



[2012] AATA 743

Division **GENERAL ADMINISTRATIVE DIVISION**

File Number **2010/2467**

Re **NaughtsnCrosses Pty Ltd**

APPLICANT

And **Innovation Australia**

RESPONDENT

DECISION

Tribunal **Deputy President P E Hack SC**

Date **24 October 2012**

Place **Brisbane**

The decision under review is affirmed.

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Deputy President P E Hack SC

CATCHWORDS

TAXATION – Tax concessions – research and development – innovation or high levels of technical risk required – six registered activities – claimed to satisfy criteria – activities not systematic, investigative and experimental – decision affirmed.

LEGISLATION

Income Tax Assessment Act 1936 (Cth) ss 73B(1), 73B(1AAA), 73B(14), 73B(2A), 73B(2B), 73B(10)

Industry Research and Development Act 1986 (Cth) ss 39J(1), 39L(1)

REASONS FOR DECISION

Deputy President P E Hack SC

24 October 2012

Introduction

1. Australia's tax system provides generous concessions – accelerated depreciation and suchlike – for companies that engage in research and development activities. The activities must satisfy the criteria specified in the legislation: the *Income Tax Assessment Act 1936* (Cth) and the *Industry Research and Development Act 1986* (Cth).
2. The applicant in these proceedings, now known as NaughtsnCrosses Pty Ltd but called Absoft (QLD) Pty Ltd at the time of the events in issue in the proceedings, is an information technology company. It claimed that it satisfied those criteria and was entitled to tax concessions for expenditure in the 2002/03 and 2003/04 income years on a

project called the "Spyderman Project". It is a sufficient description of that project for present purposes to say that it involved embedding heat resistant radio frequency identification (RFID) tags into moulds, installing RFID readers to read the tags and collecting information about the moulds in the course of a manufacturing process.

3. The respondent, Innovation Australia, in conjunction with the Commissioner of Taxation, administers the legislation and the grant of concessions. It determined that the activities claimed in connection with the Spyderman Project did not satisfy the statutory criteria. That decision was affirmed on internal review. In these proceedings, commenced on 20 October 2009, the applicant seeks a review of that decision.

The legislation

4. The objects of the taxation concession provisions are set out in s 73B(1AAA) of the *Income Tax Assessment Act 1936*. It provides¹,

The object of this section is to provide a tax incentive, in the form of a deduction, to make eligible companies more internationally competitive by:

- (a) *encouraging the development by eligible companies of innovative products, processes and services; and*
- (b) *increasing investment by eligible companies in defined research and development activities; and*
- (c) *promoting the technological advancement of eligible companies through a focus on innovation or high technical risk in defined research and development activities; and*
- (d) *encouraging the use by eligible companies of strategic research and development planning; and*
- (e) *creating an environment that is conducive to increased commercialisation of new processes and product technologies developed by eligible companies.*

The benefits of the tax incentive are targeted by being limited to particular expenditure on certain defined activities.

The operative provision is s 73B(14) of the same Act. It permits an eligible company that incurs "research and development expenditure" in excess of \$20,000 to deduct 1.25 times that expenditure from its assessable income.

¹ The legislation is as in force at the time of the claim.

5. By virtue of s73B(1) of the *Income Tax Assessment Act 1936* research and development expenditure of an eligible company includes "expenditure... incurred by the company... on or after 1 July 1985 directly in respect of research and development activities carried on by or on behalf of the company". In turn, the expression "research and development activities" is defined in the same subsection as meaning,

- (a) *systematic, investigative and experimental activities that involve innovation or high levels of technical risk and are carried on for the purpose of:*
 - (i) *acquiring new knowledge (whether or not that knowledge will have a specific practical application); or*
 - (ii) *creating new or improved materials, products, devices, processes or services; or*
- (b) *other activities that are carried on for a purpose directly related to the carrying on of activities of the kind referred to in paragraph (a).*

There is thus a distinction drawn between the "systematic, investigative and experimental activities" and "other activities" directly related to those activities. I should say, at this stage, that the applicant's case, as articulated by its representative in opening², is that the activities were carried on for the purpose of creating a new product, not any of the other subjects in sub-paragraphs (i) or (ii) above.

6. Content is given to the notions of "innovation" and "technical risk" by s 73B(2B) of the *Income Tax Assessment Act 1936*. It provides,

- (2B) *For the purposes of the definition of **research and development activities** in subsection (1):*
 - (a) *activities are not taken to involve innovation unless they involve an appreciable element of novelty; and*
 - (b) *activities are not taken to involve high levels of technical risk unless:*
 - (i) *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*
 - (ii) *the uncertainty of obtaining the outcome can be removed only through a program of systematic, investigative and experimental activities in which scientific method has been applied, in a systematic progression of work (based on principles of physical, biological, chemical, medical, engineering or computer sciences)*

² Transcript pages 38-39.

from hypothesis to experiment, observation and evaluation, followed by logical conclusions.

7. Where, as in the present case, the activities involved the development of computer software it is necessary to have regard to s73B(2A) of the *Income Tax Assessment Act 1936*. It is in these terms,

(2A) *For the purposes of the definition of **research and development activities** in subsection (1), activities carried on by or on behalf of an eligible company by way of the development of computer software shall not be taken to be systematic, investigative and experimental activities unless the computer software is developed for the purpose, or for purposes that include the purpose, of sale, rent, licence, hire or lease to 2 or more non-associates of the company (counting a non-associate of the company and the associates of such a non-associate together as one person).*

8. Section 73B(10) of the *Income Tax Assessment Act 1936* requires registration of both the company and the activities of the company. It is in these terms,

(10) *A deduction is not allowable under this section to an eligible company for a year of income in respect of expenditure in relation to research and development activities unless:*

(a) *the company is registered, in relation to the year of income and in relation to those activities, under section 39J of the *Industry Research and Development Act 1986*; or*

(b) *the company is registered, in relation to the year of income and in relation to a project comprising or including those activities, under section 39P of that Act.* [emphasis added]

9. The need to identify with precision the activities involved is emphasised by s 39J(1) of the *Industry Research and Development Act*. It provided,

(1) *Subject to section 39K, if:*

(a) *an eligible company applies to the Board for registration in relation to its research and development activities in respect of a year of income; and*

(aa) *the application is in accordance with section 39JD; and*

(b) *the company provides to the Board such information in relation to its research and development activities as the Board reasonably requires;*

the Board shall register the company, in relation to those research and development activities, in respect of that year of income. [emphasis added]

The reference to the Board is a reference to the respondent, Innovation Australia³.

10. Section 39L(1) of the *Industry Research and Development Act* empowers, and in some cases requires, the respondent to provide a certificate to the Commissioner of Taxation,

... stating whether particular activities that have been or are being carried on by or on behalf of a person were or are research and development activities.

A person dissatisfied with the respondent's decision under s 39L of the *Industry Research and Development Act* may request the respondent to reconsider the decision⁴. The respondent may confirm, revoke or vary the decision⁵. Its decision on reconsideration is reviewable in the Tribunal⁶. But it needs to be emphasised that it is the decision whether particular activities were research and development activities that is the subject matter of proceedings in the Tribunal. The focus necessarily must be on the activities, not the overall result of those activities⁷.

The procedural background

11. The applicant lodged an application for registration of its research and development activities in connection with the Spyderman Project for the year ended 30 June 2003 on 10 February 2004⁸; that for the year ended 30 June 2004 was lodged on 11 March 2005⁹. Each application described the "Project Technical Objective" in these terms,

Develop an automated production content and management system which:

- *Was based on Radio Frequency Identification Tag technology and associated readers;*
- *Integrated input drawn from various locations in a production process;*
- *Operated in harsh industrial environments to an accuracy level of 99.9%; Reduced likelihood of misread scenario from other external Are F emitting devices;*

³ See s 4(1), *Industry Research and Development Act 1986*.

⁴ See s 39S(2), *Industry Research and Development Act*.

⁵ See s 39S(4), *Industry Research and Development Act*.

⁶ See s 39T(1), *Industry Research and Development Act*.

⁷ See, for example, *Industry Research and Development Board v Cold & Allied Operations Pty Ltd* [2000] FCA 979; (2000) 101 FCR 405, 420 at [47]-[49].

⁸ Exhibit 2.

⁹ Exhibit 4.

- *Did not impede the production process; and*
- *Compensated for the limited read distance of current reader technologies.*

The activities undertaken in each year were described in identical terms as follows,

- *Detailed process mapping;*
- *Design functional requirements;*
- *Review functional requirements*
- *Developed software and hardware framework;*
- *Experimentation with different RFID tags; prototyping and testing; and*
- *Feedback modification and review.*

As the respondent's submissions observed, the meaning, content or scope of these activities is somewhat opaque. Nonetheless, it needs to be emphasised that the evidence the applicant adduced must be considered by reference to these six activities.

12. In January 2006 the Commissioner of Taxation requested the respondent, then known as the Industry Research and Development Board, to issue certificates pursuant to s39L of the *Industry Research and Development Act* stating whether the activities undertaken by the applicant constituted "research and development activities" within the definition in s 73B(1) of the *Income Tax Assessment Act*. Thereafter the respondent, by letter of 29 March 2006, sought further information from the applicant including,
- (a) a copy of the applicants authorised research and development plan,
 - (b) in relation to each activity,
 - (i) a description of each activity;
 - (ii) whether each activity is Experimental or Directly Related to the carrying on of Experimental activities.
 - (iii) the start and end dates of each activity; and
 - (iv) the estimated or indicative expenditure on each of the activities.

(c) a short description of the innovation or high levels of technical risk associated with the project.

13. On 7 February 2008 the respondent decided that the activities undertaken on the Spyderman Project for the 2002/03 and 2003/04 income years did not satisfy the definition of research and development activities in s 73B(1) of the *Income Tax Assessment Act 1936*. The applicant sought reconsideration of this decision. It was confirmed on reconsideration on 18 September 2009. These proceedings were then commenced.

The issues

14. It is not easy to discern the applicant's case i.e. why it contends that the decision made was not the correct or preferable decision. Much of the applicant's amended statement of facts, issues and contentions¹⁰ is couched in generalities; it does not descend to particulars, either as to the primary facts or as to the applicant's contentions. Two pages are devoted, quite unnecessarily in a merits review process, to what are claimed to be "procedural errors" in the respondent's decision-making processes. The same was true of the applicant's evidence, both written and oral – it was long on assertion but short on the type of factual detail required to demonstrate the activities undertaken and how expenditure on those activities could be shown to be expenditure on research and development activities as that expression is defined in the legislation.
15. That pattern continued with the applicant's written submissions, lodged some weeks after the applicant had been provided with lengthy written submissions from the respondent, and after arrangements had been made for Ms Kemp to inspect the Tribunal's copy of the transcript. Those written submissions were, with respect, properly characterised by the respondent in its submissions in reply as "assertions without reference to the evidence on which they are based". They did not point to any evidence, perhaps because there was so little evidence to which reference could be made. Reference in the submissions to

¹⁰ Exhibit 48.

assertions made in the applicant's statement of facts, issues and contentions does not make those assertions evidence in proceedings.

Some background matters

16. It seems to be common ground (although not the subject of any clear evidence) that Fulcrum Suspensions Pty Ltd (Fulcrum) was the manufacturer of a wide range of motor vehicle suspension parts. These parts appear to be made from a Bakelite substance moulded in a convection oven. The manufacturing process involved trays with moulds being taken by a conveyor through the oven. Fulcrum desired a system that would keep better records of the array of different parts that it was required to manufacture and keep in stock. The Spyderman Project was said to be that system. It involved the insertion of an RFID tag into each mould and the positioning of RFID readers during the production process to read the tags and collect information about the moulds in the course of the manufacturing process.
17. Surprisingly little evidence has been given about the factual background to the matter. There is in the material a document¹¹ which I take to be a draft of an agreement between the applicant, Fulcrum and Emroth Technologies Pty Ltd (Emroth). I assume it to be a draft because it is unexecuted and because the contracting parties, other than the applicant, are simply described as “Fulcrum” and “Emroth”. The document is undated but refers to commencement of the project in July 2002 and its completion in September 2002.
18. The evidence of Ms Kemp about this document was vague; she did not know whether any of the parties signed a version of this document but it was, she said, “executed by way of a payment”¹² (whatever that might mean). Nonetheless the applicant's case proceeded on the footing that the contractual arrangements between the applicant, Fulcrum and Emroth were as described in exhibit 20.

¹¹ Exhibit 20.

¹² Transcript page 157, line 10.

What were the activities?

19. There were six registered activities,
- Detailed process mapping;
 - Design functional requirements;
 - Review functional requirements;
 - Developed software and hardware framework;
 - Experimentation with different RFID tags; prototyping and testing; and
 - Feedback modification and review.

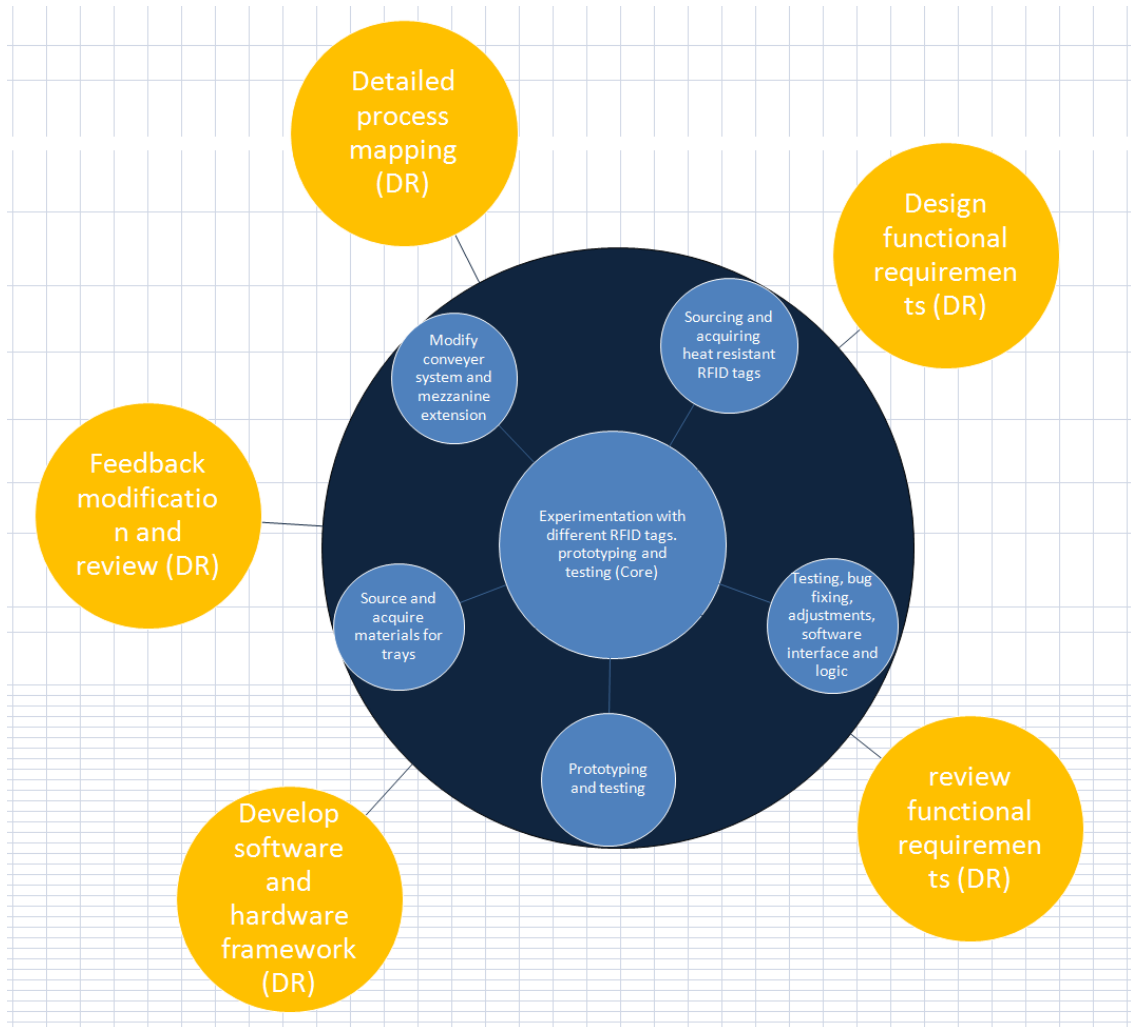
The applicant's amended statement of facts, issues and contentions expanded that list to ten activities described in this way,

- (1) Review of functional requirements.
- (2) Detailed process mapping, consultation with industry partner.
- (3) Designing functional specifications, factoring in environmental issues noise (interference), moisture, heat in the oven.
- (4) Trial on site at Fulcrum. Results required modification of conveyor systems to re-engineer the speed, and change the mezzanine extension and distance from the reader to the tag.
- (5) Spyderman software development using VB application code base, develop desktop and handheld applications. Hardware installation, multiple reader modules embedded in the one panel to improve read accuracy.
- (6) Source and acquire materials for trays. Testing of various materials to see which would allow the RFID readers to read the tags that were embedded in the bottom of the moulds. Continued software development.

- (7) Prototyping and testing, integration of ‘traffic light’ system to indicate when moulds were ready and should be taken out of the system, integration of wireless 802.11b Network.
- (8) Sourcing and acquiring heat resistant tags. Testing tags and various depths in the mould to allow optimum reading. Development of plaque system to hold the tag in the mould and enable reuse of tag at end of mould.
- (9) Testing, bug fixing, adjustments: oven-reader and Spyderman portable software interface and logic.
- (10) Final tests and checks, delivery of system.

These activities, so the applicant contended, were “an expanded version on that registered with the Respondent, but are the same in substance”¹³. I propose to describe that list of activities as the “expanded activities”. On the applicant’s original case expanded activities 3, 4, 5, 6, 7, 8 and 9 were “systematic, investigative and experimental” i.e. they satisfied s 73B(1)(a) of the *Income Tax Assessment Act*; expanded activities 1, 2 and 10 were claimed to be “directly related”. The matter was put somewhat differently in the applicants closing written submissions. The relationship between all the activities was described using this diagram:

¹³ Exhibit 48, paragraph [25].



20. If I have correctly understood the applicant’s submissions and correctly interpreted this diagram, the applicant now puts its case on the footing that the only registered activity which was “systematic, investigative and experimental” was registered activity 5; the other activities are all said to be "directly related". If that be right it is convenient to examine first the evidence about registered activity 5 which, on the applicant's case equates with, or at least incorporates, expanded activities 6, 7, 8 and 9¹⁴.

Registered activity 5

21. Registered activity 5 is described as "experimentation with different RFID tags; prototyping and testing". It is said to encompass expanded activities 6, 7, 8 and 9, shortly

¹⁴ The evidence is summarised in the respondent’s written submissions at paragraph 11.

described in the applicant's diagram as "source and acquire materials for trays," "prototyping and testing", "sourcing and acquiring heat resistant RFID tags" and "testing, bug fixing, adjustments, software interface and logic".

22. If registered activity 5 alone is considered the evidence simply does not support the proposition that there was any experimentation with different RFID tags. Ms Kemp's evidence¹⁵ was that there had been discussions with representatives of Emroth about the differing types of RFID tags that could potentially be used in Fulcrum's installation and that, on the basis of those discussions, a low frequency "laundry" tag was chosen and 10,000 of them purchased. This hardly suggests a process of experimentation.
23. Moreover, the contract between the applicant, Fulcrum and Emroth obliged Emroth to supply the 10,000 RFID tags and to "confirm the ability of the RFID tags to be able to operate at 100° C for extended periods of time in the required environment"¹⁶. The applicant's obligation was to supply that hardware to Fulcrum once Emroth had satisfied its obligations.
24. The nature of expanded activities 6, 7, 8 and 9 is sought to be explained in paragraph 45 to 51 of the applicant's statement of facts, issues and contentions but the claims made there are not made good by the evidence. It is said, in paragraph 45, that expanded activity 6,

also involved experimentation with different materials to determine which would:

- a. allow the RFID readers to read the RFID tags at the particular frequency; and*
- b. be robust enough for the hazardous manufacturing environment.¹⁷*

The succeeding paragraphs set out further detail of this "experimentation". But the difficulty that I have is that the evidence does not make good those assertions; the contract between the parties made it the responsibility of Emroth to ensure that the RFID tags were able to operate in the required environment. The evidence is universally to the same effect: Emroth was contractually bound to provide both the RFID readers and the

¹⁵ Transcript pages 176-178.

¹⁶ Exhibit 20, at page 17.

¹⁷ Internal footnotes have been omitted

RFID tags. I am not aware of, nor did the applicant's submissions point to, any evidence of the "experimentation" claimed.

25. Paragraphs 46, 47 and 48 of the applicant's statement of facts, issues and contentions make assertions about the state of knowledge of RFID technology at the time of this project and how the applicant experimented and tested with RFID tags. There is no evidence that the state of knowledge at that time was as asserted; on the contrary, as the respondent's submissions point out, a text published in 2003 described RFID systems as "completely insensitive" to harsh environmental conditions.
26. The evidence of experimentation and testing is vague and imprecise. The evidence in chief of Ms Kirsten Blake, who was employed by the applicant at the time, was to this effect:

We undertook substantial testing and experimentation in relation to the performance of RFID tags under extreme temperature conditions, and the process we went through could only be described as highly systematic. Variations in conveyor-belt speed, and distance between RFID readers and embedded tags was [sic] highly complex and required substantial testing and experimentation.

27. There was, as well, some evidence of testing from Mr Adrian Grant, the applicant's software engineer at the time of the Spyderman Project. His evidence though is vague and imprecise. His affidavit exhibits¹⁸ what appears to be the results from one test together with this description,

I recall being on-site at the client premise [sic] on a regular basis until midnight. One of the tests and results were [sic] recorded in a document namely [E 20] Fulcrum Text Report.doc.

It is not clear either from that document or from Mr Grant's evidence whether that test was undertaken on a regular basis.

28. Mr Grant makes reference, as well, to a further "test" in these terms,

34 *The Oven Test Program [E19]*

¹⁸ Attachment E20 (6 pages) to exhibit 39.

- a. *Communication Configuration: this section enabled the Spyderman software to change the speed board, flip communications between ports*
- b. *Database Check-in: this section enabled the Spyderman system to establish a database connection so when the data from the tag (test and live) was read the output of the results were directed to a database (or file) for later reporting*

Neither Mr Grant's knowledge of this test nor its content appears in his affidavit. The document [E 19] to which he makes reference is not intelligible of itself.

29. Mr Grant's affidavit¹⁹ makes reference to "extensive & recurring testing" having occurred "over months". The details do not emerge from the affidavit.
30. The applicant's submissions do not draw attention to any evidence from which I could conclude that such testing procedures as the applicant undertook were undertaken in a "systematic, investigative and experimental" manner. My own examination of the evidence leads me to conclude that there is no evidence that would satisfy me that the applicant tested or experimented with RFID tags in such a manner.
31. Whether registered activity 5 is viewed in isolation or by reference to the applicant's list of expanded activities I am not satisfied that the activities undertaken in pursuit of that activity were undertaken in a systematic, investigative and experimental manner.
32. On my understanding of the applicant's case as most recently propounded, that means that I am not satisfied that the applicant undertook the only registered activity now claimed to be systematic, investigative and experimental in such a manner. Against the possibility that I have misunderstood the case as now propounded I propose to examine, as far as is possible, each of the registered activities.

Registered activity 1

33. This activity – detailed process mapping – is said to encompass expanded activity 1 – review of functional requirements – and expanded activity 2 – detailed process mapping,

¹⁹ Exhibit 39, paragraph 35.

consultation with industry partner. Given that these activities are said by the applicant²⁰ to be "directly related" activities, determination of whether the activities are directly related to systematic, investigative and experimental activities is dependent upon the existence of those latter activities. Accordingly, examination of registered activity 1 may be deferred for the moment.

Registered activity 2

34. This activity is described in the application as “design functional requirements” and, as activity 3 in the expanded table as,

Designing functional specifications, factoring in environmental issues noise (interference), moisture, heat in the oven.

In its statement of facts, issues and contentions²¹ the applicant asserts that this activity involved designing the functional specifications of the hardware described as, conveyors, RFID reader platform and RFID tags. The claim cannot be correct. The trays, moulds and conveyors were existing hardware used and operated by Fulcrum. Moreover, reference to the tripartite contract²² demonstrates that it was the responsibility of Emroth to provide and install the RFID hardware.

35. By virtue of clause 8.1 of that agreement it was the responsibility of Emroth to provide Fulcrum with seven RFID readers and 10,000 RFID tags. Moreover Emroth agreed to indemnify the applicant “for the deliverability and functionality” of that material. That Emroth discharged that obligation is amply demonstrated by the evidence of its quotation dated 15 July 2002²³, its invoices of 29 July 2002 for 10,000 RFID tags²⁴ and 29 August 2002 for seven RFID readers²⁵, and the evidence of Ms Kemp. Paragraph 25 of the respondent’s submissions sets out a concise, and correct, summary of the

²⁰ Exhibit 48, paragraph 24.

²¹ Exhibit 48, at paragraph [42].

²² Exhibit 20.

²³ Exhibit 21.

²⁴ Exhibit 22.

²⁵ Exhibit 22.

evidence that shows that the applicant's claim²⁶ to have designed the functional specifications of the hardware is simply not made out. It is unnecessary to repeat what appears there. The evidence does not sustain the applicant's claim that it was engaged in activities that involved designing the functional specifications of the hardware. The evidence is all to the effect that others, Fulcrum and Emroth, designed and made functional, the hardware involved.

36. It follows that I am not satisfied that the evidence demonstrates that activities were undertaken with respect to registered activity 2 or that such activities as were undertaken with respect to that activity were systematic, investigative and experimental.

Registered activity 3

37. Ms Kemp agreed that registered activity 3 – review of functional requirements – was identical with expanded activity 1 (which used essentially the same words) and that the activity so described,

*involved a question of liaising with the client, discussing, conferring and reaching agreement with them as to what it is or what was their need.*²⁷

This activity, it was said²⁸,

involved the reviewing [sic] the requirements of the control interface for the handheld devices.

It was said to be directly related to expanded activity 5 and thus consideration of registered activity 3 can also be deferred for the moment.

Registered activity 4

38. Registered activity 4 – described as "develop software and hardware framework" – is said by the applicant to equate with expanded activities 4 and 5. The applicant described the software aspects of the fifth activity in these terms,

²⁶ Exhibit 48, paragraph 42.

²⁷ Transcript page 174, line 45.

²⁸ Exhibit 48, paragraph 81.

43 *Activities 5 and 6 involved experimental development of software to govern the entire manufacturing process. The software is critical because it provides the commercially-useful information.*

44 *the software tracks the RFID tag through the manufacturing process through the handheld device and other computing devices. Activity 5 also involved experimental development of user interfaces for the PC and the handheld devices.*

39. Evidence regarding software development was given by Mr Grant. On his account²⁹ the software that was written was that required to translate data from the readers (which had their own software) to a form capable of being understood on Fulcrum's computer. And what he wrote involved using an existing program (Visual Basic 6) as a base (my word, not his) to which he applied the ordinary and usual skill of a computer programmer by understanding Fulcrum's needs, writing language to meet those needs and then reviewing and changing the program as necessary³⁰. Mr Grant appeared to accept that his task was not particularly complicated – the task was not beyond him at a time when he was not particularly experienced having only worked in the area for about a year.
40. The evidence establishes that the work done in developing software was done for the sole purpose of satisfying Fulcrum's requirements. It was, as he said, tailor-made to meet Fulcrum's needs.
41. That being so, it is impossible to conclude that the development of software satisfied the statutory requirements of systematic, investigative and experimental. That is so because s 73B(2A) of the *Income Tax Assessment Act 1936*³¹ precluded activities involving development of computer software from being regarded as systematic, investigative and experimental unless the software was developed for the purpose, or for purposes that included the purpose, of sale, rent, license, hire or lease to two or more arm's length entities. Software developed solely to meet Fulcrum's needs could not answer that description.

²⁹ Transcript page 347.

³⁰ Transcript page 349, ll 27-46.

³¹ Set out in paragraph 7 above.

42. Ms Kemp claimed that a sale of the Spyderman product had been made to another company in 2007. The evidence falls well short of satisfying me that that was so but even if it were it is not demonstrated that the software was developed for a purpose of sale, lease etc. to two or more entities. If, contrary to my view of the evidence there was a second later sale that was, at best, opportunistic; it does not demonstrate the purpose of the original activity in writing the software.
43. There is, as the respondent submits, scant evidence regarding any activities of the applicant concerning the development of hardware. Generally that was done by others, in particular, Emroth, which had the responsibility to produce the RFID tags and readers and Fulcrum which had the responsibility of providing the moulds.
44. I am then not satisfied that whatever activities the applicant undertook in relation to software and hardware development answers the description of systematic, investigative and experimental.

Registered activity 6

45. Registered activity 6 is feedback, modification and review, or, in the language of expanded activity 10, final tests and checks, and delivery of system. The applicant's material provides no clue as to the activities said to come within the scope of registered activity 6 or expanded activity 10. It is the case that the system was installed at Fulcrum although it appears not to have been as successful as Mr Stephen Smith, Fulcrum's general manager at the time, would have liked, that is, it was not integrated into all of Fulcrum's information systems.

Conclusion

46. The result of this is that I am not satisfied that any of the applicant's activities, whether viewed individually or collectively, answer the description of systematic, investigative and experimental activities. In reaching that conclusion I have not overlooked the applicant's reliance on the opinion of Dr Harold Boeck, an expert in RFID technology. In my view the opinion of Dr Boeck is of no assistance in the present case because he has

not examined the evidence which is relied upon by the applicant; rather he has drawn inferences from the material supplied to him. It may be the case, as Dr Boeck seems to suggest, that a project such as this can involve systematic, investigative and experimental activities. My impression of this project is to the contrary; whatever activities were involved in this project appear to have been poorly documented and have been even more poorly evidenced. The conclusion which I have reached, having considered the applicant's evidence, is that the applicant's activities do not answer the description of systematic, investigative and experimental.

47. It follows that I would affirm the decision under review.

I certify that the preceding 47 (forty - seven) paragraphs are a true copy of the reasons for the decision herein of Deputy President P E Hack SC.

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Associate

Dated 24 October 2012

Date(s) of hearing	13 February - 16 February 2012; 26 June - 28 June 2012
Date final submissions received	24 September 2012
Advocate for the Applicant	Swanson Reed
Solicitors for the Respondent	King & Wood Mallesons
Counsel for the Respondent	Mr G McCarthy