



Tax

Appeal to have tax implications for R&D - focused firms

By AdvocateDaily.com Staff



R&D-focused companies are anxiously awaiting more guidance from the courts as to whether they can claim tax credits while also receiving government assistance, says Toronto tax litigator [Adrienne Woodyard](#).

In one recent case before the Tax Court of Canada - *Immunovaccine Technologies Inc. v. The Queen* - the Canada Revenue Agency (CRA) took issue with the fact that a company received contributions from the Atlantic Canada Opportunities Agency (ACOA) to develop vaccines, while also claiming tax credits. In its 2013 decision, the *Globe and Mail* reports, the Tax Court ruled in favour of the CRA, “arguing that companies should not get government assistance and also tax credits.” The decision is currently being appealed to the Federal Court of Appeal.

“This decision has enormous implications for various industries on which our economy relies for the development of new technologies that can be readily commercialized, and which cannot sustain themselves solely on the basis of private funding,” says Woodyard, a lawyer with Davis LLP.

In the *Immunovaccine Technologies* case, says Woodyard, the taxpayer argued that the contribution from ACOA was not the same as other types of “government assistance” such as a grant, subsidy or forgivable loan because it included mandatory terms for repayment. This repayment was to be made from the taxpayer’s gross revenues, rather than exclusively out of the proceeds from the project funded with the ACOA contribution.

However, says Woodyard, “the court took a much broader view of the term ‘government assistant,’ and held that the ‘real test’ of whether a transfer of funds falls within the category



of 'government assistance' is whether the contribution in question was made '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.' The ACOA contribution simply could not meet this threshold."

Also, the position taken by the minister in this case, Woodyard says, may be part of an overall strategy by the revenue authority to set stricter limits on the availability of Scientific Research and Experimental Development (SR&ED) credits.

"The SR&ED program has been under increased scrutiny in recent years, no doubt due to the enormous refunds that have been paid out since the program was introduced in the 1980s. Indeed, some critics have called for a tightening of the program's eligibility requirements, and in 2012, the federal government launched a study on the impact of contingency fees (i.e. the fees charged by tax preparers - some of them former CRA employees - for assisting businesses to prepare their SR&ED claims) on the SR&ED program," she says.

"Of course, in the *Immunovaccine* case, the court did not eliminate entirely the possibility of the taxpayer claiming SR&ED credits and related refundable investment tax credits (RITCs); it merely had that the taxpayer could not qualify for the credits until it repaid the government loan. Whether the taxpayer will ever be in a position to do so, of course, is another matter altogether," says Woodyard.