horst. D’Alerta received a permit to work in Canada and the appellant leased facilities in Waterloo, Ontario to enable it to carry on its activities. A secretary and technical assistants were also hired.

14 D’Alerta transferred equipment and technology to Canalerta in exchange for shares. D’Alerta used the equipment and acquired the technology while working in the United States. The equipment included a transcutaneous nerve stimulator, a bio-electric muscle stimulator, a transcutaneous nerve stimulator (different model) and a pulse meter. The technology consisted of “certain inventions relating to the moulding of reinforced plastics utilizing radio frequency radiation” and “certain electrical bio-medical diagnostic and treatment technology”. Horst stated that d’Alerta told him the equipment consisted of unique pieces built especially for him, but in fact it consisted of modifications of available equipment.

15 Horst was the first president of Canalerta and later on was its secretary-treasurer. Horst said he would visit Canalerta’s facilities “two or three times a week, sometimes daily, at least once per week ...”. He insisted he maintained a “day to day awareness of what was going on.”

16 It was Horst’s understanding that d’Alerta worked in Waterloo on the two projects. He said he “observed d’Alerta getting information from various places”. D’Alerta did “lots of reading”. On a regular basis d’Alerta, Horst and the other investors would have discussions “to see what he (d’Alerta) was establishing”.

17 D’Alerta contracted the Ferro Corporation in Massachusetts to obtain pre-impregnated materials. Ferro Corporation, according to Horst, is a leading manufacturer of such product and provided product to d’Alerta. D’Alerta worked on the electro-magnetic radiation project in the appellant’s laboratory which consisted of a room with a counter top, shelving units and the equipment.

18 During 1985 and 1986, d’Alerta would frequently verbally explain his work to the

investors. In 1986, Horst testified, the investors requested d'Alerta to put forward a written outline of his work and how he intended to proceed. D'Alerta complied with the request and his written explanations were produced into evidence. This material consisted of five "protected" summaries and reports. The first summary consisted of 66 pages and included the following:

(i) Preimpreg technical data, "Mobaloy ERS", produced by Ferro Corporation;

(ii) Ciba-Geigy Journal, April, 1986 — "New high temperature tool hardener from Ren";

(iii) Re-print from Plastics Technology, December, 1965 "Controlled flow impreg solves Helicopter Canopy Problem";

(iv) Re-print from 1965 issue of modern plastics "Preimpreg licks tough wiring problem";

(v) Article by Grant Brown, technical director and Charles Andrew Murray, technical consultant, Cordo Division of Ferro Corporation "New Technique for Checking cur of B-stage material"

(vi) Re-print from modern Plastics, October, 1965 "Doing the tough jobs in space";

(vii) Re-print from Plastics, Design and Processing, May, 1965 "D.A.P. impreg Mouldings Make Intricate Designs Practical for Short Run Parts at Cessina Aircraft";

(viii) Summary of test results, Dr. d'Alerta, September 8, 1986;

(ix) Report No. 1 "material testing of a fibre glass and epoxy composite", February 1987, prepared by Geotechnical Resources Ltd. on behalf of Canalerta Technologies Inc.;

19 These documents relate to the electro-magnetic radiation activity of the appellant which was accepted by the respondent as "scientific research and experimental development". There is therefore no need to consider this material.

20 The four other reports which concerned efforts improving therapy for muscle and nerve damage are:

(i) a 36 page ITCM report entitled "Electro-chemical modulation of cell and tissue function" by Dr. Mario d'Alerta;

(ii) an 11 page report on ITMC entitled "Scientific Explanation and basic principles supporting the ITMS System" by Dr. Mario d'Alerta;

(iii) a 19 page report of the ITMC setting forth background neurological concerns and overview of ITMC system; and

(iv) a 132 page report by Canalerta Technologies Inc. setting forth the model of the biomedical micro processor.

21 The first of these four reports, which is attributed to d'Alerta, states, at the end of the report it was "taken from Chapter 12 of *Mechanics of Growth Control* , Robert O. Becker, ed., Charles C. Thomas, Springfield, Illinois, 1981". Horst could not state with any degree of

certainty that this was an original work of d'Alerta and it appears to me to be a photostatic copy of the publication to which it is attributed. On the evidence before me I cannot accept this report as a work emanating from d'Alerta.

22 The second of the four reports, Horst admits, does not deal with electrochemistry but with something called International Telemetric Medical Centre ("ITMC") system. The ITMC system was d'Alerta's representation to the investors of how his theory could be applied to the market place; the term ITMC was coined by d'Alerta. This report contains his explanations of the cellular composition of the human body, the structure of the atom and the position of atomic particles, electrolytes, polarity of the human body and stimulation of the nervous system, nerve stimulation, nerve impulse, stimulation of enervated muscle, effects of the electrical muscular contractor, electrical stimulation and his theory. The report appears to explain various functions but here too there is no evidence of any work undertaken by d'Alerta.

23 The third report contains a "considerable" number of extracted copies from other publications, Horst acknowledged. It also includes a sketch or layout of d'Alerta's pain treatment centre, a market analysis and 1984 medical form.

24 The last report, entitled Biomedical Microprocessor, Horst said, was produced by d'Alerta while an employee of Canalerta. The report contains sketches of what would appear on a computer to assist a medical practitioner in applying d'Alerta's work. According to Horst, this report describes a medical diagnosis and treatment system to be operated by a physician and contains specifications for the creation of an interactive software program. The proposed computer system would be effective only if the muscle and nerve therapy theory project of d'Alerta did in fact have application, Horst acknowledged. In cross-examination, Horst stated that this report was an attempt by d'Alerta to develop his muscle and nerve therapy theory "... to bring (it) ... into a lab setting". This program was never tested by d'Alerta. In my view this report describes how a program may work but there is no evidence that any effort was put forth to determine whether the basic theory underlying this program was practical.

25 D'Alerta claimed to have done much of the work on muscle and nerve therapy while with NASA, before coming to Canada, and at clinics in Miami. He arranged to visit with Horst the Kennedy Space Centre in Florida as well as clinics in the Miami area where he had previously worked. Horst testified that d'Alerta introduced him to medical staff of the clinics and, at NASA, where he had security clearance, his questions were answered without any reservation. At NASA, d'Alerta discussed his therapeutic work with several people and introduced Horst to various officials. Horst said he came away from NASA with the feeling d'Alerta was "legitimate"; however he could not obtain confirmation d'Alerta had graduated in medicine from the University of Havana or that he had worked at the University of California at Los Angeles ("UCLA") as he claimed. Horst said that with respect to UCLA, the report he received was that such information was "classified"; d'Alerta had previously informed Horst his work at UCLA was classified. At this stage, Horst concluded, "we had confidence in him ... much of his past had been confirmed".

26 Horst recalled d'Alerta performing at least two applications of muscle and nerve therapy. One of Horst's fellow investors, Richard Kline ("Kline"), was "intrigued" with d'Alerta's ideas due to his son's muscular problems. D'Alerta treated Kline's son and

according to Horst the son believes the treatment was beneficial. At another time, a friend of Kline's son who was in a motorcycle accident and confined to a wheelchair sought help and was treated by d'Alerta. The friend, again according to Horst, enjoyed benefit from the treatment. However Horst and his co-investors were of the view it was premature for d'Alerta to treat humans and requested he stop such treatments.

27 In cross-examination Horst stated d'Alerta wrote up his ideas for a computer program, documenting his theory, in the 132 page report. However, except for working with Kline's son and his friend, d'Alerta did no laboratory research with respect to the project of electrical stimulation to rehabilitate muscles on humans. D'Alerta simply wrote reports. "That is the work", Horst declared.

28 Horst stated that the shareholders of Canalerta wished to expose d'Alerta to areas where he could perform his work, in particular a medical environment. Arrangements were made for him to meet medical staff at Wellesley Hospital in Toronto. He met doctors at the hospital but, said Horst, he would stress the results of his work or his theories with them. D'Alerta insisted that any work on muscle and nerve therapy be done by himself without any assistance. Horst revealed antagonism was thus built up and he and his fellow investors found themselves in a difficult situation.

29 Sometime in 1986, Kline brought to d'Alerta's and Horst's attention an article from the April, 1986 issue of "Discover" magazine. The article discussed the claim of Dr. Björn Nordenström ("Nordenström"), a Swedish radiologist, to have found in the human body electrical activity that is the foundation of the healing process. Kline had d'Alerta attend a conference in Stockholm where he arranged for d'Alerta to meet Nordenström, and in fact they did meet and discuss their theories, said Horst.

30 By May, 1987, Horst and his fellow investors caused the appellant to cease operations. The electro-magnetic radiation work was abandoned because the appellant concluded that effective patent protection could not be obtained. Discussions with staff at Wellesley Hospital and with other medical practitioners resulted in the investors realizing d'Alerta's attitude and lack of cooperation with others would cause the muscle and nerve therapy work to come to no good conclusion. "D'Alerta was unwilling to co-operate", said Horst, "and ... led us to cease ... [carrying on] ... the project". In Horst's view the "proprietary and secret domain in d'Alerta's mind couldn't be changed ... [he] ... couldn't agree to co-operate ... [and] ... we agreed to part company". D'Alerta left Canada.

Submissions

31 This appeal turns on whether or not the activities conducted by the appellant during 1986 and early 1987 with respect to muscle and nerve therapy constituted "scientific research and experimental development" within the meaning of section 2900 of the Regulations to the Act. If such activities fall within that meaning, the appellant will be successful in its appeal.

32 Subsection 2900(1) reads, in part, as follows:

> (1) For the purposes of this Part and paragraphs 37(7)(b) and 37.1(5)(e) of the Act, "scientific research and experimental development" means systematic investigation or search carried out in a field of science or technology by means of experiment or analysis,

that is to say,

> (a) basic research, namely, work undertaken for the advancement of scientific knowledge without a specific practical application in view,
>
> (b) applied research, namely, work undertaken for the advancement of scientific knowledge with a specific practical application in view, or
>
> (c) development, namely, use of the results of basic or applied research for the purpose of creating new, or improving existing, materials, devices, products or processes,

and, where such activities are undertaken directly in support of activities described in paragraph (a), (b) or (c), includes activities with respect to engineering or design, operations research, mathematical analysis or computer programming and psychological research. ...

Appellant's argument

33 Counsel analyzed subsection 2900(1) to determine what is meant by "scientific research and experimental development". He concluded that the semantics of the definition suggest that if a taxpayer qualifies under any of the alternative definitions of basic research, applied research or development he is carrying on "scientific research and experimental development". He stated that his client was carrying on applied research.

34 Canalerta's counsel cited *Steinman v. Minister of National Revenue* (1952), 7 Tax A.B.C. 255, 52 D.T.C. 415 at page 262 (D.T.C. 419) and *Partington v. Attorney General* (1869), L.R. 4 H.L. 100 at page 122 per Lord Cairns in support of the principle that, in dealing with the construction of taxation statutes, if the taxpayer is caught within the strict words of the statute then he will be taxed regardless of the court's view of equity. Similarly, where the taxpayer seeks a deduction, he must come within the words of the statute. Thus, if his client is to succeed, counsel stated, he must show that his client's activities clearly fall within the strict words of the definition contained in subsection 2900(1).

35 Appellant's counsel conceded that his client does not claim "d'Alerta ever did, during the course of his employment with it, experimental work in the application of his claimed therapeutic utilization of electrical stimulations to the human body". Counsel stated, "the fact that d'Alerta did no experimental work, no tangible physical work with recording of data and results" is not an issue.

36 What activities did Canalerta carry on in 1986 and 1987 which one may reasonably conclude constitute scientific research and experimental development, in particular applied research, within the meaning of subsection 2900(1)? Its counsel described d'Alerta's activities as follows:

> ... Dr. d'Alerta apparently sought to assemble data, to assemble prior art, to study the literature, to study this field, to think, contemplate and meditate upon the work that he had done in Miami on what he believed were healing, curative processes attributable to electromuscular treatments, that he applied to patients.

37 As counsel for Canalerta explained, it was a known art in 1986 and 1987 to apply, by means of conductive pads fixed to different portions of the human body, a pulsed electrical impulse. However, he contended that at that time it was not known that such technology had important therapeutic benefits, a fact upon which "Dr. d'Alerta, by happenstance, good luck, mere misfortune, kismet, whatever, in fact, had stumbled upon. ..."

38 Counsel for the appellant emphasized that d'Alerta carried on his work by means of analysis. He suggested "the thoughtful assembly of prior known facts, the consideration of the logical relationships between those prior known facts, the analysis of those prior known facts ... the detection of errors within those prior known facts, and the assembly of that into a reasoned presentation can well be of the very essence of scientific research and experimental development. It is certainly work ... it is ... with a specific practical application in view ... it ... is analysis ...". Finally he declared "experiment is the gathering of data or the testing of hypotheses, but the analysis of data and the formulation of hypotheses are equally vital, integral parts of the process of scientific research and experimental development".

Respondent's argument

39 In his submission that Canalerta's activities did not constitute scientific research and experimental development, counsel for the respondent cited several reported cases where this Court considered whether a particular activity fell within the subsection 2900(1) definition of that term. In *Sass Manufacturing Ltd. v. Minister of National Revenue*, [1988] 1 C.T.C. 2524, 88 D.T.C. 1363 (T.C.C.) , Sarchuk, J., at page 2535 (D.T.C. 1371), stated the test to determine whether an activity constitutes scientific research or experimental development within the meaning of subsection 2900(1) as follows:

> In my view, Regulation 2900 requires an appellant to adduce cogent evidence of such investigation or search. Systematic investigation connotes the existence of controlled experiments and of highly accurate measurements and involves the testing of one's theories against empirical evidence. Scientific research must mean the enterprise of explaining and predicting and the gaining knowledge of whatever the subject matter of the hypothesis is. This surely would include repeatable experiments in which the steps, the various changes made and the results are carefully noted. There is no evidence of such an approach in the case at bar, either in the context of applied research or development. The appeal on this issue cannot succeed.

40 Counsel suggested *Sass* was dismissed because the learned trial judge found that the activities undertaken by that appellant fell short of meeting the criteria set out in subsection 2900(1) since there was no cogent evidence of a systematic investigation or of controlled experiments, of highly accurate measurements, of testing of theories against empirical evidence.

41 Counsel argued that it is not the intention of the appellant that governs. The words of paragraph 37.1(6)(a) of the Act require that an expenditure must be of a current nature on scientific research and experimental development directly undertaken by or on behalf of the taxpayer. To support this contention, counsel referred to *Revelations Research Corp. v. Minister of National Revenue*, [1992] 1 C.T.C. 2136, 92 D.T.C. 1036 (T.C.C.) in which Christie, A.C.J. dismissed the appeal of a taxpayer who had some ideas that he believed might

be fruitful, yet did not have a plan of how he was going to go about putting them into action and did not undertake the kind of systematic investigation, search, analysis or controlled experiments as required in *Sass* . At page 2144 (D.T.C. 1043) of his reasons for judgment, Christie, A.C.J. concluded:

> ... it has not been established that there was any systematic investigation or research carried out of the nature described in *Sass Manufacturing Ltd.*

42 Finally counsel compared the facts in *Satellite Earth Station v. Minister of National Revenue*, [1991] 1 C.T.C. 2416, 91 D.T.C. 337 (T.C.C.) with those in the case at bar. In *Satellite* , the witness described the activities of the appellant in the following manner at page 2419 (D.T.C. 340):

> Our research effort wasn't what you would characterize as being high technology by any means. We were working initially out of a converted pig barn and other buildings on a farm, a chicken coop. Much of our work was actually done by taking bits of paper and drawing out, sketching out various components. We did not use a methodology that might be followed by the Spar Aerospaces or by the big firms. Often it was a case of going to the blackboard or taking the chalk and writing on the shop floor, sketching out different ideas and hypotheses. You actually had to try them.

43 Bonner, T.C.C.J., gave his reasons for dismissing the appeal at page 2420 (D.T.C. 340):

> I cannot find in the evidence of the activities described in the passages quoted or in any of the other testimony or in Exhibits A-10 and A-11 any indication of "... systematic investigation or search carried out in a field of science or technology by means of experiment or analysis ..." within the meaning of section 2900 of the Income Tax Regulations.

44 Respondent's counsel concluded that "casual doodling with ideas", even trying out those ideas, where it is not done in a systematic scientific fashion, does not constitute scientific research or experimental development. He added that the appellant's activities which consisted of contemplating, meditating, and thinking do not constitute scientific research because analysis, if it consists exclusively of mental work, must involve the disciplined analysis that advances knowledge or at least attempts in a disciplined fashion to resolve an area of scientific uncertainty. Counsel concluded as follows:

> This man [d'Alerta] did not postulate any specific hypotheses. He didn't analyze any data. He didn't advance knowledge in any way. ... He obviously thought he was attempting something in his own air, I suppose, but he was doodling. He was a dreamer. He was not practising scientific research and experimental development within the criteria that the courts have laid down.

Analysis

45 The appellant insists that "thinking, contemplating and meditating" are acceptable activities which constitute "scientific research and experimental development" within the meaning of subsection 2900(1) of the Regulations. Its counsel stated:

> The Regulation does not say no daydreaming allowed. The section does not say you can't take something that you dreamt about last night and wonder whether or not you've got some inspiration that will lead you into profitable scientific enquiry. The section doesn't say you have to succeed.

46 I agree with appellant's counsel. Daydreaming may be a vital component of scientific research. However the daydreaming must be coupled with a "system atic investigation or research ... by means of experiment or analysis. ..." Work must be undertaken. Mr. Jones pointed out that if a taxpayer is claiming a deduction, he must fall squarely within the words of the statute. Subsection 2900(1) does not exclude daydreaming from the concept of scientific research and experimental development but that provision insists that other factors be present. This is apparent from the words of the Act and the conclusions of this Court in *Sass, Satellite* , and *Revelations* as well as *J and J Cameron Venture Corp. v. Minister of National Revenue* , unreported judgment dated October 2, 1989 (Court File No. 87-1774).

47 Several steps should normally be present in an endeavour that might represent scientific research and experimental development for the purposes of subsection 2900(1): *Sass, op cit.* In this regard, scientific research contemplates activities which might be based on hypothesis in respect of which the objective is the gaining of knowledge. To attain that objective, theories must be tested against empirical data. This testing is accomplished through controlled experimentation, and must be done with extremely accurate measurements. Without the presence of these elements, an activity will not meet the requirements of subsection 2900(1). From the arguments presented by the appellant, it is evident that the activities of d'Alerta with respect to muscular and nerve therapy did not represent those targeted by section 2900 of the Regulations.

48 Subsection 2900(1) states that "scientific research and experimental development" means research in a particular field by means of experiment or analysis. Intuition is not research, although it can trigger research.

49 There is no evidence that anything d'Alerta did with respect to any research in nerve and muscle therapy was "systematic". The *Shorter Oxford Dictionary on Historical Principles* defines the word "systematic" as:

> 3. Arranged or conducted according to a system, plan, or organized method, involving or observing a system, (of a person) acting according to system, regular, methodical. ...

50 There was no evidence produced by the appellant to indicate d'Alerta carried on any of his work in nerve and muscle therapy research according to any plan or organized method. He was by nature secretive and reluctant to part with any knowledge. D'Alerta himself was not called by the appellant to testify as to the work he performed and the method of analysis he employed. D'Alerta apparently kept no records of his analyses. This made it difficult for Horst to give evidence.

51 In my view the appellant's work, if any, in muscular and nerve therapy did not constitute "scientific research and experimental development" within the meaning of subsection 2900(1) of the Regulations.

52 The appeals will be allowed and the assessments referred back to the respondent to reconsider the allocation of expenses between the electro-magnetic radiation research and the muscular and nerve therapy activity and to calculate the Part VII refund on the basis that only the electro-magnetic radiation activity was scientific research or experimental development within the meaning of subsection 2900(1) of the Regulations. The decision to award costs will await such allocation.

Appeal allowed in part.

Footnotes

1 As stated in paragraph 6 of the reply to notice of appeal:
Under subparagraph 192(2)(a)(ii) of the Act a taxpayer's "Part VIII refund" is calculated by reference to the definition of "Investment Tax Credit" in subsection 127(9) of the Act. That definition refers to a "Qualified Expenditure". "Qualified Expenditure" is also defined in subsection 127(9) of the Act as meaning an expenditure "in respect of scientific research and experimental development that qualifies as an expenditure described in paragraph 37(1)(a) or subparagraph 37(1)(b)(i)". Subsection 37(7) of the Act states that in section 37 "scientific research and experimental development" has the meaning given to that expression by Regulation. Hence the resort to subsection 2900(1) of the Income Tax Regulations which contains a detailed definition of the phrase "scientific research and experimental development".