Industry Research & Development Board v Unisys Information Services Australia Pty Ltd (formerly Synercom Australia Pty Ltd) [1997] FCA 777 (19 August 1997)

FEDERAL COURT OF AUSTRALIA

INDUSTRY RESEARCH AND DEVELOPMENT - research and development activities - software development project - certificate issued - eligibility for tax concession - whether Tribunal in error of law in determining activity involved "innovation or technical risk."

Administrative Appeals Tribunal Act 1975(Cth), s44

Industry Research and Development Act 1986 (Cth) s39T

Income Tax Assessment Act 1936 (Cth) ss73B(1), 73B(1)(a)(ii)

Acts Interpretation Act 1901 (Cth) ss15AA, 15AB(1)(a), 15AB(1)(b)(i)

Re North Broken Hill Limited and Industry and Research Development Board 93 ATC 2148

Re Mobil Oil Australia Limited and Industry Research and Development Board 95 ATC 2042

Farnell Electronic Components Pty Ltd v Collector of Customs (1996) 142 ALR 322

Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union [1979] FCA 85; (1979) 27 ALR 367

Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd [1982] FCA 206; (1982) 44 ALR 557

Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 136 ALR 481

Collector of Customs v Agfa-Gevaert Ltd [1996] HCA 36; (1996) 141 ALR 59

Maunsell v Olins [1975] AC 373

INDUSTRY RESEARCH AND DEVELOPMENT BOARD v UNISYS INFORMATION SERVICES AUSTRALIA PTY LIMITED (Formerly SYNERCOM AUSTRALIA PTY LIMITED) (ACN 000 005 309)

NG 247 OF 1997

CARR, R D NICHOLSON AND FINN JJ

PERTH

19 AUGUST 1997

IN THE FEDERAL COURT OF AUSTRALIA)
)
WESTERN AUSTRALIA DISTRICT REGISTRY) NG 247 of 1997
)
GENERAL DIVISION)

BETWEEN: INDUSTRY RESEARCH AND DEVELOPMENT BOARD

Applicant

AND: UNISYS INFORMATION SERVICES AUSTRALIA PTY LIMITED (formerly SYNERCOM AUSTRALIA PTY LIMITED) (ACN 000 005 309)

Respondent

JUDGES: CARR, R D NICHOLSON AND FINN JJ

PLACE: PERTH

DATED: 19 AUGUST 1997

MINUTE OF ORDERS

THE COURT ORDERS THAT:

The appeal be dismissed with costs.

IN THE FEDERAL COURT OF AUSTRALIA)
)
WESTERN AUSTRALIA DISTRICT REGISTRY) NG 247 of 1997
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BETWEEN: INDUSTRY RESEARCH AND DEVELOPMENT BOARD

Applicant

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JUDGES: CARR, R D NICHOLSON AND FINN JJ

PLACE: PERTH

DATED: 19 AUGUST 1997

REASONS FOR JUDGMENT

THE COURT

The applicant brings this appeal pursuant to s44 of the *Administrative Appeals Tribunal Act 1975* (Cth) from a decision of the Administrative Appeals Tribunal *("the Tribunal")* under s39T of the *Industry Research and Development Act 1986* (Cth) ("*the Act 1936* "). The decision of the Tribunal was to set aside the decision under review and remit the matter to the applicant with a direction the respondent is entitled to a favourable certificate under s39L of the Act. The effect of the certificate is that work undertaken during the income year(s) ended 31 December 1990 and 31 December 1991 in connection with the development of certain computer software constitutes "*research and development activities*" within the meaning of s73B(1) of the *Income Tax Assessment Act* (Cth) *("the Tax Act").*

RESEARCH AND DEVELOPMENT ACTIVITIES

Section 73B was introduced by the *Income Tax Assessment Amendment (Research and Development*) *Act 1986* (Cth). The section was subsequently amended by the *Taxation Laws Amendment Act (No 4)* 1994(Cth) (No 181 of 1994) s3 and Sch4 Pt2 by the substitution of a new definition of *"research and development activities"*. That definition was further amended in 1996 by the *Taxation Laws Amendment Act (No 3)*1996 (Cth) (No 78 of 1996) s3 and Sch4 Div7. However, the definition as originally enacted remains applicable to deductions claimed for income years prior to 1994-1995 (see *Taxation Laws Amendment Act (No 4)* 1994 s3 and Sch4 Item 23).

At the relevant time, s73B(1) of the *Tax Act 1901* provided that *"research and development activities"* meant:

"(a) systematic, investigative or experimental activities that -

(i) are carried on in Australia or in an external Territory;

(ii) involve innovation or technical risk; and

(iii) are carried on for the purpose:

(A) of acquiring new knowledge (whether or not that knowledge will have a specific practical application); or

(B) creating new or improved materials, products, devices, processes or services; or

(b) other activities that -

(i) are carried on in Australia or in an external Territory; and

(ii) are carried on for a purpose directly related to the carrying on of activities of the kind referred to in paragraph (a);" (Emphasis added).

The only issue before the Tribunal was whether work undertaken by the respondent in the development of the computer software satisfied the requirements of par(a)(ii) of the definition.

TRIBUNAL'S REASONS

The Tribunal (Deputy President McMahon and Mr Way) commenced their reasons by stating the application was brought to review a decision which had been confirmed on review by the Tax Concession Committee*("the TCC").* As the reasons recount, the applicant had delegated to the TCC a number of powers including the power to issue certificates pursuant to s39L. On review the TCC had confirmed its original decision*"that the Abstract Syntax Notation One C++ Compiler did not constitute R and D as described in the [Tax Act], due to insufficient evidence of innovation or technical risk".* In reaching its original decision the TCC had disagreed with the assessor's recommendation to the contrary effect.

After setting out s73B(1) of the *Tax Act* the Tribunal said of it:

"The four requirements of paragraph (a) are cumulative. It seems to us, however, that the two requirements of sub-paragraph (a)(ii) are in the alternative. Thus, if all the requirements of paragraph (a) are present, except possibly those of sub-paragraph (a)(ii), then in order to qualify for a favourable certificate, an applicant must show either innovation or technical risk. If it can successfully show one or other of the qualities then it is entitled to its certificate. We believe that innovation and technical risk are two different criteria (as we will later discuss) and that the use of the word "or" is not simply to explain the former word by reference to the latter phrase."

The Tribunal noted it had been agreed all elements in the activities required by the definition were present except for the requirement of innovation or technical risk. The Tribunal also noted the applicant took the view that, in order for there to be *"innovation"*, an activity must have an *"appreciable degree of novelty"*. Further it noted the applicant in construing the words "*technical risk*" took account of its own established policy which was to the effect there was no technical risk in the given activity unless either there is reasonable uncertainty over what the results will be or there is reasonable certainty over the general results, but reasonable uncertainty over which of several alternatives is technically feasible, meets a desired technical specification, or meets a desired cost target.

The Tribunal then set out the contentions made on behalf of the respondent concerning *"innovation*". These were that computer programming in the language referred to as "*C*" is substantially and technically different from programming in the computer language referred to as *"C++"*. It was contended for the respondent the aim of the activities was to ensure the C++ compiler would possess additional functionality not previously available in C compilers. On the subject of technical risk, it was contended the development of the compiler involved significant technical risk because of the technical uncertainties regarding its performance.

Turning to the statement of reasons provided on behalf of the decision-maker, the Tribunal said that it referred to two previous Tribunal decisions, namely *Re North Broken Hill Limited and Industry and Research Development Board* 93 ATC 2148 and *Re Mobil Oil Australia Limited and Industry Research and Development Board* 95 ATC 2042. The Tribunal said that in *Re Mobil Oil* no special meaning had been attributed to the word *"innovation"* and no reference made, as it had been in *Re North Broken Hill*, to the Explanatory Memorandum relating to the introduction of the definition in s73B(1) of the *Tax Act* or to any Parliamentary speech. The Tribunal noted *Re Mobil Oil* had been decided on the basis the word *"innovation*" was an ordinary English word which should be given its ordinary meaning.

In relation to the term "*technical risk*" the Tribunal said of its decision in *Re Mobil Oil* that it had adopted a passage from a submission of counsel, which read:

"As far as technical risk is concerned, the dictionary is not very helpful here because of the combination of the two words but there seem to be general agreement amongst the experts that it is referring touncertainty as to outcome and that indeed seems to be the logical meaning of the words in the context. So there has to be a relevant uncertainty as to outcome. And we would accept once again that it has to be a material uncertainty. As my learned friend says there is always some element of uncertainty at the margin, complete precision is not possible in whatever you do and we would agree that very minor uncertainty as to outcome certainly will not qualify, it has to be a material uncertainty but once again that is not a vigorous hurdle." (Emphasis added).

The present Tribunal said if the term was restricted merely to mean *"uncertainty as to outcome*", such a meaning would be consistent with the ordinary meaning to be attributed to the words and to the interpretation to be given to the statute. It found nothing in the reasons of the Tribunal in *Re Mobil Oil* to support an interpretation of "*technical risk*" in terms of the Board's established policy.

The reasons of the Tribunal stated reliance had been placed for the applicant upon the decision in *Re North Broken Hill,* of which it said:

"29. ...The Tribunal quoted dictionary meanings of "innovation" and professed itself to be satisfied that there was no ambiguity or obscurity in the meaning of the word as it appeared in the context of s73B (paragraph 41). Nevertheless the Tribunal went on to quote from the Explanatory Memorandum and from the Second Reading speeches. The phrase "appreciable element of novelty" comes from the Explanatory Memorandum and also from a manual which was tendered in evidence and which was referred to in the Second Reading speech in the Senate. There is no reference to "an appreciable element of novelty" in the statute. The Tribunal, however, assumed that this was the meaning intended by the phrase "involved innovation" (paragraph 45). From this assumption (which was unnecessary to the Tribunal's reasons for decision) arose the basis for the present reviewable decision. As we pointed out in paragraph 18, the Board was concerned at the applicant's failure to exhibit the necessary degree of innovation. In other words whilst there may have been an element of novelty in the involvement, there was not an "appreciable" element."

The Tribunal then extracted certain propositions and made further observations from its examination of the decisions of previous tribunals in *Re North Broken Hill* and *Re Mobil Oil*. Firstly it noted the phrase in s73B(1), "*involved innovation or technical risk*", was to be construed in accordance with s15AA of the *Acts Interpretation Act* (Cth) ("*the Interpretation Act*") so as to promote the purpose or object of the section. The object of the Act, as the Tribunal also noted, is set out in s3 and is to promote the development and improve the efficiency and international competitiveness of Australian industry by encouraging research and development activities.

The Tribunal said in par34 there was no requirement in the statute the innovation or technical risk should be substantial. A contention to that effect had come from a gloss on the statute originating in the Explanatory Memorandum. It said guidelines used by the applicant had been drawn up with statements in the Memorandum in mind, rather than the provisions of the *Tax Act*.

The Tribunal then said it was fortified in its conclusion that "*innovation*" should not be given a narrow meaning because of the subsequent history of the legislation. It noted s73B and the definition of research and development activities in s4 of the *Tax Act* had been amended since the relevant fiscal years but the word "*innovation*" had been retained in its old form. Further the phrase "*technical risk*" had been left intact when the definition was amended. The Tribunal said had Parliament intended to give these words a narrower scope of operation, it had an opportunity to do so.

The Tribunal next addressed certain submissions of the respondent as follows:

"37. The respondent submitted that merely to produce a new product, or one having novelty, does not necessarily involve innovation under the Act. As counsel

put it "it is the process, not the product, that must meet the criteria, as Re North Broken Hill Limited shows". In our opinion, this proposition can not be elicited from anything that was said in the reasons in Re North Broken Hill Limited. The legislation requires that the activities involve innovation. If what is produced is an innovative product then the activity must, as a matter of logic, involve innovation. The definition in the ITAA in fact contemplates that the purpose of the research may be the creation of new or improved products. Neither the definition, nor anything said in the previous cases require that this reference be read down to refer only to processes rather than products.

38. Counsel for the respondent submitted that in considering "technical risk" one should decide whether there is a realistic likelihood of the work failing altogether. The section does not require this and the agreed interpretation to be found in Mobil Oil Australia Limited makes no reference to it. A mere uncertainty as to outcome is all that is required. If the present submission were to be accepted, it would result in the section having almost no scope for positive operation. Few commercially responsible companies would decide to invest resources in projects where there was a realistic likelihood of the work failing altogether." (Their emphasis).

The Tribunal then referred to the evidence. Four witnesses gave evidence on behalf of the respondent. Of the evidence of one, Mr G, the Tribunal said it found his evidence of assistance in formulating and supporting the claim. It quoted a written statement in which he identified the core of the innovation claimed by the respondent in the following terms:

"The core of the innovation being offered by the ASN 1 C++ compiler was that it generated object-oriented C++ code rather than procedural style C code. This code used the new object-oriented mechanisms provided by C++ code generated by the ASN 1 C++ compiler and was significantly different in form and application generated by previous ASN 1 compilers.

ASN 1 compilers are not just concerned with the definition of data structures. The task of an ASN 1 compiler is to generate code to handle the encoding and decoding of messages whose possible structure has been defined through the use of ASN 1. Application programmers need to be given the ability to decode an encoded message, access the component parts of an encoded message, build up a new message to be encoded and encode a message. Any data structures used in this process form just a part of the interface provided to this functionality. The ASN 1 C++ compiler provided an object-oriented interface to object-oriented C++ code rather than C-style data structures."

The Tribunal also found the uncontested evidence of Professor H, a professor of computing called for the respondent to be helpful and saw no reason why it should be rejected. In essence the conclusions of that evidence were that the respondent's

product was innovative because the implementation had to pioneer new territory and involved technical risk because, while there was little risk in the technology itself, there was*"induced"* risk in the attempt to apply it.

Of the evidence of three independent experts who had been called for the applicant the Tribunal said:

"Their conclusions, however, were based upon their understanding of the meaning of the terms innovation or technical risk. Whilst there is no question about their expert qualifications, their evidence has to be viewed in this light."

The Tribunal concluded:

"It is possible to discern a consensus in all of the evidence put forward, both for the applicant and for the respondent. All witnesses agreed that there was an involvement in some innovation and some technical risk. The real issue was whether those elements were present in a substantial degree. As we have indicated we are of the view that it is not necessary to show this quality in order to qualify for the deduction. Having regard to this evidence and to our understanding of the legal principles we are satisfied that the work carried out involved innovation, or technical risk, or both. The decision under review therefore will be set aside and the matter will be remitted to the respondent with the direction that a certificate to this effect should be issued by the respondent."

CONSTRUCTION OF "INNOVATION OR TECHNICAL RISK"

Five of the grounds of appeal are directed towards the manner in which the Tribunal construed the word "*innovation*", the words "*technical risk*" and the phrase "*innovation or technical risk*" as those words and phrase appear in s73B(1) of the *Tax Act*. These grounds are supported by the general contention that a proper analysis of the reasons of the Tribunal show it reached its decision by adoption of the lowest threshold possible for these terms and therefore erred in law. The applicant submitted the Tribunal applied the standard of ephemeral or nominal innovation or technical risk whereas what is required is a material innovation or technical risk that is real or of substance. It is submitted that by adopting the approach which it did the Tribunal offended the *de minimis* principle to the effect that the law takes no notice of trivialities (*"de minimis non curat lex"*) see: *Farnell Electronic Components Pty Ltd v Collector of Customs* (1996) 142 ALR 322 at 324 - 327. Furthermore, it is contended in the grounds that by adoption of such an approach the Tribunal erred in concluding it would promote the object of the legislation because, on such a construction, research and development would not necessarily be encouraged.

Counsel for the applicant commenced his submissions by turning attention to the wording of the reasons of the Tribunal. He submitted the Tribunal in par29 had not defined what it meant when it used the word "*appreciable*".

Similarly when the Tribunal concluded in par34 there was no requirement in the statute for innovation or technical risk to be substantial, it had not defined what it meant by *"substantial"*. Additionally in the final conclusion of the Tribunal the use of the word *"some"* to qualify innovation and technical risk was said to support the contention of a *de minimis* approach.

In our opinion the reasons of the Tribunal are not to be read in the manner contended for on behalf of the applicant and do not offend the principles relied upon for it. Our reasons for this conclusion are as follows:

(1) In the discussion in par29 of its reasons the Tribunal in using the reference *"an appreciable element of novelty"* was referring to the manner in which that phrase, derivative from the Explanatory Memorandum, had been dealt with by the previous Tribunal in *Re North Broken Hill*. There is nothing which shows in not defining the word "*appreciable*" it was adopting an understanding of that word offending the *de minimis* principle.

Furthermore, the word *"appreciable"* means *"capable of being perceived or estimated; noticeable"* or *"fairly large"* (*The Macquarie Dictionary*, 2nd Ed (1992) at 80). The word is similarly defined in the *New Shorter Oxford English Dictionary* (Clarendon Press (1993) at 101) to mean "*worth esteeming*" and *"able to be estimated or judged; perceptible; considerable*". These meanings make apparent that any use of the word necessarily avoids any application of the *de minimis* principle.

(2) In *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* [1979] FCA 85; (1979) 27 ALR 367 at 382 Deane J said:

"The word "substantial" is not only susceptible of ambiguity: it is a word calculated to conceal a lack of precision. In the phrase "substantial loss or damage", it can, in an appropriate context, mean real or of substance as distinct from ephemeral or nominal. It can also mean large, weighty or big. It can be used in a relative sense or can indicate an absolute significance, quantity or size."

See also: *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* [1982] FCA 206; (1982) 44 ALR 557 at 563 - 564. These dicta address the use of the word *"substantial*" in a statutory context.

The Tribunal used the word *"substantial"* in its reasons in par34 and its conclusion. In the first case it was to deny any requirement in the statute for substantiality and in the second to describe the real issue as being whether such a degree was

requisite. The word "*substantial*" has included in its meanings "*of ample or considerable amount, quantity, size, etc*." *(The Macquarie Dictionary*, (supra) at 1774). It is similarly defined in the *New Shorter Oxford English Dictionary* (supra) at 3124. It is apparent the Tribunal properly understood these words. The rejection by it of the proposition substantiality was required did not carry with it the corollary that what remained offended the *de minimis* principle or accepted ephemeral or nominal innovation or technical work as satisfying the statutory test.

(3) The word "*innovation*" means "*something new or different introduced*" and "*the act of innovating: introducing of new things or methods*" the (*The Macquarie Dictionary*, (supra) at 907). See also the new*Shorter Oxford Dictionary (*supra*)* at 1373-1374.

The word "*risk*" is defined to mean "*exposure to the chance of injury or loss; a hazard or dangerous chance*" the (*The Macquarie Dictionary*, (supra) at 1516). See also the new *Shorter Oxford English Dictionary* (supra) at 2609.

In neither of these definitions is there requirement of any particular degree nor any possibility of admittance into the meaning of the word of a *de minimis* concept. When the Tribunal used these words it can be presumed, in the absence of textual evidence to the contrary, to have given them their usual meaning. In our view there is no textual rebuttal of that proposition.

(4) In its examination of the decisions in *Re North Broken Hill* and in *Re Mobil Oil* the Tribunal has not misunderstood what each of the Tribunals said in those decisions. In particular, it made apparent that when the Tribunal in *Re North Broken Hill* assumed the phrase "*involved innovation*" referred to "*an appreciable element of novelty*" it was unnecessary for it to do so for the purposes of its decision and it had already accepted there was no ambiguity or obscurity in the meaning of the word *"innovation*" as it appeared in the context of s73B(1) of the *Tax Act.*

(5) When the Tribunal said in par38 a "*mere uncertainty as to outcome is all that is required*" it was using the word "*mere*" to contrast the words "*uncertainty as to outcome*" with the proposition which had been put to the Tribunal that there should be a realistic likelihood of the work failing altogether. It was not using the adjective "*mere*" in a *de minimis* sense. To so read it is in our view to misapprehend the context and course of the Tribunal's reasons.

(6) It is accepted the Tribunal was in error when it concluded in par35 the subsequent history of the legislation had left the concepts of innovation and technical risk unchanged. The effect of the 1996 amendments was that the definition of "*research and development activities*" now refers explicitly to activities which "*involve ... high levels of technical risk*" and which further provide (in s73B(2B)(b)) the criteria is not to be taken to be fulfilled unless "*the probability*

of obtaining the technical or scientific outcome of the activities cannot be known or determined in advance on the basis of current knowledge or experience" and "*the uncertainty of obtaining the outcome can be removed only through a programme of systematic, investigative and experimental activities in which scientific method has been applied ...".*

Nothing turns upon the misunderstanding of the Tribunal. Had the Tribunal correctly taken into account the amendments in the above terms it would have had to conclude the effect of the legislation was to narrow the concept of technical risk in a way not previously part of the understanding of that concept.

(7) The use of the word "*some*" in the conclusion of the Tribunal is referrable to the evidence which the Tribunal was addressing and is not to be understood as a *de minimis* qualification to the concepts of innovation and technical risk. We will return to this in consideration of the ground of appeal directed to evidence.

(8) Because the Tribunal did not misunderstand the words in issue it did not adopt an interpretation of them which would not promote the object of the legislation.

(9) It is established the reasons of an administrative decision maker, and hence a tribunal standing in place of such a decision maker, are meant to inform and are not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 136 ALR 481at 491 citing *McAuliffe v Secretary, Department of Social Security* (1992) 28 ALD 609 at 616. The case for the applicant is based almost entirely on an overly zealous scrutiny of the Tribunal's reasons.

USE OF EXTRINSIC MATERIALS

The grounds of appeal next contend the Tribunal erred in law by failing to have regard to relevant extrinsic materials within the meaning of s15AB of the *Interpretation Act* for the purposes of construing the words "*innovation or technical risk*". In particular it is said the Tribunal erred in failing to have regard to the terms of the Explanatory Memorandum in two respects - firstly, so far as it is stated in respect of the meaning of "*innovation*" that "*a basic criterion associated with determination of innovation is an appreciable element of novelty*" and secondly, insofar as it is stated in respect of the meaning of "*technical risk*" that it "*requires that the probability of obtaining a given technical objective cannot be known or determined in advance on the basis of current knowledge or experience".*

This extrinsic evidence ground is expressed in even wider terms in written submissions where it is said the appropriateness of the "*appreciable element of novelty*" test is confirmed, not only by the Explanatory Memorandum but also by the terms of the definition of "*research and development*" used by the OECD and

upon which the statutory definition was identified in the second reading speech in the Senate as having been based. That definition, as shown in the *Frascati Manual* for 1980, states *"the basic criterion for distinguishing R and D from related activities is the presence in R and D of an appreciable element of novelty"*.

Section 15AB(1)(a) permits reference to be made to extrinsic material capable of assisting in the ascertainment of the meaning of a provision in order to confirm the meaning of the provision is the ordinary meaning conveyed by the text taking into account its context in the Act and the purpose or object underlying the Act. That provision is subject to subs(3) which requires that, in determining whether consideration should be given to any such material or the weight to be given it, regard must be had, in addition to any other relevant matters, to the desirability of persons being able to rely on the ordinary meaning conveyed by the text and the need to avoid prolonging legal or other proceedings.

In our opinion there is nothing in the text of the Act which put into question the meaning of the words "*innovation or technical risk*" and required confirmation the words were being used in their ordinary meaning. There is nothing in the words or the Act which indicates the words were intended to have any meaning other than their respective ordinary meanings. See: *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; (1996) 141 ALR 59 at 62-65.

Section 15AB(1)(b)(i) allows reference to external material to determine the meaning of the provision when it is "*ambiguous or obscure*". The word "*innovation"* in the context of s73B(1) is not ambiguous or obscure. Likewise the words *"technical risk"* have no ambiguity or obscurity. The meaning of the word "*risk*" is "*uncertainty as to outcome*". The word "*technical*" qualifies "*risk*" adjectivally and means "*belonging or pertaining to an art, science or the like*" (*T*he *Macquarie Dictionary,* (supra) at 1743).

Reliance was placed for the applicant upon what was said by Lord Simon in *Maunsell v Olins* [1975] AC 373 at 391 (cited in *Agfa-Geveart*, (supra) at 65) to the effect that statutory language, like all language, is capable of an almost infinite gradation of register - i.e. it will be used at the semantic level appropriate to the subject matter and to the audience of the address. It is therefore the duty of a court of construction to tune into such register and to interpret the statutory language so as to give it the primary meaning appropriate to that register.

For the applicant it was submitted when the words "*innovation or technical risk*" are read in their context they are seen to be words of gradation and necessarily ones on which minds may differ so that there is the requisite presence of ambiguity or obscurity to invoke the application of s15AB(1)(b)(i).

If this submission were to be accepted the result would be that whenever a statute used a word contextually able to be regarded as containing gradations, the

condition of ambiguity or obscurity would exist, thus permitting resort to extrinsic materials. "*Ambiguity*" is defined as "*doubtfulness or uncertainty of meaning*" (*The Macquarie Dictionary*, (supra) at 52). "*Obscurity*" means "*uncertainty of meaning or expression*" (*The Macquarie Dictionary*, (supra) at 1228). Ambiguity or obscurity will exist not where there are gradations but where there are the conditions referred to in these definitions. Ordinary English words may in their context permit gradations. That does not necessarily mean there is thus created a condition of ambiguity or obscurity.

In the case of the words *"innovation*" or "*technical risk*" in their context in s73B(1) of the *Tax Act* their meaning is not possessed of the character of ambiguity or obscurity. It is clear that, provided the condition of innovation or technical risk is not *de minimis*, the conditions will be satisfied by the presence of innovation or technical risk of whatever degree and not necessarily of any particular degree. One activity may be considerably more innovative and possessed of risk than another but each may satisfy the conditions of the statutory language.

There is no contention the meaning of the words "*innovation or technical risk*" as understood by the Tribunal produces a result manifestly absurd or unreasonable: see s15AB(1)(b)(ii) of the *Interpretation Act.*

In our opinion the Tribunal did not err in law in its approach to use of extrinsic materials.

WHETHER INNOVATIVE PRODUCT INVOLVES INNOVATION

The grounds of appeal next contend that the Tribunal was in error in par37 when it expressed the view that "*... if what is produced is an innnovative product then the activity must, as a matter of logic, involve innovation* ...". This was preceded by the statement by the Tribunal that "*The legislation requires that the activities involve innovation"*. (Their emphasis).

Even if it is the case an innovative product may result from an activity which does not involve innovation (a proposition which should be the subject of more extensive argument than occurred before us), we do not consider the Tribunal's view on this issue was determinative of its decision in the matter under appeal. The conclusion the Tribunal reached was one relating to the activity and to whether it possessed the character of involving innovation or technical risk. It did not arrive at its conclusion by inference from the nature of the product. The issue arose before it only in answer to a submission made to it by counsel for the applicant. There was no relevant error of law in the Tribunal's statement.

FAILURE TO WEIGH COMPETING EVIDENCE

The grounds of appeal finally contend the Tribunal erred in law by failing to weigh the competing evidence called on the question of whether or not "*innovation*" or "*technical risk*" was present on the basis that what was required for innovation to be present was "*an appreciable element of novelty*" and for "*technical risk*" the *"probability of obtaining a given technical objective which could not have been known or determined in advance on the basis of current knowledge or experience"*.

In our opinion it is not the case the Tribunal failed to resolve the evidence for the following reasons:

(1) It clearly preferred and accepted the evidence of Professor H and regarded it as credible.

(2) It found the evidence of the three independent experts called by the respondent was coloured by their understanding of the meaning of the terms innovation or technical risk and concluded their evidence should be viewed in that light.

(3) In its conclusion it found a consensus in all of the evidence, both for the respondent and the applicant, to the effect that there was "*an involvement in some innovation and some technical risk*". That was a finding of the effect of the evidence and not the acceptance of the lowest possible threshold.

(4) It then reached its conclusion "*having regard to the evidence*".

In our opinion this ground is not made out.

CONCLUSION

For these reasons we consider the appeal should be dismissed.

I certify that this and the preceding eleven (11) pages are a true copy of the Reasons for Judgment herein of the Honourable Justices Carr, R D Nicholson and Finn.

Associate:

Dated: 19 August 1997

Counsel for the Applicant: J S Hilton SC

Solicitor for the Applicant: Australian Government Solicitor

Counself for the Respondent: D M Yates

Solicitor for the Respondent: Ernst & Young Legal Services

Dates of hearing: 17 July 1997