Federal Court  Cour fédérale

Date: 20121127

Docket: T-1983-10

Citation: 2012 FC 1376

Ottawa, Ontario, November 27, 2012

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

THERATECHNOLOGIES INC.

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

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I. Introduction

[1] This judicial review application, commenced on November 26, 2010 by Theratechnologies Inc. (Thera), challenges the verbal refusal by the Minister of National Revenue (the Minister) on November 4, 2010 of a request by Thera to issue Notices of Determination of the amount of the refundable investment tax credits (RITCs) for Theratechnologies R&D Inc. (R&D Inc.) for each of the December 15, 1994 (the 1994 Tax Year) and the November 30, 1995 (the 1995 Tax Year). R&D Inc. was wound up into Thera in 1997.

[2] The Thera case is similar to another case heard by this Court at the same time, that of Signalgene R&D Inc. v Minister of National Revenue, Court docket T-1949-10 (*Signalgene*). A decision in that case is also being released today: see 2012 FC 1375. These two cases were joined by Order of Prothonotary Morneau, dated April 28, 2011.

[3] The *Signalgene* case challenges the Minister's refusal on October 26, 2010 of a request by Signalgene the Minister issue Notices of Determination of Signalgene's RITCs for each of the April 30, 1997, December 31, 1997, 1998 and 1999 taxation years.

[4] The similarities between both case are the following:

1. The Notice of Application to this Court is similar;
2. The subject matter of the cases are the same; the refusal to issue requested Notices of Determination of refundable investment tax credits earned;
3. The statutory provisions in the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)) (the *Act*) which are pertinent are the same;

4. The same statutory scheme giving rise to the entitlement to RITCs, namely, a research and development company incurring scientific research and experimental development expenses (SR&ED expenses) is present;
5. The Canada Revenue Agency's (CRA) Montreal office (MTSO) was involved in both cases.
6. The grounds for review sought by the two different and unrelated technology companies is equally the same; and
7. The decision maker was the same person, namely, Guylaine Gaudreault, Acting Director, SR&ED Division at the MTSO.

[5] What differs between the two cases is:

1. The timing of the filing of the relevant tax returns by the two applicants because of their different taxation years;
2. The timing of the verification of SR&ED expenses and the audit of non-refundable investment tax credits (ITCs);
3. The timing of any issuance of Notices of Assessment or Notices of Reassessment;
4. The timing of the claims by the two applicants for refundable ITCs, that is, the RITCs;
5. The personnel involved at the MTSO were different except for the Acting Director SR&ED;
6. The reasons for refusal of the requested Notices of Determination are somewhat different; and

7. The decision maker in this case did not submit any affidavit in support of the Minister's position.

[6] The similarity extends to the presence of the same counsel for Thera and for Signalgene as well as for the respondent and the same auditors. The auditors for both were the audit firm of KPMG. Evelyn Moskowitz, a partner of KPMG and a partner in KPMG's affiliate law firm filed an affidavit in support of both applications. She was not cross-examined on her affidavits.

II. Statutory Regime

[7] As will be immediately appreciated there is a difference between non-refundable ITCs and refundable ITCs, despite they have a common source, namely, SR&ED expenses from which they earn investment tax credits. Non-refundable ITCs (hereinafter ITCs) and refundable ITCs (hereinafter RITCs) operate differently. Non-refundable ITCs not used to offset federal tax payable in a year may be carried forward for a number of years or carried back three years to offset tax payable in those years.

[8] RITCs are only available for a taxpayer who is a Canadian Controlled Private Corporation (CCPC) as defined in the *Act*. Where the taxpayer is a CCPC has incurred SR&ED expenses, and its taxable income for the previous year does not exceed a certain threshold amount, that taxpayer is generally entitled to both a higher rate of Non-refundable ITCs and to an immediate refund of refundable tax credits to the extent they exceed the taxpayer's federal taxes payable for the taxation year in question. Unlike excess ITCs, excess RITCs are not carried forward (or back) to offset federal taxed payable in other taxation year. Instead, they are immediately paid out to the taxpayer

with the assessment of its Part I tax as a "refund" of taxes that the taxpayer is deemed to have paid in respect of the particular taxation year (the Deemed Overpayment). Under section 127.1(1) of the *Act* no Deemed Overpayment (and no consequent entitlement to an RITC refund) arises unless the taxpayer files certain prescribed forms and information with the Minister.

[9] In terms of the statutory provisions, the point of departure is section 127.1(1) entitled Refundable investment tax credit, it reads:

127.1 (1) Where a taxpayer (other than a person exempt from tax under section 149) files	127.1 (1) Lorsqu'un contribuable (à l'exception d'une personne exonérée d'impôt en vertu de l'article 149) présente :
(a) with the taxpayer's return of income (other than a return of income filed under subsection 70(2) or 104(23), paragraph 128(2)(f) or subsection 150(4)) for a taxation year, or	a) avec sa déclaration de revenu produite pour une année d'imposition, à l'exception d'une déclaration de revenu produite en vertu des paragraphes 70(2) ou 104(23), de l'alinéa 128(2) f) ou du paragraphe 150(4);
(b) with a prescribed form amending a return referred to in paragraph 127.1(1)(a) a prescribed form containing prescribed information, the taxpayer is deemed to have paid on the taxpayer's balance-due day for the year an amount on account of the taxpayer's tax payable under this Part for the year equal to the lesser of	b) avec un formulaire prescrit modifiant une déclaration visée à l'alinéa a), un formulaire prescrit contenant les renseignements prescrits, il est réputé avoir payé, à la date d'exigibilité du solde qui lui est applicable pour l'année, une somme au titre de son impôt payable pour l'année en vertu de la présente partie égale à son crédit d'impôt à l'investissement remboursable pour l'année ou, s'il est inférieur, au montant qu'il a
(c) the taxpayer's refundable investment tax credit for the year, and	
(d) the amount designated by the taxpayer in the prescribed	

form.	indiqué dans le formulaire prescrit.

[Emphasis added]

[10] Section 152(1) of the *Act* is entitled "Assessment" and its subsection 152(1)(b) keys into section 127.1(1) above. It reads:

152. (1) The Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine	152. (1) Le ministre, avec diligence, examine la déclaration de revenu d'un contribuable pour une année d'imposition, fixe l'impôt pour l'année, ainsi que les intérêts et les pénalités éventuels payables et détermine :
(a) the amount of refund, if any, to which the taxpayer may be entitled by virtue of section 129, 131, 132 or 133 for the year; or	a) le montant du remboursement éventuel auquel il a droit en vertu des articles 129, 131, 132 ou 133, pour l'année;
(b) the amount of tax, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year.	b) le montant d'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 122.7(2) ou (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année.

[Emphasis added]

[11] Section 152(1.2) provides that provisions as they relate to an assessment or a reassessment and to assessing and reassessing tax apply to a determination or re-determination of an amount under this division. It reads:

(1.2) Paragraphs 56(1)(l) and 60(o), this Division and Division J, as they relate to an assessment or a reassessment and to assessing or reassessing tax, apply, with any modifications that the circumstances require, to a determination or redetermination under subsection (1.01) and to a determination or redetermination of an amount under this Division or an amount deemed under section 122.61 to be an overpayment on account of a taxpayer's liability under this Part, except that

(a) subsections (1) and (2) do not apply to determinations made under subsections (1.01), (1.1) and (1.11);

(b) an original determination of a taxpayer's non-capital loss, net capital loss, restricted farm loss, farm loss or limited partnership loss for a taxation year may be made by the Minister only at the request of the taxpayer; and

(c) subsection 164(4.1) does not apply to a determination made under subsection 152(1.4).

[Emphasis added]

(1.2) Les alinéas 56(1)l) et 60o), la présente section et la section J, dans la mesure où ces dispositions portent sur une cotisation ou une nouvelle cotisation ou sur l'établissement d'une cotisation ou d'une nouvelle cotisation concernant l'impôt, s'appliquent, avec les adaptations nécessaires, à toute détermination ou nouvelle détermination effectuée selon le paragraphe (1.01) et aux montants déterminés ou déterminés de nouveau en application de la présente section ou aux montants qui sont réputés par l'article 122.61 être des paiements en trop au titre des sommes dont un contribuable est redevable en vertu de la présente partie. Toutefois :

a) les paragraphes (1) et (2) ne s'appliquent pas aux déterminations ou aux montants déterminés en application des paragraphes (1.01), (1.1) et (1.11);

b) le montant d'une perte autre qu'une perte en capital, d'une perte en capital nette, d'une perte agricole restreinte, d'une perte agricole ou d'une perte comme commanditaire subie par un contribuable pour une année d'imposition ne peut être initialement déterminé par le ministre qu'à la demande du contribuable;

c) le paragraphe 164(4.1) ne s'applique pas aux montants déterminés en application du paragraphe (1.4).

[12] Section 152(2) of the *Act* headed "Notice of Assessment" reads:

(2) After examination of a return, the Minister shall send a notice of assessment to the person by whom the return was filed.	(2) Après examen d'une déclaration, le ministre envoie un avis de cotisation à la personne qui a produit la déclaration.

III. The Decision under Review

[13] The November 4, 2010 telephone message left in the telephone mailbox of Evelyn Moskowitz by Guylaine Gaudreault, Acting Director SR&ED Division at MTSO, which post dates her telephone message of October 26, 2010 in the *Signalgene* case, is as follows:

> Hello, Evy, Guylaine Gaudreault. Sorry for taking so long to get back to you. I'm not much in my office, but I took the time to review your two files – Thera and Algene [Signalgene]. I think I have some good news and bad news. In the case of Algene, if, and I will have to check on this, we never issued a Determination for the refundable investment tax credits, I think you are right, we'll have to issue you one. I don't think it has ever been done, but I need to confirm this. And in the case of Thera, unfortunately, a determination of the refundable ITC was submitted to the taxpayer on August 30, 1999 as a result of an audit. So, based on what I have in the file, we do not re-issue a Determination if one has already been issued, so I should get back to you, I hope, early next week. Tomorrow I'm not in the office, but I will be making a few follow-ups. And hopefully, we'll be able to resolve this ASAP. So sorry again for the delay. If you want to call me, I'll be in the office next week, Monday and Tuesday afternoon. Have a good day, bye!

IV. The Facts

[14] Only two R&D Inc. taxation years are involved in this judicial review application: its December 15, 1994 and November 30, 1995 taxation years (the Relevant Taxation Years).

(a) The 1994 Tax Year

[15] For its 1994 tax year R&D Inc. filed its income tax return on March 13, 1995. It declared having incurred SR&ED expenses of $7,132,000 and declared ITCs of $911,000. It identified itself as a "corporation controlled by a public corporation" (hereinafter a Non-CPCC) and therefore not eligible to earn RITCs. The Minister says in his memorandum of fact and law that R&D Inc. "claimed nil amount of RITC in its returns."

[16] The Minister says that he initially assessed R&D Inc. for its 1994 year on April 18, 1995 and that as a Non-CPCC that 1994 tax year became statute-barred four years later, i.e. on April 18, 1999.

[17] Between December 27, 1995 and May 6, 1998 the Minister audited R&D Inc. for its 1994 tax year. The auditor was to audit R&D Inc.'s SR&ED claim composed of its SR&ED expenditures and its non-refundable ITCs. No change resulted from the audit as compared to the initial assessment.

[18] Counsel for the Minister points to the CRA's final audit letter to R&D Inc. for its 1994 tax year. He writes the following in his memorandum:

> In its final audit letter to Theratechnologies dated June 12, 1998, the auditor informed it that its claim for RITCs had been processed as claimed in its return: "votre réclamation de crédit d'impôt à l'investissement et de crédit d'impôt remboursable à l'investissement relatif à vos dépenses admissibles a été traitée comme il était indiqué dans votre déclaration." No representations were made by Theratechnologies with respect to the results of the audit.

(b) The 1995 Taxation Year

[19] For that taxation year, R&D Inc. filed its income tax return on March 14, 1996. It declared having incurred SR&ED expenses of $5,380,830 and ITCs of $793,437. It continued to identify itself as a Non-CCPC and therefore not eligible to earn RITCs. The Minister says R&D Inc. "claimed nil amount in it returns."

[20] The Minister states in his memorandum R&D Inc. was assessed initially on April 25, 1996 as a Non-CPCC its 1995 taxation which became statute-barred on April 25, 2000.

[21] R&D Inc. was also audited for its 1995 taxation year between December 1997 and January 1999. The auditor's mandate was to audit the company's SR&ED expenses and corresponding tax credits namely non-refundable ITCs and Quebec tax credits.

[22] On February 11, 1999 the auditors sent a proposed reassessment to Thera (R&D Inc.) having been folded into that company and subsequently dissolved). The respondent says the proposed reassessment included a schedule indicating Thera's RITCs "were established as declared, at nil". Discussions took place between the auditors and Thera on issues not related to the RITCs.

[23] Agreement was reached; the auditor on May 28, 1999 (finalized on June 17, 1999) sent a revised proposed amendment which included a schedule indicating that Thera's RITCs were established at, as declared, at nil. On August 30, 1999 Thera was reassessed by the Minister in order to implement the adjustments from the audit.

V. Thera's Requests for RITCs

(a) The First Request

[24] The Minister recognizes that on September 17, 2001 Thera submitted amended income tax returns for each of 1994 and 1995 taxation years in which it identified itself for the first time as a CCPC and claimed for the first time RITCs totalling $904,293 for it 1994 year and $835,596 for its 1995 year.

[25] Discussions took place; Thera also asked the Minister for a Determination of Loss for it's 1995 taxation year.

[26] On August 7, 2002 the Minister refused to process Thera's amended return for 1994 on the ground it was filed out of time and on August 4, 2003 refused to process Thera's amended returns for 1995 on the same grounds, i.e. filed out of time.

[27] On September 3, 2003 the Minister reiterated his refusal to process Thera's amended returns for 1994 and 1995 taxation years on the same ground, i.e. filed out of time (the Oliverio decision).

[28] Thera did not dispute these decisions to refuse to process its amended returns pending the outcome of a case before the Tax Court of Canada known as the *Perfect Fry* case (*Perfect Fry Company Ltd. v The Queen*, 2007 TCC 133). Justice Paris of the Tax Court of Canada decided the *Perfect Fry* case on March 6, 2007. The Minister's appeal to the Federal Court of Appeal was dismissed from the Bench on June 18, 2008.

[29] For tactical reasons, in conjunction with its efforts in 2001, 2002 and 2003 to obtain RITCs for the Relevant Taxation Years, Thera, as previously noted asked the Minister to determine its loss for 1995. On April 17, 2002 the Minister issued a determination of non capital losses. On July 9, 2002 Thera objected to the determination of loss on the grounds that it was entitled to RITCs.

[30] It was not until June 29, 2009 that CRA dismissed Thera's Notice of Objection thereby confirming the loss determination. Thera had asked CRA Appeals to hold deciding its objection until the *Perfect Fry* case had been decided. CRA Appeals in dismissing the Notice of Objection took the position Thera was not entitled to raise any issue (i.e. the 1995 RITCs claim) other than the amount of its losses for the 1995 tax year. Thera did not pursue the issue further because, as a result of the *Perfect Fry* decision at the Tax Court of Canada, it had a more direct route to assert its entitlement to RITCs for its 1994 and 1995 tax years.

(b) The Reassertion of the RITCs Claims

[31] It will be recalled the first time Thera asserted R&D Inc.'s RITCs claim was on September 17, 2001 with the result the Minister refused to process the amended income tax returns (which contained the prescribed information required by section 127.1(1) of the *Act* because the amended returns were filed out of time, i.e. were statute-barred.

[32] As noted, on March 6, 2007 Justice Paris of the Tax Court of Canada decided the *Perfect Fry* case. On August 10, 2007 Sylvain Charest of KPMG, on behalf of Thera, re-filed the same amended income tax returns with prescribed information as he had on September 17, 2001 and

noted Mr. Oliverio's decision of September 3, 2003 that CRA could not consider those documents because they were not produced (filed) within the required time frame.

[33] Mr. Charest submitted as a result of the *Perfect Fry* case he understood CRA had changed its position and now recognized that the T-2038 forms containing the information prescribed by section 127.1(1) of the *Act* were not subject to any delay of production (filing time limit). He noted in *Perfect Fry* the T-2038 amended form had been filed by that company well beyond 18 months after its tax year limits and had increased the ITCs by 15%, according to section 127 (10.1) of the *Act* and calculated RITCs in accordance with section 127.1(1) but had refused the required refund.

[34] Mr. Charest formally asked CRA to process the amended T-2038 as contemplated under section 127.1(1) and then determine the amount of RITCs Thera was entitled to and finally to refund any deemed overpayment.

[35] CRA's response came on September 17, 2010 in the form of a letter from Giovanna Paglia, Manager of Financial Reviews SR&ED Division, MTSO to KPMG LLP. That letter read:

> This letter is in response to your letter dated August 10, 2007 (copy attached) regarding your request for refundable investment tax credits ("ITCs") for your taxation years ending December 15, 1994 and November 30, 1995.
>
> The review of CRA files indicated that these requests to the modifications of ITCs and refundable ITCs were already the subject of a CRA review and that a final response was communicated to you on September 3, 2003 (copy attached) advising you that the requests were inadmissible.

> Furthermore, the requests for refundable ITCs were made after the expiry of the normal reassessment period and are therefore inadmissible.
>
> [Emphasis added]

(c) Subsequent Correspondence

[36] On September 23, 2010 Evelyn Moskowitz wrote a letter to Giovanna Paglia in response to Giovanna Paglia's September 17, 2010 refusal letter. She stated her letter had two purposes:

- First, to comment briefly on the merits of the position CRA had previously reiterated on Ceptember 3, 2003, namely, the request for RITCs were inadmissible because not filed by a specific date, i.e. that a RITC claim had to be made within 18 months of the year in which the SR&ED expenditures giving rise to the RITC claims were made; and the statute-barred reason because they were made outside the normal reassessment period. She argued that both the 18 month bar and the outside the normal reassessment period bars were contrary to the *Perfect Fry* decision.

- Second, if, notwithstanding the two arguments put forward by her, CRA was still of the view that Thera is not entitled to any portion of the claims, "we request that CRA issue Notices of Determination in that regard for each relevant year and state in that Notice the amount of RITCs to which it believes Thera is entitled to for those years (1994 and 1995 taxation years).

[37] Evelyn Moskowitz went on to argue the Minister, before Justice Paris, at the outset of the trial, abandoned the argument there was an eighteen month deadline within which to file a RITC claim.

[38] As to the statute-barred argument, she submitted Justice Paris, construing the *Act*, and particularly, sub-section 152(1.2) held "refunds which are payable as a consequence of a determination must be requested within the taxpayer's normal redetermination period rather than within its normal reassessment period."

[39] It was after Evelyn Moskowitz received Guylaine Gaudreault's November 4, 2010 voicemail message that Thera began these proceedings on November 26, 2010 within the prescribed 30-day limitation under the *Federal Courts Act* (RSC, 1985, c F-7).

[40] After the filing of the Notice of Application, Evelyn Moskowitz filed on December 16, 2010 a Notice of Objection to the September 17, 2010 letter but taking the view it was not a Notice of Determination but was filing the Notice of Objection as a protective measure in the event CRA took a contrary view than the one it had previously taken. There is nothing in the record to suggest that CRA ever did take the contrary view.

VI. The Affidavit Evidence

(a) On Behalf of Thera

(i) Affidavit of Evelyn Moskowitz

[41] As previously mentioned, Thera's application for judicial review was supported by the affidavit of Evelyn Moskowitz who was not cross-examined. Her affidavit is restricted to providing a chronological enumeration of the major events in this case. She also provided her interpretation of the *Perfect Fry* case.

[42] She did, however, in paragraph 31 of her affidavit, refer to an August 31, 2010 Directive issued by the Director of Policy Development at CRA Headquarters (CRA-HQ) in Ottawa sent to all Assistant Directors/SR&ED Division at each Tax Services Office which stated as follows:

> In cases where the tax year is statute-barred, any letter issued by the TSO/TC to the taxpayer denying a [taxpayer requested adjustment] should be worded to ensure that it is not considered a determination or reassessment thus allowing a taxpayer the right to object. It is recommended that the letter include the following wording:
>
> > Our examination of the CRA's files upon receipt of your letter of MM/DD/YY, shows that the ITC in question had already been reviewed by the CRA and that a final response had been sent on MM/DD/YY. The CRA has therefore discharged its duty with regard to your request.
>
> [Emphasis added]

[43] She opined the September 17, 2010 letter sent to her by Giovanna Paglia "was in accordance with the Directive".

(b) On Behalf of the Minister

[44] The Minister's position was supported by the following affidavits.

(i) Joseph Gatti's Affidavit

[45] Joseph Gatti is an auditor in MTSO's SR&ED Division. His mandate was to audit R&D Inc.'s 1994 tax year SR&ED claim "composed of its SR&ED expenditures and its SR&ED ITCs."

[46] Mr. Gatti appended to his affidavit R&D Inc.'s 1994 income tax return without schedules as Exhibit 1 to his affidavit. He states R&D Inc.'s 1994 taxation return was initially assessed on April

18, 1995; the amounts claimed as SR&ED expenditures and ITCs were allowed. There is no mention of any claim for RITCs in that assessment. R&D Inc., in its tax return had identified itself as a Non-CCPC and there not eligible to earn RITCs.

[47] He finalized his audit on May 6, 1998. The result was no change to R&D Inc.'s declaration. He appends as Exhibit 2 a copy of his audit report.

[48] At page 123 of the Respondent's Record (RR) is a copy of the first five pages of R&D Inc.'s tax return for 1994. R&D Inc. identified itself as a Non-CCPC and therefore not eligible to claim RITCs but eligible to claim ITCs, e.g. non refundable tax credits which it did so and were allowed in the amount of $911,000.

[49] He noted in paragraph 1 to his audit report that his audit was restricted to a review of the SR&ED claims and related investment tax credit (ITC) and refundable ITC and, particularly, the qualified expenditures for ITC purposes were reviewed in order to validate the claim.

[50] In the covering letter of June 1998 to Thera he states "Ainsi votre réclamation de crédit d'impôt d'investissement et de crédit d'impôt remboursable est comme il était indiqué dans votre déclaration."

(ii) Affidavit of Michel Beaudry

[51] His affidavit is written in French; he is an auditor in the MTSO and was assigned the task of auditing R&D Inc.'s 1995 tax return. He was also assigned to audit Thera's income tax returns for

the 1996 and 1997 tax years which I will not deal with since only the 1994 and 1995 tax years are involved in this judicial review application.

[52] He had a similar mandate as that given to Joseph Gatti: audit the SR&ED expenses claimed and the tax credits associated with those expenses "soit le credit d'impôt à l'investissement (CII)…" Exhibit 1 to his affidavit is R&D Inc.'s 1995 return. It clearly shows R&D Inc. identified itself as a Non-CPCC therefore not eligible to claim RITCs.

[53] Mr. Beaudry makes this point clearly in his affidavit:

> En produisant ses déclarations de revenu pour ses années d'imposition 1995, 1996 et 1997, Theratechnologies R&D Inc. n'a réclamé aucun CII remboursable (« CIIR »). (RITCs)
>
> [Emphasis added]

[54] He confirms the SR&ED expenses and the CII (Non-refundable ITCs) earned by R&D Inc. were accepted as declared in the initial Notice of Assessment issued by CRA which for the 1995 taxation year was on August 25, 1996.

[55] As part of his audit, he examined R&D Inc.'s corporate books which showed on November 30, 1997 R&D Inc. to be 100% owned by Thera and voluntarily dissolved in March of 1998.

[56] In the balance of his affidavit he describes the exchanges between he and Thera's Accounting Director in an effort to agree on a proposal for the issuance of a reassessment for the three years involved in his audit. During that process he confirmed R&D Inc. statute barred date was four years from the date of the initial Notice of Assessment and not three years because R&D

Inc. was declared as a Non-CCPC. Agreement was quickly reached for the 1995 tax year, the problem being with the 1997 tax year which is of no concern in this judicial review application.

[57] On August 30, 1999 reassessments were issued in order to implement the agreement reached and the changes were explained in T7WC forms issued for each tax year. That form, Mr. Beaudry explains, indicated the amount of ITCs earned and balances in the ITC pool carried over. There is no mention by Mr. Beaudry of any determination of RITCs.

[58] Mr. Beaudry's audit report, upon which reassessment was based, clearly shows Thera (R&D Inc.) not to be eligible to earn RITCs. Mr. Beaudry wrote:

> **(l) Crédit d'impôt à l'investissement**
>
> Le Contribuable n'est pas admissible au taux majorité de 35% selon 127(10.1) car il n'était pas une SPCC [CCPC] tout au long de la période vérifiée.
>
> **(m) Crédit d'impôt à l'investissement remboursable**
>
> Le Contribuable n'a pas droit au remboursement des crédits d'impôt gagnés sur les dépenses courantes et en capital de RS & DE car il n'est pas une société admissible en vertu de 127.1(2) de la LIR.
>
> [Emphasis added] (See RR, p 340)

[59] Moreover, the issued T7WC for the 1995 tax year and for 1996, and 1997 make no mention of RITCs (Se RR, pp 342-344).

(iii) Louis Bougie's Affidavit

[60] It will be recalled that Mr. Bougie was in charge of dealing with the Notice of Objection Thera filed on July 12, 2002 against CRA's Notice of Loss determination for the 1995 tax year. That objection was based on Thera's contention that it was entitled to RITCs.

[61] In his affidavit, Mr. Bougie noted, at paragraph 5, Thera had previously filed amended income tax returns for its 1994 and 1995 tax years "the purpose of which was to obtain a new calculation of its RITC."

[62] He wrote the following at paragraph 7 of his affidavit:

> Before I made a decision on the objection, I was made aware that on August 7, 2002, August 4, 2003 and again on September 3, 2003, the CRA had already determined that Theratechnologies R&D Inc. was not entitled to the RITCs it requested for its taxation years ending December 15, 1994 and November 30, 1995.
>
> [Emphasis added]

[63] At paragraph 9 of his affidavit he indicates that on or around June 29, 2009 he informed both KPMG and Thera of his decision on the loss objection:

> I advised them that Theratechnologies R&D Inc. could not argue it was entitled to RITCs: the amount of its non-capital loss was the sole issue to be decided.
>
> [Emphasis added]

[64] As noted, Thera did not appeal the matter to the Tax Court of Canada as it was entitled to.

(iv) Giovanna Paglia's Affidavit

[65] As previously mentioned, Giovanna Paglia, as a Team Leader in the Montreal TSO's SR&ED Division was in charge of answering Thera's request "to process the amended T-2038 ITC forms and to determine the amount of the refundable ITC" (paragraph 1 of her affidavit).

[66] In paragraphs 2 to 7 inclusive of her affidavit, she traces the history of Thera's efforts to obtain RITCs; (1) beginning with Mr. Charest's letter request of September 17, 2001 which was denied on September 3, 2003 by Joe Oliverio on the ground Thera's amended claim for "an Investment Tax Credit" had been untimely filed and; (2) the RITC claim was reasserted in Mr. Charest's August 10, 2007 letter which "requested on behalf of the Applicant that CRA determine the amount of RITC the Applicant was entitled to for its 1994 and 1995 taxation years" she stated Mr. Charest "based this new request on the fact that in his opinion, the Tax Court of Canada in another case had held those forms could be filed at any time".

[67] She then said at paragraph 9 of her affidavit Guylaine Gaudreault, Acting Director of the SR&ED Division of CRA at the MTSO asked her to answer Thera's 2007 request sent by Mr. Charest.

[68] She then wrote the following at paragraph 9 of her affidavit:

> On September 17, 2010, I answered the Applicant's 2007 request with a courtesy letter in which I set out the following:
>
> (a) The same request had already been made in 2001;
>
> (b) CRA had already answered it in the negative on September 3, 2003;

(c) CRA's 2003 decision was final;

(d) The 2001 request was untimely filed

[Emphasis added]

[69] At paragraph 12, Giovanna Paglia notes that on or around September 23, 2010 she received further representations on the matter from Evelyn Moskowitz of KPMG and said in the next paragraph she "was not in charge of answering them".

VII. The Results of the Cross-Examination of the Respondent's Affiants

[70] Mr. Gatti recognized:

1. He did not know what was actually put in the Notice of Assessment of R&D Inc. for its 1994 tax year (AR, p 170).
2. He has never had a taxpayer request a Notice of Determination of RITCs (AR p 171).
3. R&D Inc. did not request a Notice of Determination of RITCs for the 1994 taxation year (AR p 171).
4. For the 1994 tax year R&D Inc. did not request any RITCs (AR pp 177 and 178).
5. He confirmed that exhibit 3 to his affidavit, the letter dated June 12, 1998 told R&D Inc. that his audit confirms its RITC claim was as indicated in its income tax return for 1994. He confirmed once again the taxpayer had not requested any RITCs and that he did not determine any (AR pp 178-180).

[71] Mr. Beaudry, the auditor for R&D Inc.'s 1995 income tax return confirmed on cross-examination the following:

1. A notice of reassessment had been sent out after his audit but it was not attached to his affidavit. This fact was derived from looking at a computer printout (AR p 237) but he did not actually see that document.
2. He examined R&D Inc.'s income tax returns and in particular the T-661 for thd SR&ED expenses claimed and then the T-2038 which show the calculations for the investment tax credits sought (AR p 244), as well as the T-2S1 form if there is an amendment to net revenue sought and, the company's financial statements (AR p 245).
3. In terms of the RITCs requested for the 1995 tax year that number was zero; R&D Inc. did not request RITCs (AR pp 248-253). What was claimed by R&D Inc. were non refundable ITCs. The reason was the company was not eligible for RITCs because it was identified as "une société controlée par une société publique". His audit only concerned the SR&ED expenses and the claimed non refundable ITCs (AR p 253-255).
4. He had never seen a Notice of Determination of RITCs and none of the documents enumerated at AR p 256 were notices of determination of RITCs.
5. To him "une réclamation à zéro ce n'est pas une réclamation" (AR p 260). He also confirmed that the T7WC which explained the reassessment for 1995 made no reference to RITCs (AR p 264).

[72] Giovanna Paglia's cross-examination was lengthy. The main points gleaned were:

1. The mandate she received from Guylaine Gaudreault on April 6, 2010 was to answer Thera's 2007 request by Sylvain Charest, to process the amended T-2038 ITC forms and to determine the amount of the refundable ITC (RITCs).
2. She explained the three year gap between the 2007 request and 2010 answer due to the fact the file was in the Appeals Section (on the Notice of Objection related to the loss determination) and the CRA wanted to wait until that decision was made before replying to the 2007 request and such was normal practice; she also indicated she did not speak to Mr. Bougie about the file given concerns of independence (AR p 195).
3. She explained she was not in charge of answering Evelyn Moskowitz's letter of September 23, 2010 making further representations to the letter she sent to Mr. Charest on September 17, 2010. It will be recalled that in her September 23, 2010 letter Evelyn Moskowitz formally asked CRA to issue Notices of Determination of Thera's entitlement to RITCs which led to Guylaine Gaudreault's voicemail message of November 4, 2010.
4. Her mandate was to answer Mr. Charest's letter of 2007. She also expressed the view she did not make any decision on September 17, 2010 "I just reconfirmed the Department's position that was already made in 2003"(AR p 200). She conceded, prior to her letter of September 17, 2010 Mr. Charest had not received a formal response from CRA (AR pp 201-202).
5. She stated what she had to do to accomplish her task in replying was to validate the information written in the letter of August 2007 and to check if CRA had rendered a decision on September 3, 2003.

6. She acknowledged she did not read the *Perfect Fry* case before replying nor did she examine the pertinent sections of the *Act* (AR p 204) nor did she look at the technical merits of his argument (AR p 205).
7. She confirmed Mr. Charest's request was to process the amended T-2038 forms and to determine the amount of RITCs.
8. When asked whether Mr. Charest had asked CRA to issue a Notice of Determination of RITCs she answered he "just asked us to determine the amount of the RITCs". She conceded she was not familiar with the need to issue Notices of Determination of RITCs and never had such a request (AR p 208).
9. When asked if a person needs to contest the ruling how do they do it she answered they file a Notice of Objection and when asked to what she answered to their Notice of Assessment (AR p 209).
10. When asked whether she was telling Mr. Charest he could not have a refund she answered "I wasn't telling him anything. I was confirming the position CRA had made in 2003" (AR p 210).
11. She agreed the only decision Mr. Oliverio made in September 2003 was that he could not accept the amended T-2038 forms (AR pp 211-213). Her September 17, 2010 letter was a courtesy letter to re-confirm CRA's 2003 decision; she did not refuse to issue a Notice of Determination or investment tax credits.
12. Asked if she looked at any Notices of Reassessment had been issued to the applicant or did not consider whether a Notice of Assessment or Reassessment was a Notice of Determination of RITCs (AR p 214).

13. She confirmed she did not look at any technical interpretations or speak to anyone at CRA-HQ when dealing with the matter (AR p 216-217).

VIII. The Position of the Parties

(a) That of Thera

[73] As noted, Thera's challenge is to the Minister's decision to refuse to issue to it Notices of Determination, the Notice in respect of its claims for RITCs. It requests this Court to issue a writ of mandamus ordering the Minister to issue such Notices so that Thera in turn can exercise its rights of appeal and objection and appeal if need be.

[74] Thera's legal argument is the same as that in *Signalgene* and is incorporated into these reasons with such factual adaptation as are necessary. A comparison of the applicant's Memorandum in the *Signalgene* case and this case amply demonstrate the identity of legal arguments.

(b) That of the Respondent

[75] Again for the sake of brevity a reading of the Minister's position is in essence the same as expressed in the *Signalgene* case.

IX. Analysis and Conclusions

[76] As I did in the *Signalgene* case, I consider the essence of Thera's case to be a judicial review application in which Thera seeks to quash coupled with an appropriate remedy under paragraph 18.1(3)(a) of the *Federal Courts Act* the decision made by Guylaine Gaudreault, Acting

Director, SR&ED Division at the MTSO on October 26, 2010 in which she advised Evelyn Moskowitz in respect of Thera that a determination for RITCs was submitted to Thera on August 20, 1999 as the result of an audit. She also advised "we do not re-issue a Determination if one has already been issued." This is the same ground as expressed in *Signalgene* i.e. Notice of Reassessment is deemed to be a Notice of Determination.

[77] The reference to August 30, 1999 were the Reassessments which were issued as a result of Michel Beaudry's audit (see paragraph 57 of these reasons) which Mr. Beaudry specifically said has nothing to do with RITCs because Thera was not eligible to claim those not being a SPCC (CCPC) (see paragraph 58 of these reasons). Moreover, in cross-examinations Mr. Beaudry specifically said "une réclamation à zéro ce n'est pas une réclamation" (paragraph 71(5))

[78] A review of the Affidavits of the other auditors is to the same effect; they were not auditing Thera's RITCs because none were claimed at that time. The first time Thera claimed RITCs was in 2001 before the *Perfect Fry* case. That claim was refused to be processed because it was filed out of time (the Oliverio decision).

[79] Thera's RITC claims were reasserted on August 10, 2007 by Sylvain Charest on behalf of Thera. Those claims were refused on September 10, 2010 in Giovanna Paglia's letter on the grounds they were statute barred and had already been reviewed following the Directive of August 13, 2012 which concerned a request to change the corporation type reported on a T2 corporation income tax return after the statute barred date.

[80] As a result, I consider that the decision under review in Thera which was made by the same person as decided the *Signalgene* case and refused on the same basis i.e. Notice of Reassessment is a deemed Notice of Determination suffers from the same infirmities as identified in that case: disregard of the technical ruling, disregard of the scheme of the Act in respect of RITCs and disregard of the teachings in the *Perfect Fry* case.

[81] As a result this judicial review application must be granted.

JUDGMENT

THIS COURT'S JUDGMENT is that this judicial review application is granted with costs to be assessed on Column V with the units fixed at the highest number in the range for each assessable service of the Court's Tariff. The Minister's decision of November 4, 2010 refusing to issue to the applicant Notices of Determination of the amount of the applicant's RITCs for the relevant two tax years is quashed and the matter is remitted pursuant to this Court's power under paragraph 18.1(3)(a) of the *Federal Courts Act* to the Minister for the issuance of the requested Notice of Determination of the amount the applicant is deemed to have paid on account of its tax payable under Part I in each relevant tax year in accordance with paragraph 152(1)(b) of the *Income Tax Act*.

"François Lemieux"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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