Docket: 2021-1701(IT)G

BETWEEN:

LES ÉLÉMENTS CHAUFFANTS TEMPORA INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on common evidence with the appeals of Shady Elhami (2021-1703(IT)G) and Maged Elhami (2021-1704(IT)G) on February 3, 4, 5, and 6, and March 17, 18, and 19, 2025, at Montreal, Quebec; and written submissions filed by the Respondent on April 25, 2025, and by the Appellant on May 22, 2025.

Before: The Honourable Justice Dominique Lafleur

Appearances:

Counsel for the Appellants:	Christopher Mostovac Olivier Verdon
Counsel for the Respondent:	Marie-Aimée Cantin Noémie Vespignani Alexandre MacBeth

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JUDGMENT

In accordance with the attached Reasons for Judgment:

1. the appeals from the reassessments made under the *Income Tax Act* (the "Act") for the Appellant's taxation years ending July 31, 2006, and July 31, 2009, are dismissed; and

2. the appeals from the reassessments made under the Act for the Appellant's taxation years ending July 31, 2007, and July 31, 2008, are allowed, and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant's following projects qualified as scientific research and experimental development ("SR&ED") projects, that the Appellant incurred SR&ED expenditures and that the Appellant was entitled to corresponding investment tax credits ("ITCs") for these projects:

   (i) for the taxation year ending July 31, 2007: "Tubular Element Manufacturing Line" project, with ITCs totalling $173,540; and

   (ii) for the taxation year ending July 31, 2008: "Flexible Silicone Rubber and Kapton Heating Elements" and "Straight and Bent Annealed Tubular & Finned Heating Elements" projects, with ITCs totalling $242,328.

   Each party shall bear their own costs.

Signed this 20th day of November 2025.

"Dominique Lafleur"

Lafleur J.

Docket: 2021-1703(IT)G

BETWEEN:

SHADY ELHAMI,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on common evidence with the appeals of Les Éléments Chauffants Tempora Inc. (2021-1701(IT)G) and Maged Elhami (2021-1704(IT)G) on February 3, 4, 5, and 6, and March 17, 18, and 19, 2025, at Montreal, Quebec; and written submissions filed by the Respondent on April 25, 2025, and by the Appellant on May 22, 2025.

Before: The Honourable Justice Dominique Lafleur

Appearances:

Counsel for the Appellants:	Christopher Mostovac Olivier Verdon
Counsel for the Respondent:	Marie-Aimée Cantin Noémie Vespignani Alexandre MacBeth

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JUDGMENT

WHEREAS by virtue of a judgment of today's date, the appeals from reassessments made under the *Income Tax Act* (the "Act") for Les Éléments Chauffants Tempora Inc.'s taxation years ending July 31, 2006, and July 31, 2009, were dismissed, and therefore, Les Éléments Chauffants Tempora Inc. has a tax debt in respect of its taxation years ending July 31, 2006, and July 31, 2009;

In accordance with the attached Reasons for Judgment, the appeal from the assessment dated November 9, 2016 (bearing number 4083655), made under section 160 of the Act, is dismissed, without costs.

Signed this 20th day of November 2025.

"Dominique Lafleur"

Lafleur J.

Docket: 2021-1704(IT)G

BETWEEN:

MAGED ELHAMI,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on common evidence with the appeals of Les Éléments Chauffants Tempora Inc. (2021-1701(IT)G) and Shady Elhami (2021-1703(IT)G) on February 3, 4, 5, and 6, and March 17, 18, and 19, 2025, at Montreal, Quebec; and written submissions filed by the Respondent on April 25, 2025, and by the Appellant on May 22, 2025.

Before: The Honourable Justice Dominique Lafleur

Appearances:

Counsel for the Appellants:	Christopher Mostovac Olivier Verdon
Counsel for the Respondent:	Marie-Aimée Cantin Noémie Vespignani Alexandre MacBeth

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JUDGMENT

WHEREAS by virtue of judgment of today's date, the appeals from reassessments made under the *Income Tax Act* (the "Act") for Les Éléments Chauffants Tempora Inc.'s taxation years ending July 31, 2006, and July 31, 2009, were dismissed, and therefore, Les Éléments Chauffants Tempora Inc. has a tax debt in respect of its taxation years ending July 31, 2006, and July 31, 2009;

In accordance with the attached Reasons for Judgment, the appeal from the assessment dated November 9, 2016 (bearing number 4083671), made under section 160 of the *Income Tax Act*, is dismissed, without costs.

Signed this 20th day of November 2025.

"Dominique Lafleur"

Lafleur J.

Citation: 2025 TCC 173
Date: 20251120
Docket: 2021-1701(IT)G

BETWEEN:

LES ÉLÉMENTS CHAUFFANTS TEMPORA INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent;

Docket: 2021-1703(IT)G

AND BETWEEN:

SHADY ELHAMI,

Appellant,

and

HIS MAJESTY THE KING,

Respondent;

Docket: 2021-1704(IT)G

AND BETWEEN:

MAGED ELHAMI,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Lafleur J.

I. INTRODUCTION

[1] Les Éléments Chauffants Tempora Inc. ("Tempora" or the "Appellant") appealed to this Court from reassessments issued by the Minister of National

Revenue (the "Minister") beyond the normal reassessment period under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "Act") for its taxation years ending July 31, 2006, July 31, 2007, July 31, 2008, and July 31, 2009 (respectively, the "2006 taxation year", the "2007 taxation year", the "2008 taxation year" and the "2009 taxation year").

[2] For the 2006 to 2009 taxation years, Tempora claimed deductions for scientific research and experimental development ("SR&ED") expenditures and corresponding investment tax credits ("ITCs"). Claims for ITCs are at issue in these appeals.

[3] The Minister initially assessed Tempora to allow the deductibility of the SR&ED expenditures (in totality or partly for some years) and the claim for the corresponding ITCs.

[4] On November 9, 2016, the Minister reassessed Tempora for the 2006 to 2009 taxation years, disallowing ITCs claimed for SR&ED expenditures and assessing penalties under subsection 163(2) of the Act (the "Reassessments").

[5] In the Reassessments, the Minister took the view that it was not possible to determine whether various expenses made or incurred by Tempora during the 2006, 2007, 2008 and 2009 taxation years with respect to eight projects were SR&ED expenditures under the Act, and whether the Appellant had carried on any SR&ED activities as defined in subsection 248(1) of the Act. Accordingly, the Minister denied the claims for the corresponding ITCs refunded to Tempora in the following amounts: $170,649, $173,540, $242,328 and $151,954 for the 2006, 2007, 2008 and 2009 taxation years respectively.

[6] However, the Minister does not otherwise challenge the deductibility of Tempora's expenses as regular business expenses.

[7] On December 6, 2016, Tempora objected to the Reassessments. On July 15, 2021, Tempora filed a notice of appeal with this Court in respect of the Reassessments, before any decision was rendered on the objection.

[8] Mr. Maged Elhami ("Maged") and Mr. Shady Elhami ("Shady") are also appealing to this Court from assessments issued by the Minister under section 160 of the Act, notices of which are dated November 9, 2016, and bear number 4083671 (Maged) and number 4083655 (Shady). Maged was assessed for an amount of $44,166.95, and Shady was assessed for an amount of $27,860. According to the

Minister, Tempora paid personal tax debts owed by each of Maged and Shady, at a time when Tempora was a tax debtor. Tempora's tax debts resulted from the Reassessments under appeal.

[9] At the hearing, counsel for the Appellant, for Maged and for Shady, acknowledged that the sole issue with respect to the assessments issued under section 160 of the Act to both Maged and Shady was the existence of Tempora's underlying tax debts, which is the subject of Tempora's present appeals. Accordingly, the parties acknowledged that the appeals from the assessments issued to both Maged and Shady shall be vacated, or shall be confirmed, depending upon the findings of the Court as to whether Tempora was a tax debtor at the time Tempora paid personal tax debts owed by Maged and Shady.

[10] At the hearing, both Maged and Shady testified on behalf of Tempora, as did two Canada Revenue Agency ("CRA") financial examiners, Ms. Élaine Jacques and Mr. Mauge Justin. For the Respondent, the following persons testified: Mr. Gabriel Babineau, a CRA officer at the objection level; Mr. Jean-Luc Pérey, a CRA investigator; and Mr. Benoît Lussier, a CRA research and technology advisor.

[11] Mr. Lussier was a CRA research and technology advisor from 2009 to 2015. From 2015 to 2022, he occupied various other roles at the CRA. He earned a Ph.D. in physics at McGill University, specializing in thermal processes and plasma.

[12] In these reasons, all references to statutory provisions are references to the Act, unless otherwise indicated.

II. **CONTEXT**

[13] Tempora was incorporated in 2004 and is in the business of manufacturing products, including the manufacturing of various types of heating elements. From 2004 to December 2006, Maged and Shady's father, Mr. Atef Elhami, owned and managed Tempora.

[14] Both Maged and Shady have been involved in Tempora's business since their childhood. When their father passed away while travelling in Egypt with his family during the Christmas holidays in December 2006, Maged and Shady had to put an end to their university studies and started working for Tempora on a full-time basis. They decided to continue carrying on Tempora's business. Some time after their father passed away, around February 2007, Maged and Shady were appointed

directors of Tempora, and Ms. Claire-William Ibrahim, Maged and Shady's mother, became Tempora's sole shareholder and president.

[15] Mr. Serge Lavoie, Tempora's accountant, had previously convinced Mr. Atef Elhami to claim SR&ED expenses and the corresponding ITCs. Mr. Lavoie prepared all income tax returns (T2s) for Tempora, as well as the T661 forms, titled "Scientific Research and Experimental Development (SR&ED) Expenditures Claim". For his services, Mr. Lavoie took a fee equal to 25% of the amount refunded to Tempora.

[16] The first SR&ED claim Tempora made was filed for its taxation year ending on July 31, 2005, but this SR&ED claim is not at issue in these appeals. On November 1, 2006, Mr. Ali Guidara, a former CRA research and technology advisor, and Mr. Justin visited Tempora's place of business to meet with Mr. Atef Elhami and Maged to discuss the 2005 SR&ED claim. During the visit, they realized that the taxpayer probably did not have a full understanding of the SR&ED program requirements because, *inter alia*, of all the documentation attached to Form T661, which was too voluminous and included fact sheets for Tempora's products. However, the CRA concluded that the 2005 project qualified as SR&ED, but the taxpayer was advised to provide a more complete and specific description of projects for future SR&ED claims (Exhibit R-1, Respondent's Book of Documents, tab 26). Mr. Justin also indicated that although the amount claimed for materials was significant, he concluded that this amount was justified because of what they had seen during their visit to Tempora's place of business (Exhibit R-1, Respondent's Book of Documents, tab 25).

[17] Tempora filed the following SR&ED claims for the 2006 to 2009 taxation years.

[18] In 2006, for the project entitled "Thermocouple and Temperature Moderator", Tempora claimed $464,324 as a deduction for SR&ED expenditures (this deduction was allowed), and corresponding ITCs totalling $174,363. The CRA refunded ITCs in the amount of $170,649 to Tempora.

[19] In 2007, for the project entitled "Tubular Element Manufacturing Line", Tempora claimed $924,915 as a deduction for SR&ED expenditures (this deduction was only partly allowed in the amount of $498,760), and corresponding ITCs. The CRA initially allowed an ITC of $189,889, of which $173,540 was refunded to Tempora.

[20] In 2008, Tempora filed SR&ED claims for three projects: “Flexible Silicone Rubber and Kapton Heating Elements” (project 2008-01), “Straight and Bent Annealed Tubular & Finned Heating Elements” (continuation of the 2007 project) (project 2008-02), and “Hi-Density Cartridge Heaters” (project 2008-03). Tempora claimed $991,624 as a deduction for SR&ED expenditures (this deduction was only partly allowed in the amount of $968,618), and corresponding ITCs. The CRA initially allowed an ITC of $319,874, of which $242,328 was refunded to Tempora.

[21] In 2009, Tempora filed SR&ED claims for three projects: “Hi-Density Cartridge Heaters” (project 2009-01) (a continuation of project 2008-03), “Tubular Process Heaters” (project 2009-02), and “Coil & Cable Heaters” (project 2009-03). Tempora claimed $367,668 as a deduction for SR&ED expenditures, which the Minister increased to $407,668, and corresponding ITCs. The CRA initially allowed and refunded ITCs in the amount of $151,954 to Tempora.

[22] Mr. Guidara performed a scientific examination of the various projects that Tempora claimed as SR&ED for the 2006 to 2008 taxation years. However, Mr. Guidara did not do a scientific examination of the SR&ED claim filed by Tempora for the 2009 taxation year, although he was involved in evaluating that claim, as Ms. Jacques testified.

[23] Mr. Guidara concluded that all the projects Tempora had claimed qualified for SR&ED (except for one project in 2008 entitled “Hi-Density Cartridge Heaters”). However, Mr. Guidara did not prepare any scientific report for any of the SR&ED projects. In 2009, the CRA did not perform any scientific review because of a lack of resources. Further, the CRA performed a financial examination of all expenses for the 2007 to 2009 taxation years, but not for 2006.

[24] For the 2010 taxation year, Tempora filed an SR&ED claim for a new project, which is not at issue in these appeals. The scientific examination was performed in February 2011 mainly by Mr. Clément Leclerc, a CRA research and technology advisor. Mr. Lussier, who testified at the hearing, assisted him. They concluded that the invoice submitted by Tempora in support of its SR&ED claim was false and denied the SR&ED claim.

[25] Furthermore, because of their findings regarding the 2010 SR&ED claim, Mr. Leclerc and Mr. Lussier proceeded to examine the previous taxation years’ SR&ED claims and found out that the technical reports filed by Tempora in support of its claims had been plagiarized and came mostly from documents available from other suppliers or manufacturers’ websites. Tempora’s files for the 2006 to 2010

taxation years were then sent to another CRA division, which carried out a criminal investigation into the affairs of Tempora.

[26] During its criminal investigation, the CRA obtained search warrants to determine the nature and details of the alleged scheme by which Tempora had obtained ITCs for SR&ED purposes for the 2006 to 2010 taxation years. The CRA executed the warrants on July 4, 2012. Searches were carried out at Tempora's place of business, as well as at Ms. Ibrahim's home and Tempora's accountant's place of business. The CRA seized 32 boxes of documents and many computers. All the documents and computers seized by the CRA were handed back to Tempora in August 2017.

[27] In September 2012, Mr. Lussier performed a scientific examination of Tempora's SR&ED claims for its 2006 to 2009 taxation years. Mr. Lussier's audit consisted of reviewing the documents submitted by Tempora with its T661 forms, as well as documents and materials seized by the CRA (including electronic documents), without contacting Tempora or any of its directors or shareholders. He did not find any notebook or test records but saw a good deal of documents attesting to commercial activities, including client billings and bills from suppliers. According to Mr. Lussier, it was not possible to determine whether the activities Tempora had performed during these taxation years were SR&ED activities. At the hearing, the report prepared by Mr. Lussier, dated December 14, 2012, was introduced in evidence (Exhibit R-1, Respondent's Book of Documents, tab 78).

[28] Further, during his examination of the seized documents and materials, Mr. Lussier found out that Mr. Guidara had been invited to Shady's wedding in August 2010 (Exhibit R-1, Respondent's Book of Documents, tab 176). He reported his findings to the CRA, and the CRA subsequently put an end to Mr. Guidara's employment.

[29] In September 2013, the CRA laid criminal charges against Tempora, Ms. Ibrahim, Maged and Shady under paragraphs 239(1.1)(a) and (c) because of alleged false or deceptive statements made to the CRA in respect of the SR&ED claim for the 2010 taxation year. No criminal charges were laid in respect of the SR&ED claims for the 2006 to 2009 taxation years.

[30] On October 17, 2016, the provincial Court of Québec, by summary conviction, found Tempora, Maged and Shady guilty of an offence under paragraphs 239(1.1)(a) and (c) for the 2010 taxation year (*R. c. Elhami*,

2017 QCCQ 2684); they were found liable to pay a fine of $1,000,000 each (as revised by the Superior Court of Québec, 2018 QCCS 2576).

III. **ISSUES**

[31] For each of Tempora's 2006 to 2009 taxation years, the issues in these appeals are:

(1) Was the Minister justified in reassessing Tempora beyond the normal reassessment period under subparagraph 152(4)(a)(i)?

(2) If the Court finds that the Minister was justified in reassessing Tempora beyond the normal reassessment period:

   (a) Did the activities undertaken by Tempora qualify as SR&ED as defined under subsection 248(1), entitling Tempora to corresponding ITCs per subsection 127(5)?

   (b) Was the Minister justified in assessing penalties under subsection 163(2)?

IV. **POSITIONS OF THE PARTIES**

A. **The Appellant**

[32] According to the Appellant, the audit process was a retaliatory criminal investigation because of the CRA's findings in respect of the 2010 SR&ED claim. The CRA waited for the criminal charges to be confirmed for the 2010 taxation year before issuing reassessments in respect of the 2006 to 2009 taxation years. In doing his audit, Mr. Lussier was not authorized to contact the Elhami brothers to discuss any projects. Further, Mr. Lussier disregarded any analysis previously carried out by other CRA employees in respect of the same projects. Plagiarism in documentation attached to the SR&ED claims was the main reason for which Mr. Lussier disallowed these claims.

[33] To be allowed to reassess Tempora beyond the normal reassessment period, the Respondent must establish that Tempora had been negligent in respect of its SR&ED claims. According to the Appellant, the Respondent failed to do so. The evidence showed that Tempora and its representatives (directors and shareholders)

were not negligent as they had always been in contact with the CRA, explaining their activities and keeping meticulous records, including photographs of waste materials.

[34] Moreover, debates on a project's technical aspects and on whether a project satisfies SR&ED criteria are not indicative of negligence. Because Tempora claimed that it carried out SR&ED activities, and because there are no hard-and-fast rules in making that determination, there could be no misrepresentation sufficient to allow the Minister to reassess Tempora beyond the normal reassessment period. For the same reasons, the penalties assessed under subsection 163(2) should be vacated.

[35] In addition, according to the Appellant, all projects Tempora claimed for the 2006 to 2009 taxation years qualify as SR&ED. The Respondent's theory that the projects are not SR&ED activities mainly relies on lack of corroboration, which is not enough in the case at bar for the Court to be satisfied that the projects do not qualify as SR&ED.

B. **The Respondent**

[36] According to the Respondent, the Minister was justified in reassessing Tempora beyond the normal reassessment period because Tempora has made a "…misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing [its] return or in supplying any information under the Act".

[37] In the case at bar, the evidence clearly showed that all the SR&ED claims were in large part plagiarized. Furthermore, Tempora, and both Maged and Shady, knew or must have reasonably known that Tempora undertook no SR&ED activities.

[38] The Respondent also alleges that the credibility of both Maged and Shady was undermined during the hearing, mostly because of contradictions in their testimonies.

[39] The Respondent is of the view that the above-noted facts also satisfy requirements for the Minister to assess penalties under subsection 163(2).

[40] Further, the Respondent is of the view that the Appellant failed to adduce sufficient evidence to show that the activities Tempora undertook for the projects for the 2006 to 2009 taxation years were SR&ED as defined in subsection 248(1) and the case law (*Northwest Hydraulic Consultants Ltd. v. R.*, [1998] 3 C.T.C. 2520 (TCC), at para. 16 [*Northwest Hydraulic*]). Tempora did not adduce sufficient

evidence showing any technological uncertainties nor any technological advancement. According to the Respondent, all activities Tempora undertook during the 2006 to 2009 taxation years were commercial production activities, namely, the commercialization of heating elements, and not SR&ED activities.

V. **PRELIMINARY MATTER – OBJECTION BY THE RESPONDENT**

[41] During the hearing, the Respondent objected to Shady and Maged's testimonies with respect to all the testing activities Tempora performed. The Respondent submits that Tempora failed to comply with its undertaking to provide "…all the data and all the testing that was done for all the projects during the years in issue, 2006 to 2009" (Exhibit R-4, Transcripts of Examinations for Discovery dated March 28, 2023, Questions 89 to 96, and Undertaking No. 1).

[42] In the answer to its undertaking, Tempora emailed the Respondent a copy of five Excel programs that, according to the Appellant, contain all the information with respect to Tempora's 2007 to 2009 SR&ED projects (tests, results, costs, etc.) but not with respect to the 2006 project (Exhibit R-3, Letter from Starnino Mostovac dated June 15, 2023).

[43] The Respondent submits that under sections 96 and 98 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules"), the Court should exclude any testimony on Tempora's testing activities.

[44] According to the Respondent, it would not be in the interests of justice for the Respondent to be taken by surprise. The Court should also consider that Shady has admitted that Tempora refused to provide the documents requested, but for five Excel programs.

[45] The Respondent further submits that the Appellant's failure to comply with its undertaking has prejudiced the Respondent, who could no longer cross-examine the Appellant's representatives nor submit expert reports on any of the testing activities. Counsel for the Respondent had to figure out themselves how to manipulate the Excel programs to look at what tests the Appellant performed, if any.

[46] According to the Appellant, the Excel programs provided to the Respondent represent the only documents containing all the results, tests, and data as requested by the Respondent at the examination for discovery. As Shady indicated, they used to keep paper records of their testing, and then they switched to Excel files in 2007. They inputted the models and thousands of values (from testing) into these Excel

programs, which allowed Tempora to then ascertain the possibility and methodology of making a heater.

[47] Hence, according to the Appellant, because Maged did provide a complete and full answer to the question asked by the Respondent, and subsequently complied with the undertaking, sections 96 and 98 of the Rules should not be applied to uphold the Respondent's objection. Further, the Respondent was not taken by surprise, because he had received all the available documentation, as requested.

[48] Moreover, the Court should consider the fact that Mr. Lussier testified having seen some of the Excel programs when he performed his audit through the seized documents and materials, although he was not able to navigate through them.

[49] The relevant provisions of sections 96 and 98 of the Rules read as follows:

96 (1) Where a party, or a person examined for discovery on behalf or in place of a party, has refused to answer a proper question or to answer a question on the ground of privilege, and has failed to furnish the information in writing not later than ten days after the proceeding is set down for hearing, the party may not introduce at the hearing the information refused on discovery, except with leave of the judge.	**96 (1)** La partie interrogée au préalable, ou la personne qui l'est au nom ou à la place de la partie, qui refuse de répondre à une question légitime ou qui prétend que le renseignement est privilégié, et qui ne fournit pas ce renseignement par écrit dans les dix jours à compter de l'inscription de l'instance pour audition, ne peut, sans l'autorisation du juge, présenter en preuve à l'audience le renseignement qu'elle a refusé de communiquer.
(2) The sanction provided by subsection (1) is in addition to the sanctions provided by section 110.	**(2)** La sanction prévue au paragraphe (1) s'ajoute à celles que prévoit l'article 110.
…	…
98 (1) Where a party has been examined for discovery or a person has been examined for discovery on behalf or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the examination,	**98 (1)** La partie interrogée au préalable, ou la personne qui l'est au nom, à la place ou en plus de cette partie, qui découvre ultérieurement qu'une réponse à une question de l'interrogatoire :

(a) was incorrect or incomplete when made, or	**a)** était inexacte ou incomplète;
(b) is no longer correct and complete,	**b)** n'est plus exacte et complète,
the party shall forthwith provide the information in writing to every other party.	doit fournir immédiatement ce renseignement par écrit à toutes les autres parties.
…	…
(3) Where a party has failed to comply with subsection (1) or a requirement under paragraph(2)(a), and the information subsequently discovered is,	**(3)** Si une partie ne se conforme pas au paragraphe (1) ou à l'alinéa (2)a) et que le renseignement obtenu ultérieurement est :
(a) favourable to that party's case, the party may not introduce the information at the hearing, except with leave of the judge, or	**a)** favorable à sa cause, elle ne peut le présenter en preuve à l'instance qu'avec l'autorisation du juge;
(b) not favourable to that party's case, the Court may give such direction as is just.	**b)** défavorable à sa cause, la Cour peut rendre des directives appropriées.

[50] For the following reasons, the Respondent's objection is overruled, and Maged and Shady's testimonies on Tempora's testing activities during the 2006 to 2009 taxation years are admitted and shall form part of the record.

[51] The purpose of examination for discovery is to render the trial process fair and more efficient by allowing each party to fully know before trial the positions of each party to define the issues between them (*Canada v. Lehigh Cement Limited*, 2011 FCA 120, at para. 30, citing *Montana Band v. Canada*, (T.D.), [2000] 1 F.C. 267). Trial by ambush is no longer allowed in Canada (*Rudolph v. The King*, 2024 TCC 148, at para. 167).

[52] Section 98 of the Rules was enacted in furtherance of this purpose and specifically provides that the parties owe each other continuous disclosure obligations. Upon becoming aware that an answer was incomplete, a party has an obligation to provide the information forthwith to every other party. As provided in paragraph 98(3)(a) of the Rules, where a party fails to follow the Rules, that party

may not introduce the favourable information at the hearing, except with leave of the Court.

[53] During Maged's examination for discovery as Tempora's representative, which was held on March 28, 2023, he testified regarding the Excel programs and stated that they contained "thousands of pieces of information that were entered in them, and we developed those programs into also being able to provide work order" (Exhibit R-4, Transcripts of Examinations for Discovery dated March 28, 2023, p. 26, Question 89, lines 8–11).

[54] At the hearing, I did not grant the Appellant's motion to seal the USB key containing the Excel programs. The Appellant then decided to adduce in evidence five extracts of the Excel programs (Exhibit A-2 – Tempora Tubular Specifications; Exhibit A-3 – Silicone Rubber; Exhibit A-4 – Hi-Density Cartridge Heaters; Exhibit A-5 – Coil & Cable Heaters no.1; and Exhibit A-6 – Coil & Cable Heaters, no. 2). Maged and Shady testified regarding the testing activities Tempora performed during the 2007 to 2009 taxation years using these extracts of the Excel programs.

[55] In the case at bar, Maged testified that the Excel programs delivered to the Respondent represent the only documents containing all the results, tests, and data in respect of the 2007 to 2009 taxation years, as the Respondent requested at the examinations for discovery.

[56] I therefore find that the undertaking was satisfied and was complete. Accordingly, sections 96 and 98 of the Rules are of no application.

VI. **CREDIBILITY OF MAGED AND SHADY'S TESTIMONIES AT THE HEARING**

[57] I find that, for the most part, Maged and Shady's testimonies at the hearing were credible. Both Maged and Shady testified honestly and openly overall, explaining the process Tempora followed during the 2006 to 2009 taxation years in respect of the projects at issue in these appeals. However, I did not find Maged credible when he testified that the documentation attached to the various technical reports and the SR&ED claims was theory. I will discuss that matter further below.

[58] In his written submissions, the Respondent raised the following factors as undermining Maged and Shady's credibility as witnesses in these appeals. After reviewing the evidence adduced at trial, I do not find that these factors undermined their credibility materially, for the following reasons.

[59] The Elhami family's decision to hide Mr. Atef Elhami's death during the 2006 Christmas holiday from Tempora's employees does not affect Maged and Shady's credibility. There are many reasons why owners of a family business, like Tempora, would not want to advertise hastily the death of its founder.

[60] The Respondent asks that I draw an adverse inference from the Appellant's failure to call Tempora's accountant, Mr. Serge Lavoie, as a witness in these appeals, as he was the person who completed all the SR&ED claims.

[61] I do not agree with the Respondent. In *Imperial Pacific Greenhouses Ltd. v. The Queen*, 2011 FCA 79, at para. 14, the Federal Court of Appeal stated that a Tax Court judge can draw an adverse inference from a party's failure to call a witness, especially if the witness's evidence would have been central to establishing an important fact. The testimony of Mr. Lavoie was not central to establish any important fact in these appeals. The fact that it was Mr. Lavoie who prepared the SR&ED claims is not an important fact considering the case law, which has established that a taxpayer cannot argue, in order to avoid a finding of misrepresentation under subsection 152(4), that he or she relied on his or her accountant to prepare an income tax return. Further, Mr. Lavoie's testimony was not essential to establish the nature of the activities Tempora performed during the 2006 to 2009 taxation years.

[62] The Respondent raised some statements that he argues were contradictions between Maged and Shady's testimonies.

[63] Firstly, Maged testified that before the tubular element became a program, Tempora had collected data representing "40% of the testing required in order for us to start the testing", but Shady testified that the testing did not start before the Oakley Industries ("Oakley") machines were delivered and put in commission. I do not see any contradiction between these two statements. Instead, both Maged and Shady confirmed that the testing performed by Tempora as part of the tubular element project (which started sometime in 2007 and continued in 2008) started only when the Oakley machines were delivered and commissioned sometime after August 7, 2007.

[64] In addition, the Respondent referred to the following statements dealing with the uses of the Oakley machines: Maged testified that they were used only for SR&ED purposes, but Shady testified that they were used commercially, even today. Reviewing the evidence adduced at the hearing, I conclude that Shady's comments

referred to the uses of the Oakley machines as of the day of the hearing, and not back then in 2007.

[65] Further, the Respondent stated that both Maged and Shady had described the Excel programs adduced in evidence at the hearing under Exhibits A-2 to A-6 differently: to Maged, they were documents to help employees complete purchase orders; to Shady, they were just Excel programs that did not contain tests and results. Reviewing the evidence adduced at the hearing, I do not agree with the Respondent. Maged testified at the hearing that the Excel programs were created based on all the testing and results they obtained doing SR&ED, and that they were not only documents used by employees to complete purchase orders. Shady's testimony was to the same effect.

[66] The Respondent also argues that Maged and Shady's conviction of an offence under paragraphs 239(1.1)(a) and (c) and their default in paying the resulting fines undermine their credibility as witnesses. I agree that a prior conviction is an important factor in assessing the credibility of a witness, especially here since paragraphs 239(1.1)(a) and (c) are essentially punishing false or deceptive statements or claims. However, I also considered the fact that the convictions occurred over nine years ago, that they relate to events that occurred in 2010 (15 years ago), and that nothing in the evidence suggests that Maged and Shady broke the law again, including through Tempora or another corporate entity (*Boily v. Canada*, 2022 FC 1243, at paras. 58–76).

[67] The Respondent also asks the Court to draw a negative inference with respect to Shady's credibility because he extended a wedding invitation to Mr. Guidara. Shady testified that it was out of respect as part of Egyptian culture. The Respondent gave this Court no valid reason to question that explanation. In any event, this Court has generally found Shady's testimony to be credible and does not view this wedding invitation as having a material impact on that conclusion.

VII. **DISCUSSION**

A. **Reassessments beyond the normal reassessment period under subparagraph 152(4)(a)(i)**

[68] The Respondent must show that Tempora made a misrepresentation that is "attributable to neglect, carelessness or wilful default or has committed any fraud", either in filing its return or in supplying information under the Act, for the Minister

to be allowed to reassess Tempora beyond the normal reassessment period for each taxation year.

[69] The relevant portion of subparagraph 152(4)(a)(i) reads as follows:

> **152(4)** The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer…, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if
>
> > **(a)** the taxpayer or person filing the return
> >
> > > **(i)** has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or

[70] In French, the Act reads as follows:

> **152(4)** Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie…. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants :
>
> > **a)** le contribuable ou la personne produisant la déclaration :
> >
> > > **(i)** soit a fait une présentation erronée des faits, par négligence, inattention ou omission volontaire, ou a commis quelque fraude en produisant la déclaration ou en fournissant quelque renseignement sous le régime de la présente loi,

(1) **Positions of the parties**

(a) ***The Respondent:***

[71] According to the Respondent, Tempora did not file with the CRA, nor did it retain, documentation supporting any SR&ED activities performed over the years as prescribed by the Act and by Form T661. Tempora claimed in its T661 forms to have in its possession certain documents in support of its SR&ED claims, but it did not. Further, the evidence failed to show that Tempora performed SR&ED activities. Accordingly, the Respondent submits that as some prescribed information was

missing from Form T661, the expenses claimed are deemed not to be SR&ED expenditures (subss. 37(11) and (12), 127.1(1) and 127(9); *Francis & Associates v. R.*, 2014 TCC 137, at para. 20).

[72] The Respondent maintains that because Tempora claimed SR&ED expenditures and the corresponding ITCs to which it was not entitled, and because Tempora claimed to have documents in support of its SR&ED claims but it did not, Tempora made an incorrect statement in its T2 income tax returns and therefore made a misrepresentation at the time of filing its T2 income tax returns.

[73] Further, according to the Respondent, plagiarism amounts to fraud or at least to neglect, or gross negligence. Given the extent of plagiarized documentation in the technical reports attached to the T661 forms Tempora filed with its T2 income tax returns, the Minister was allowed to reassess Tempora for statute-barred years, because Tempora had made a misrepresentation attributable to fraud or neglect when filing its income tax returns.

[74] The evidence showed that Tempora had plagiarized other suppliers and manufacturers' documentation found on the Internet. The Respondent submits that the Appellant has appropriated other suppliers and manufacturers' documentation. Tempora added titles to this documentation, removed the logos of other suppliers and manufacturers and added its own logo, removed the reference to the suppliers or manufacturers' names and added its own, and removed references to part numbers or telephone numbers. By doing this, the Elhami brothers made it impossible to qualify the documents as "theory", as they claimed. What they were really doing was passing off the work of these suppliers and manufacturers as Tempora's work product. Tempora did more than mere copy-pasting. This is an immense amount of work done to defraud the Minister, of the same gravity as counsel who tampers with case law to mislead the Court. The evidence showed that the Appellant tampered with 136 pages of documents in total.

[75] Further, the Appellant had indicated in one technical report that both Shady and Maged were engineers by adding "ENG." besides their respective names (Exhibit R-1, Respondent's Book of Documents, tab 38 at p. 3). Shady and Maged are not engineers.

[76] The Respondent argues another ground to allow the Minister to reassess Tempora's otherwise statute-barred years. At the time of the filing of the T661 forms with its T2 income tax returns, Tempora had made a misrepresentation attributable to neglect because it had failed to inform itself of the SR&ED program's

requirements. The Elhami brothers both testified that they did not read Form T661 or the T4088 CRA guide on Form T661. They both demonstrated a lack of reasonable care sufficient to allow the Minister to reassess Tempora's otherwise statute-barred years. Moreover, Tempora may not have reasonably believed that it had conducted SR&ED activities for all the projects at issue in these appeals.

(b) ***The Appellant:***

[77] According to the Appellant, the Respondent must establish that Tempora had been negligent with respect to its SR&ED claims for the 2006 to 2009 taxation years. However, the evidence did not establish that Tempora had been negligent in that respect. In fact, Maged had always been in contact with the CRA, he explained to the CRA what each project entailed, and he kept records of Tempora's activities, including photographs of consumed materials for each project.

[78] In the previous years, the CRA had fully cooperated with Tempora to explain the SR&ED program. During the 2006 to 2009 taxation years, Tempora was investing its funds, not to defraud the government, but rather to make technological advances, develop new products and build heating elements beyond market standards. During those years, Mr. Guidara was Tempora's guide and resource person for any questions.

[79] Further, according to the Appellant, the Respondent's allegations of negligence justifying the reopening of the taxation years are not related to the SR&ED claims, but rather to the supporting documentation attached to the T661 forms as filed by Tempora. Tempora was merely using documentation from other suppliers and manufacturers' websites to explain to the CRA the theory and knowledge base underlying its purported work. In any event, according to the Appellant, plagiarism is irrelevant in determining whether a project qualifies as SR&ED and should not be considered by the Court.

[80] In addition, according to the Appellant, the filing of technical reports by Tempora with its T661 forms, including sources of information, is not a condition prescribed by the Act for obtaining ITCs for SR&ED activities, and hence, is irrelevant for those purposes.

[81] Finally, according to the Appellant, debate as to whether a project qualifies as SR&ED is not indicative of negligence.

(2) **Analysis**

[82] As indicated above, the Minister has the onus to establish, on a balance of probabilities, the facts required to justify reassessing after the expiration of the normal reassessment period. The Respondent must show, on a balance of probabilities, that Tempora made a misrepresentation in filing its returns or in supplying information under the Act and that this misrepresentation was attributable to neglect, carelessness or wilful default or fraud.

[83] For the following reasons, I find that Tempora has made a misrepresentation attributable to neglect in supplying information under the Act for the 2006 to 2009 taxation years. Thus, I do not have to determine whether Tempora has made any misrepresentation attributable to neglect, carelessness or wilful default, or has committed any fraud, in filing its income tax returns for those years. Consequently, the Minister was allowed to reassess Tempora beyond the normal reassessment period for the 2006 to 2009 taxation years under subparagraph 152(4)(a)(i).

[84] The Appellant takes the view that it is only in circumstances where a taxpayer has committed fraud in supplying information under the Act that the Minister may reassess the taxpayer beyond the normal reassessment period, and that neglect does not suffice, relying on an *obiter* of this Court in *Ross v. The Queen*, 2013 TCC 333, at paras. 30 and 70–77 [*Ross*].

[85] I do not agree with the Appellant's interpretation of subparagraph 152(4)(a)(i). The Court's comments in *Ross* were an *obiter*. In addition, I agree with submissions made by the Respondent in *Ross* that:

> [75] …a textual, contextual and purposive analysis supports the Crown's interpretation of paragraph 152(4)(*a*). In re-formatting the subsection for clarity, the Respondent argues that "the Minister may reassess beyond the normal reassessment period in cases where a taxpayer";
>
> > a) has made any misrepresentation that is attributable to neglect, carelessness or wilful default in filing the return or in supplying any information under the *Act*; or
> >
> > b) has committed any fraud in filing the return or in supplying information under the *Act*" [paragraphing added for clarity].

[86] To make a determination under subparagraph 152(4)(a)(i), the Court must assess all of the evidence admitted during the hearing (see *Vine Estate v. Canada*, 2015 FCA 125, at paras. 24–25 [*Vine Estate*]).

(a) ***Review of the evidence:***

[87] A careful review of the evidence adduced at trial shows the following.

(i) ***For 2006:***

[88] The income tax return (T2) dated January 30, 2007, was signed by Mr. Atef Elhami as president of Tempora. Form T661, dated January 30, 2007, was also signed by Mr. Atef Elhami and attached to the T2 income tax return. Schedule 31 of the T2 income tax return was also completed to claim the corresponding ITCs.

[89] However, Mr. Atef Elhami passed away in December 2006. Maged and Shady gave no explanation for Mr. Atef Elhami's signature.

[90] A technical report was attached to Form T661 (Exhibit A-1, Appellant's Book of Documents, tab 15). The technical report is a three-page document prepared by Mr. Lavoie (with the mention "*Les Éléments Chauffants Tempora Inc.*" at the bottom of each page) to which are attached 133 pages of information relating to thermocouples.

[91] More than half of the documents attached to the technical report submitted with Form T661 have been copied from documents found on the Internet from suppliers and manufacturers of heating elements, such as Watlow, Omega, Thermo Electric, Rosemount, Lumrix, and Instrument Service & Equipment. Furthermore, more than half of the documents from suppliers and manufacturers' websites have been modified, either by removing the supplier or manufacturer's name or the reference to a product, or by adding Tempora's logo.

(ii) ***For 2007:***

[92] Claire-William Ibrahim, as Tempora's president, signed the income tax return (T2) dated September 14, 2007. She also signed Form T661 dated September 14, 2007. The form was attached to the T2 income tax return. Further, a technical report was attached to the Form T661 (Exhibit A-1, Appellant's Book of Documents, tab 16). Schedule 31 of the T2 was also completed to claim the corresponding ITCs.

[93] The technical report is a three-page document prepared by the Elhami brothers on Tempora's letterhead, to which are attached 38 pages of information relating to tubular heating, as well as documentation regarding the Oakley machines (pages 4 to 26 are general documentation from various sources, and pages 27 to 41 contain a detailed description of the machines manufactured by Oakley).

[94] The documentation attached to the SR&ED claim was similar to the documentation attached to the request for a preliminary opinion filed by Tempora for the 2007 SR&ED project. However, with the SR&ED claim, the reference to Oakley was removed from pages describing the Oakley machines; further, Tempora refers to a 13-step process taken from Oakley documentation.

[95] A total of 27 pages out of 41 pages attached to the technical report submitted with Form T661 have been copied from documents found on the Internet from suppliers and manufacturers of heating elements, such as Watlow, TruHeat, Ivaldi, Tempco, Durex Industries, and Oakley. Furthermore, 26 pages out of 27 pages from suppliers and manufacturers' websites have been modified, either by removing the supplier or manufacturer's name or the reference to a product, or by adding Tempora's logo.

(iii) ***For 2008:***

[96] Claire-William Ibrahim, Tempora's president, signed the income tax return (T2) dated September 3, 2008. She also signed the Form T661 dated September 3, 2008, which was attached to the T2 income tax return. Further, technical reports for all three projects were attached to the Form T661 (under Exhibit A-1, Appellant's Book of Documents, tab 17 (Flexible Silicone Rubber and Kapton Heating Elements R&D), tab 18 (Straight and bent annealed Tubular & Finned Heating Elements Development Project), and tab 19 (Hi-Density Cartridge R&D Project)).

[97] The format of Tempora's technical reports had changed from previous years. For example, the technical report for the Flexible Silicone Rubber and Kapton Heating Elements project contained a title page, a summary of the SR&ED credits on Tempora's letterhead, a table of contents (introduction and objectives, knowledge base, technological advancements and SR&ED content activities and documentation), followed by pages with the titles "Technological Objectives", "Knowledge Base", "Technological Advancement", "Analysis of Experimental Partial Results", "Advancement Achieved", "Technological Achieved [sic]", "Technological Achievement", "Technological Analysis of Partial Results", "The

Specific procedures and Partial analysis & of results obtained", and "Experimental Partial Results".

[98] The technical reports prepared for the other two projects were in a similar format. Furthermore, the technical report for the Straight and Bent Annealed Tubular & Finned Heating Elements project also contained various pictures of consumed materials, and various charts of results.

[99] Tempora also obtained from Mr. Guidara a preliminary opinion for the Flexible Silicone Rubber and Kapton Heating Elements project (Exhibit A-1, Appellant's Book of Documents, tab 9). The technical report contains specification pages of a general nature (from various suppliers), and results pages (pp. 14–17) with a description of the project and an analysis of results obtained.

[100] The technical report for the project entitled Straight and Bent Annealed Tubular & Finned Heating Elements, which is a continuation of the 2007 project, also contains specification pages of a general nature and results pages, in addition to pages with pictures of consumed materials and equipment used. The results pages refer to specific experimental procedures performed by Tempora.

[101] Finally, the technical report for the project entitled Hi-Density Cartridge Heaters is of a general nature and concerns cartridge heaters. More particularly, all documentation is plagiarized from the Internet.

[102] A total of 22 of the 65 pages attached to the three technical reports have been copied from documents found on the Internet from suppliers and manufacturers of heating elements, such as Watlow, TruHeat, Ivaldi, Tempco, Durex Industries, and Indeeco. Furthermore, 20 out of 22 pages from suppliers and manufacturers' websites have been modified, either by removing the supplier or manufacturer's name or the reference to a product, or by adding Tempora's logo.

(iv) ***For 2009:***

[103] Only an extract of Tempora's income tax return (T2) for the 2009 taxation year was produced in evidence. It does not show who signed the return.

[104] Claire-William Ibrahim signed the Form T661 dated September 30, 2009, that was attached to the T2 income tax return. Further, technical reports for all three projects were attached to the Form T661 (Exhibit A-1, Appellant's Book of Documents, tab 20 (Hi-Density Cartridge Heaters), tab 21 (Tubular Process

Heaters), and tab 22 (Coil & Cable Heaters)). The format of the technical reports was changed again, as Form T661 was greatly modified by the CRA for the 2009 taxation year. For example, the technical report for the Hi-Density Cartridge Heaters project contained only six pages, including a page entitled "Step by Step Process of Hi-Density Cartridge Heater R&D". The technical report prepared for the other two projects is of a similar format. Further, Form T661 indicates that lines 231 and 232 of the T2 income tax returns were checked and that Schedule 31 of the T2 was completed.

[105] Because Tempora did not complete boxes 240, 242 and 244 of the newly issued Form T661, the CRA required them to complete these boxes for each project. By letter dated December 1, 2009, Tempora, through its accountant's firm, sent the required sections of Form T661 for the three projects (Exhibit A-1, Appellant's Book of Documents, tab 14).

[106] Tempora attached 22 pages of documentation to the technical reports for the 2009 projects, and 14 pages have been copied from documents found on the Internet from suppliers and manufacturers of heating elements, such as Watlow, TruHeat, Tempco and Durex Industries. Furthermore, all 14 pages from suppliers and manufacturers' websites have been modified, either by removing the supplier or manufacturer's name or the reference to a product, or by adding Tempora's logo. Furthermore, box 240 of Form T661 filed by Tempora, which describes the technological advancement of the project entitled "Coil & Cable Heaters", was mostly copied from the Internet.

(b) ***Findings of the Court:***

[107] For the following reasons, I find that Tempora made a misrepresentation in respect of the technical reports, including any attached documentation, submitted with Tempora's T661 forms which contained incorrect statements having a material effect on the purposes of Tempora's SR&ED claims.

[108] Under the applicable case law, an incorrect statement in an income tax return amounts to a misrepresentation, "at least one that is material to the purposes of the return and to any future reassessment" (*Nesbitt v. The Queen*, 96 D.T.C. 6588, [1996] F.C.J. No. 1470 (F.C.A.) (QL); cited with approval in *Vine Estate*). Further, in that same decision, the Court held that an incorrect statement would remain a misrepresentation even if the Minister could find the error on the income tax return, after a careful analysis of the supporting material.

[109] The Court has also set out that the threshold to establish misrepresentation is low (*Fuhr v. The King*, 2024 TCC 43, at para. 21, citing *MF Electric Incorporated v. R.*, 2023 TCC 60).

[110] I do not find credible Maged's explanations that the documentation attached to, or forming part of, the technical reports was theory. I do not find that the documentation from various suppliers and manufacturers' websites attached to, or forming part of, the various technical reports is theory that validates or explains Tempora's activities. Further, the fact that Mr. Guidara may have known where the information submitted had been taken from, and that he may have been informed that Maged had replaced the various names of suppliers or manufacturers with Tempora's name is not relevant.

[111] The extent of the modifications to documentation from various suppliers and manufacturers' websites (e.g. replacing their names with Tempora's, removing their logos to add Tempora's logo, adding titles, removing references to part numbers or telephone numbers) can only lead the Court to find that Maged's explanations were not credible. If Tempora wanted to submit theory with its Form T661, it could have simply attached documentation from suppliers and manufacturers of heating elements to the Form T661, without modifying that documentation.

[112] Because I find that documentation attached to, or forming part of, the technical reports submitted with the T661 forms for the 2006 to 2009 taxation years was greatly plagiarized from other suppliers and manufacturers' websites, I conclude that Tempora has made a misrepresentation in that respect for the 2006 to 2009 taxation years.

[113] As discussed above, misrepresentation under subparagraph 152(4)(a)(i) allowing the Minister to reassess statute-barred years can also occur in supplying information under the Act. The Appellant submits that the documents forming the theoretical basis of the SR&ED claims at issue, namely the technical reports and attachments, are optional and therefore cannot be prescribed information under the Act. For the following reasons, I do not agree with the Appellant as I find that the technical reports, including documentation attached thereto, submitted in support of Tempora's SR&ED claims are prescribed information and therefore, are information supplied "under the Act" within the meaning of subparagraph 152(4)(a)(i).

[114] Subsection 37(1) provides for the deductibility, in computing a taxpayer's income, of expenditures of a current and capital nature made by a taxpayer on SR&ED carried on in Canada.

[115] Subsections 37(11) and 37(12) (as they read during the 2006 to 2009 taxation years) provide that if the prescribed form containing prescribed information is not filed within the prescribed delay, no amount could be deducted by a taxpayer under subsection 37(1) as SR&ED expenditures.

[116] The relevant parts of subsections 37(11) and 37(12) read as follows (during the 2006 to 2009 taxation years):

> **37(11)** Subject to subsection 37(12), no amount in respect of an expenditure that would be incurred by a taxpayer in a taxation year … may be deducted under subsection 37(1) unless the taxpayer files with the Minister a prescribed form containing prescribed information in respect of the expenditure on or before the day that is 12 months after the taxpayer's filing-due date for the year.
>
> **37(12)** If a taxpayer has not filed a prescribed form in respect of an expenditure in accordance with subsection 37(11), for the purposes of this Act, the expenditure is deemed not to be an expenditure on or in respect of scientific research and experimental development.

[Emphasis added.]

[117] Further, if an expenditure is deemed not to be an expenditure on or in respect of SR&ED, a taxpayer cannot obtain an ITC in that regard (see subsection 127(9), definitions of the terms "investment tax credit", "qualified expenditure" and "SR&ED qualified expenditure pool", as applicable to the 2006 to 2009 taxation years).

[118] Incorrect prescribed information found on Form T661 or delays in filing Form T661 may impact a taxpayer's eligibility to deduct an amount under subsection 37(1) as SR&ED expenditures and to obtain corresponding ITCs.

[119] In the case at bar, to obtain an ITC for SR&ED expenditures under the Act, Tempora must have filed with the Minister the prescribed form (that is, Form T661) containing the prescribed information within the prescribed delay. The evidence showed that Tempora indeed filed the T661 forms for the 2006 to 2009 taxation years, together with technical reports containing documentation from other suppliers and manufacturers' websites, which were greatly plagiarized. The various technical reports, including documentation from other suppliers and manufacturers' websites, attached to the T661 forms are prescribed information as the term "prescribed" is defined in the Act.

[120] Subsection 248(1) defines the term "prescribed" for the purposes of the Act as meaning:

> ***prescribed*** means
>
> > **(a)** in the case of a form, the information to be given on a form or the manner of filing a form, authorized by the Minister,
> >
> > **(a.1)** in the case of the manner of making or filing an election, authorized by the Minister, and
> >
> > **(b)** in any other case, prescribed by regulation or determined in accordance with rules prescribed by regulation;

[121] In dealing with Form T661 (version applicable after 2008), this Court had concluded that, in accordance with the definition of the term "prescribed" in subsection 248(1), information to be given on a prescribed form is prescribed information; therefore, information required in boxes 240, 242 and 244 of Form T661 is prescribed information (*Westsource Group Holdings Inc. v. The Queen*, 2017 TCC 9, at para. 26 [*Westsource TCC*] (aff'd in *Westsource Group Holdings Inc. v. Canada*, 2018 FCA 57 [*Westsource FCA*])).

[122] In *Westsource TCC*, this Court made the following additional conclusions:

> [27] The instructions on Form T661 also clearly state that the information given on the form is "prescribed information". They read, in part:
>
> > "The information requested in this form and documents supporting your expenditures are prescribed information."
>
> [28] Failure to provide the "prescribed information" required in boxes 240, 242 and 244 of Form T661 means that the Appellant did not meet the requirements of subsection 37(11) of the *Act* and the Minister properly determined that Project 1 did not qualify for the SR&ED program in its 2011 taxation year.

[123] I agree with these conclusions. Although the Court dealt specifically with missing information under boxes 240, 242 and 244 of Form T661, I find that the same reasoning applies for supporting documentation provided with Form T661, either in the post-2008 version or in earlier versions of the form.

[124] My conclusion is supported by the Federal Court of Appeal's statement in *Westsource FCA*, that is, "…the legislation is clear that prescribed information includes information necessary to determine whether the activity qualifies as

SR&ED, such as the information elicited in the boxes that Westsource did not fill in" (at para. 7).

[125] Form T661 (version applicable prior to 2009) specifically indicates that a taxpayer must provide the information requested under Step 1. Step 1 requires that the taxpayer submit a detailed description of each project, including sufficient information to show that the project qualifies under the SR&ED program, namely scientific or technological objectives, technology or knowledge base or level, scientific or technological advancement, description of work in the tax year, and supporting information.

[126] Further, similarly to Form T661 (version applicable after 2008), Form T661 (version applicable prior to 2009) specifically provides that:

> All the information requested in this form including the attachments, schedules and any other document supporting your expenditures is prescribed information.

[127] Finally, for the following reasons, I find that the misrepresentation made by Tempora in supplying information under the Act was attributable to neglect, which refers to a lack of reasonable care, for the purposes of subparagraph 152(4)(a)(i).

[128] As reiterated recently by the Federal Court of Appeal in *Canada v. Paletta Estate,* 2022 FCA 86, neglect under subparagraph 152(4)(a)(i) refers to a lack of reasonable care:

> [65] Neglect under subparagraph 152(4)(*a*)(i) refers to a lack of reasonable care. The duty of reasonable care is met if the taxpayer has "thoughtfully, deliberately and carefully assesse[d] the situation and file[d] on what [he] believe[d] bona fide to be the proper method"; in other words, "in a manner that the taxpayer truly believe[d] to be correct" (*Regina Shoppers Mall Ltd. v. Canada*, [1990] 2 C.T.C. 183, 90 D.T.C. 6427 (F.C.T.D.); aff'd in *Regina Shoppers Mall Ltd. v. Canada* (1991), 126 N.R. 141, 91 D.T.C. 5101 (F.C.A.); see also *Canada v. Johnson,* 2012 FCA 253, 435 N.R. 361). .... The Court may also draw inferences of negligence from an omission to verify the validity of a taxpayer's belief (*Robertson v. Canada,* 2016 FCA 303, 2016 D.T.C. 5131, paras. 5 and 6).

[129] I find that Tempora showed a lack of reasonable care because it used various documents from other suppliers and manufacturers' websites and submitted these documents (sometimes with changes such as the addition of Tempora's logo or name) in support of its SR&ED claims without mentioning their sources, as if the documents were Tempora's own. The evidence showed that Tempora plagiarized a great portion of the additional supporting documentation filed with the T661 forms.

The fact that Mr. Guidara may have been aware of the source of the documentation does not change my conclusion, nor is my conclusion changed by the fact that Mr. Guidara may have advised Tempora to include less theory with its SR&ED claims.

[130] The *Canadian Oxford Dictionary* defines the word "plagiarize" as "to take and use (the thoughts, writings, inventions, etc. of another person) as one's own" and "to pass off the thoughts etc. of (another person) as one's own".

[131] In French, the *Dictionnaire Larousse* defines the term "plagiat" as "[un] acte de quelqu'un qui, dans le domaine artistique ou littéraire, donne pour sien ce qu'il a pris à l'œuvre d'un autre" and "ce qui est emprunté, copié, démarqué".

[132] In the case at bar, Maged did commit plagiarism by using entire texts from the websites of various suppliers and manufacturers without indicating their sources. Further, by making changes to the documents (e.g. by adding Tempora's logo and Tempora's name), Maged clearly wanted to let the CRA believe that these documents were Tempora's documents. Again, if Tempora had wanted to provide theory to the CRA with its SR&ED claims, that is, to provide the project's theoretical foundation, there would have been no point in substituting logos and other identifiers of other suppliers and manufacturers.

[133] In an application for judicial review in *Nicolas v. Canada (Attorney General)*, 2010 FC 1045, the Federal Court states that "a reasonable person, having completed university or even secondary studies, would be aware of plagiarism and therefore have general knowledge of the subject" (at para. 23). I agree with this conclusion.

[134] Maged did not act as a reasonable person would when he proceeded with the plagiarism given the extent of it, and hence, he failed to use reasonable care, which I find is akin to neglect under subparagraph 152(4)(a)(i).

[135] Further, both Maged and Shady showed a lack of reasonable care because they admitted that they had never read Form T661, nor the guide issued by the CRA dealing with SR&ED (T4088), even though Tempora had been claiming SR&ED expenditures starting in 2005.

[136] Because of my findings on neglect, I do not have to determine whether the plagiarism amounted to "fraud" for the purposes of subparagraph 152(4)(a)(i).

B. **SR&ED issues**

(1) **The law and applicable principles for SR&ED**

[137] The Act has created a two-part test. First, I must determine whether the activities Tempora undertook during the 2006 to 2009 taxation years in respect of the various projects meet the criteria of the definition of SR&ED as set out in subsection 248(1).

[138] Tempora has the burden of showing, on a balance of probabilities, that its activities constitute SR&ED. If those activities do not constitute SR&ED, that is the end of the analysis. However, if the activities meet the criteria as set out in subsection 248(1), then the Court shall determine whether the expenditures are deductible under section 37 as SR&ED expenditures, and whether those expenditures are qualified expenditures for the purposes of the ITCs (*Zeuter Development Corporation v. The Queen*, 2006 TCC 597, at para. 20).

[139] In the case at bar, the Respondent does not take issue with the deductibility of the expenses Tempora claimed. However, the Respondent is of the view that the expenses Tempora claimed are not SR&ED expenditures. Therefore, I will address only the first part of the test.

[140] SR&ED is defined in subsection 248(1) as follows:

scientific research and experimental development means systematic investigation or search that is carried out in a field of science or technology by means of experiment or analysis and that is	***activités de recherche scientifique et de développement expérimental*** Investigation ou recherche systématique d'ordre scientifique ou technologique, effectuée par voie d'expérimentation ou d'analyse, c'est-à-dire :
(a) basic research, namely, work undertaken for the advancement of scientific knowledge without a specific practical application in view,	**a)** la recherche pure, à savoir les travaux entrepris pour l'avancement de la science sans aucune application pratique en vue;
(b) applied research, namely, work undertaken for the advancement of scientific knowledge with a specific	**b)** la recherche appliquée, à savoir les travaux entrepris pour l'avancement de la

practical application in view, or

(c) experimental development, namely, work undertaken for the purpose of achieving technological advancement for the purpose of creating new, or improving existing, materials, devices, products or processes, including incremental improvements thereto,

and, in applying this definition in respect of a taxpayer, includes

(d) work undertaken by or on behalf of the taxpayer with respect to engineering, design, operations research, mathematical analysis, computer programming, data collection, testing or psychological research, where the work is commensurate with the needs, and directly in support, of work described in paragraph (a), (b), or (c) that is undertaken in Canada by or on behalf of the taxpayer,

but does not include work with respect to

(e) market research or sales promotion,

(f) quality control or routine testing of materials, devices, products or processes,

(g) research in the social sciences or the humanities,

science avec application pratique en vue;

c) le développement expérimental, à savoir les travaux entrepris dans l'intérêt du progrès technologique en vue de la création de nouveaux matériaux, dispositifs, produits ou procédés ou de l'amélioration, même légère, de ceux qui existent.

Pour l'application de la présente définition à un contribuable, sont compris parmi les activités de recherche scientifique et de développement expérimental:

d) les travaux entrepris par le contribuable ou pour son compte relativement aux travaux de génie, à la conception, à la recherche opérationnelle, à l'analyse mathématique, à la programmation informatique, à la collecte de données, aux essais et à la recherche psychologique, lorsque ces travaux sont proportionnels aux besoins des travaux visés aux alinéas a), b) ou c) qui sont entrepris au Canada par le contribuable ou pour son compte et servent à les appuyer directement.

Ne constituent pas des activités de recherche scientifique et de développement expérimental les travaux relatifs aux activités suivantes :

(h) prospecting, exploring or drilling for, or producing, minerals, petroleum or natural gas,

(i) the commercial production of a new or improved material, device or product or the commercial use of a new or improved process,

(j) style changes, or

(k) routine data collection.

e) l'étude du marché et la promotion des ventes;

f) le contrôle de la qualité ou la mise à l'essai normale des matériaux, dispositifs, produits ou procédés;

g) la recherche dans les sciences sociales ou humaines;

h) la prospection, l'exploration et le forage fait en vue de la découverte de minéraux, de pétrole ou de gaz naturel et leur production;

i) la production commerciale d'un matériau, d'un dispositif ou d'un produit nouveau ou amélioré, et l'utilisation commerciale d'un procédé nouveau ou amélioré;

j) les modifications de style;

k) la collecte normale de données.

[141] Given the definition's preamble, a systematic investigation by means of an experiment or analysis is necessary for an activity to qualify as SR&ED. Further, for activities to qualify as "experimental development", they must have been undertaken for the purpose of achieving technological advancement for the purpose of creating new, or improving existing, materials, devices, products or processes, including incremental improvements thereto.

[142] The case law has established five criteria for determining whether a particular activity qualifies as SR&ED, and more particularly, whether the activity qualifies as "experimental development" (para. (d) of the definition of SR&ED; when referring to basic research (para. (a)) or applied research (para. (b)), the criteria should be referring to the advancement of "scientific" knowledge).

[143] These criteria were laid down by Justice Bowman, as he then was, in *Northwest Hydraulic*. In establishing these criteria, Justice Bowman reviewed Information Circular 86-4R3 dated May 24, 1994 (the "Circular") and stated that, generally, it was a useful and reliable guide (*Northwest Hydraulic*, at para. 15).

[144] As regards the application of the criteria, Justice Bowman also commented that "[t]he tax incentives given for doing SRED are intended to encourage scientific research in Canada…. As such the legislation dealing with such incentives must be given 'such fair, large and liberal construction and interpretation as best ensures the attainment of its objects'" (*Northwest Hydraulic*, at para. 11).

[145] These same criteria were later approved by the Federal Court of Appeal in two subsequent cases, *R I S-Christie Ltd. v. R.* ([1999] 1 C.T.C. 132, at para. 10 [*R I S-Christie*]) and *CW Agencies Inc. v. The Queen* (2001 FCA 393, at para. 17 [*CW Agencies*]).

[146] The Federal Court of Appeal summarized these criteria in *CW Agencies* as follows:

> 1. Was there a technological risk or uncertainty which could not be removed by routine engineering or standard procedures?
>
> 2. Did the person claiming to be doing SRED formulate hypotheses specifically aimed at reducing or eliminating that technological uncertainty?
>
> 3. Did the procedure adopted accord with the total discipline of the scientific method including the formulation[,] testing and modification of hypotheses?
>
> 4. Did the process result in a technological advancement?
>
> 5. Was a detailed record of the hypotheses tested, and results kept as the work progressed?

[147] Regarding the first criterion, case law has established that if the resolution of a problem is reasonably predictable using standard procedure or routine engineering, there are no technological uncertainties (*Northwest Hydraulic*, at para. 16).

[148] Further, creating a new product using techniques, procedures and data generally accessible to competent professionals in the field is not SR&ED, even if there is doubt concerning the way in which the objective will be achieved. The starting point of analyzing whether uncertainty exists is to ascertain the knowledge generally accessible to competent professionals in the field.

[149] Regarding the second criterion, a five-stage process was set out to determine whether hypotheses were formulated as contemplated by the SR&ED definition (*Northwest Hydraulic*, at para. 16):

> (a) the observation of the subject matter of the problem;
>
> (b) the formulation of a clear objective;
>
> (c) the identification and articulation of the technological uncertainty;
>
> (d) the formulation of an hypothesis or hypotheses designed to reduce or eliminate the uncertainty;
>
> (e) the methodical and systematic testing of the hypotheses.

[150] Regarding the third criterion, the taxpayer's procedure must "accord with established and objective principles of scientific method, characterized by trained and systematic observation, measurement and experiment, and the formulation, testing and modification of hypotheses" (*Northwest Hydraulic*, at para. 16). Mere trial-and-error does not constitute a scientific method as contemplated by this criterion.

[151] Regarding the fourth criterion, "[t]he technological or scientific uncertainty and technological or scientific advancement criteria are interrelated" (*Béton mobile du Québec Inc. v. The Queen*, 2019 TCC 278, at para. 51 [*Béton mobile*]). The technological advancement refers to an advancement in the general understanding (*Northwest Hydraulic*, at para. 16).

[152] Further, the Court added two specifications with respect to this criterion:

(i) "General" means "something that is known to, or, at all events, available to persons knowledgeable in the field. I am not referring to a piece of knowledge that may be known to someone somewhere. The scientific community is large, and publishes in many languages. A technological advance in Canada does not cease to be one merely because there is a theoretical possibility that a researcher in, say, China, may have made the same advance but his or her work is not generally known" (*Northwest Hydraulic*, at para. 16).

(ii) "The rejection after testing of an hypothesis is nonetheless an advance in that it eliminates one hitherto untested hypothesis…. The fact that the initial objective is not achieved invalidates neither the hypothesis formed nor the

> methods used. On the contrary it is possible that the very failure reinforces the measure of the technological uncertainty" (*Northwest Hydraulic*, at para. 16). In other words, even if the work is unsuccessful, if it was "undertaken for the purpose of achieving technological advancement, it may still qualify" (*Abeilles Service de Conditionnement Inc. v. The Queen*, 2014 TCC 313, at para. 143 [*Abeilles*]).

[153] Finally, once the Court has identified a technological advancement, that advancement does not have to be important: "the technological advancement achieved only has to be slight in order to qualify as such" (*National R&D Inc. v. The Queen*, 2020 TCC 47, at para. 60 [*National R&D*], aff'd 2022 FCA 72 and leave to appeal to the Supreme Court of Canada denied 2023 CanLII 17188 (SCC)).

[154] Finally, regarding the fifth criterion, that is, the requirement to keep detailed records, the case law has established that this is an implicit requirement stemming from the notion of "scientific method" and "systematic investigation" in the preamble to the definition of SR&ED (*National R&D*, at para. 65). This criterion requires a taxpayer to keep records or notes to "establish that tests were performed" and "demonstrate that [tests] were conducted in a systematic fashion" (*RIS-Christie*, at para. 14). However, testimonial evidence is admissible to show that tests and systematic research were performed.

(2) **2006 taxation year: "Thermocouple and Temperature Moderator"**

[155] In 2006, Tempora claimed one SR&ED project called "Thermocouple and Temperature Moderator".

[156] Mr. Atef Elhami oversaw that project.

[157] The evidence showed that all the information with respect to the project was kept in paper format; however, at the hearing, no document showing the various drawings and results was adduced in evidence.

[158] The 2006 SR&ED claim was accepted without any financial examination being conducted (Exhibit R-1, Respondent's Book of Documents, tab 32). Mr. Guidara was of the view that the activities carried out as part of this project qualified as SR&ED (Exhibit R-1, Respondent's Book of Documents, tab 31). In that document, Mr. Guidara indicated that he was able to confirm the project's extent and complexities, which required advanced expertise in the field of thermocouples.

(a) ***Description:***

[159] The project's objective was experimentation regarding various techniques and technologies to create thermocouples for different industrial uses. A thermocouple is an element found in various applications. As Maged explained, a thermocouple basically controls the heat in an application, and even though a thermocouple is not expensive, its malfunction can paralyze a system worth millions of dollars.

[160] According to the evidence, Mr. Atef Elhami designed three types of thermocouples to be used in specific industrial environments. Tempora carried on activities through testing at Tempora's place of business, manufacturing, and validating. Tempora would also give free thermocouples to its clients for testing, and would get the results back from them, revealing the limitations and maintenance cycles for each unit. Testing allowed Tempora to improve products and correct issues with thermocouples.

[161] The technical report attached to Form T661 indicates that these techniques and technologies were not available to Tempora as they could not be found within the public domain. The technical report also contains a list of 10 technological uncertainties. Further, the technical report indicates that some prototypes were not functional on account of durability issues.

[162] More specifically, Tempora's activities involved ascertaining the theoretical knowledge on how to weld and assemble the three types of thermocouples designed by Mr. Atef Elhami. According to Maged, this knowledge was also acquired through examining "a lot of books and manuals" as well as documents that various industries uploaded online.

[163] Results obtained through the testing of various thermocouples allowed Tempora to better understand how to build the three types of thermocouples (welding, intensity of welding, insulation, attachment or insertion in the element, etc.).

[164] Mr. Lussier's testimony mainly dealt with the lack of corroborating documentation in support of Tempora's activities and work performed. Mr. Lussier testified that he did not find within the seized materials and documents:

- any experimental protocol for the stated objective of durability check;

- any results regarding durability tests; or

- any formulation of a technological uncertainty, hypotheses or procedure consistent with scientific method that would be related to durability.

[165] Further, as one of the uncertainties described in the technical report relates to the materials to be used, Mr. Lussier expected Tempora to indicate which materials were used and what problems were encountered with respect to each material, but he did not find any information on these matters within the seized materials and documents.

(b) ***Qualification:***

[166] After considering the evidence adduced at the hearing and for the following reasons, I find that, on a balance of probabilities, the project does not qualify under the SR&ED requirements. The Appellant did not provide sufficient evidence to show, on a balance of probabilities, the existence of any technological uncertainty and any technological advancement. Further, I find that the procedure Tempora used was consistent with a trial-and-error method and was not consistent with the scientific method.

[167] I find that there was no technological uncertainty with respect to the three types of thermocouples designed by Mr. Atef Elhami. This project involved new thermocouple designs with new diameters. Tempora's objectives was to determine the ideal parameters for those designs, including the materials used, the intensity of the weld, the variation of the filling and the resistance change. To achieve this objective, Tempora varied different factors such as the wattage, voltage and length of the elements. The various types of thermocouples were tested in Tempora's facilities as well as at the facilities of Tempora's clients.

[168] In practice, the Appellant's activities would involve ascertaining the theoretical knowledge of welding and assembling thermocouples. According to Maged, this knowledge would be acquired through "a lot of books and manuals" as well as documents that many suppliers and manufacturers uploaded online. Indeed, the evidence showed that Tempora obtained the theoretical basis of the thermocouples with publicly available knowledge published by other suppliers and manufacturers (assemblage and welding techniques for thermocouples).

[169] The evidence also showed that the technical problems raised by the three types of thermocouples could be solved with reasonably predictable routine engineering. I find that all required knowledge was readily available to the Appellant. Further, I find that all the Appellant did was to adjust some of the parameters of the

thermocouples depending on its clients' needs. Although it could be argued that the thermocouples' parameters needed may not have existed, the evidence showed that the major suppliers and manufacturers in the same field could resolve the Appellant's issues with standard and established techniques.

[170] Using standard and established techniques, the other major suppliers and manufacturers could adjust the fill rate, the amount of insulation and vibration rate of their own thermocouples. Even if the Appellant did not have free and unhindered access to all information held by these suppliers and manufacturers due to proprietary rights, I find that the information was nevertheless "generally accessible to competent professionals in the field," which makes it "routine engineering" (*Northwest Hydraulics*, at para. 16).

[171] The Appellant cannot successfully argue the existence of a technological uncertainty merely because some aspects of the project were uncertain to its staff. This criterion is not subjective and depends on whether the "uncertainty identified by the Appellant is an uncertainty to those knowledgeable and experienced in the relevant field" (*Logix Data Products Inc. v. R.*, 2021 TCC 36 at para. 69 [*Logix*]).

[172] Moreover, I find that this project did not generate any new characteristic nor capability with respect to thermocouples which did not previously exist or was unavailable in standard practice.

[173] Further, no satisfactory evidence was adduced at trial to show that the Appellant used a scientific method in performing its testing under this project. Maged testified that the methodology Tempora used was testing, either in its own facility or by sending thermocouples to clients to test themselves. Although various tests were made, I find that the Appellant did not proceed using a scientific method, as I find that Tempora resorted to a trial-and-error method in performing its activities. According to both Shady and Maged, when they tested thermocouples, they were trying to figure out what did not work, and then making some adjustments, and then making more tests. Therefore, I find that that criterion is not met.

(3) **2007 taxation year: "Tubular Element Manufacturing Line"**

[174] In 2007, Tempora made one SR&ED claim for a project called "Tubular Element Manufacturing Line".

[175] Tempora had obtained a preliminary approval of the project. It filed a request with the CRA, submitting documentation describing various machines manufactured

by a Chicago-based company called Oakley Industries, which Tempora intended to purchase to carry on its SR&ED activities for that project (Exhibit A-1, Appellant's Book of Document, tab 6). Mr. Guidara had reviewed 25 pages of documents submitted in support of the preliminary opinion request; these pages described the project and the technological uncertainties it raised.

[176] As indicated by the Elhami brothers, they included Oakley's description of the machines in the documents attached to the request for a preliminary opinion, as well as to the technical report filed with the SR&ED claim for 2007.

[177] According to Maged, without the CRA's preliminary approval of the project, Tempora would not have been able to obtain a loan to finance the purchase of the Oakley machines. Further, Maged testified that he had met with Mr. Guidara a couple of times for that project.

[178] The evidence adduced at the hearing corroborates Maged's testimony. As indicated in the SR&ED assessment form (Exhibit R-1, Respondent's Book of Documents, tab 35), Mr. Guidara met with Maged on three occasions for that project: once in November 2006 at Tempora's place of business and twice at the CRA offices during the month of January 2007.

[179] After the filing of the project's Form T661, a CRA research and technology agent recommended that it be reviewed in more detail and sent it to Mr. Guidara.

[180] After a detailed scientific review conducted at the CRA office, Mr. Guidara concluded that the project qualified for SR&ED purposes. According to Mr. Guidara's statements found on the SR&ED assessment form (Exhibit R-1, Respondent's Book of Documents, tab 35):

> [TRANSLATION]
>
> …given the level of engagement in R&D and the shift the company made after finding out about the tax incentives, I was invited on two occasions, before and after the preliminary review of the projects, to better understand the projects' technological challenges, to answer certain questions on trial eligibility and also to be present for certain tests. The company wants to carve out promising new niches in the heating element market. In light of the field's complexity and the type of elements to develop for specific applications or industries, it is more than necessary to resort to R&D, and the company decided to put its resources and energy into experimental development.

> In my opinion, the projects seem to meet the criteria, and I was able to note that a great deal of material is required (consumed) for the tests. The equipment acquired (447K) to develop the process…could not—at first glance—be converted into production equipment because of its nature and size, and also because of all the changes that were made and the tinkering that was done. Once the technology has been mastered, it will be necessary to use bigger, higher-performance equipment to set up a production line. Also, the heating elements that will be developed and the fabrication process must be certified before being fabricated and put on the market. …. I do not believe a technical review is needed given the various challenges encountered in developing this line of new products.

[181] Mr. Justin testified that he performed a detailed examination of the SR&ED expenses claimed for the project and that he reduced the claim by an amount representing costs of various machines bought from Oakley ($369,265) and delivered after the end of the 2007 taxation year (namely, on August 7, 2007) and other costs (Exhibit R-1, Respondent's Book of Documents, tab 43). However, because the requirements for SR&ED were met, Mr. Justin was of the view that Tempora could claim the expenses for the purchase of the Oakley machines in its 2008 taxation year (Exhibit R-1, Respondent's Book of Documents, tab 40).

[182] Lastly, Mr. Justin testified that although Mr. Guidara had not prepared any scientific report, Mr. Guidara had still performed a scientific examination for that project.

(a) ***Description:***

[183] The objective of the project was to build tubular heaters of various lengths, wattages and voltages, with various sheaths and material requirements, meeting CSA accreditations.

[184] The technological advancement as per the technical report was to find the "ratio calculations mentioned below are of thermoengineering [*sic*], heat transfer and mechanics."

[185] The uncertainties listed in the technical report were the thickness of wire to be used based on diameter of heater, the amount of stretch per volt/watts desired, the filling process, the fusion welding of pin to coil, and the annealing process as to the time period. Tempora also indicated its work plan.

[186] The evidence showed that Tempora needed machines to manufacture, test and validate the high-density tubular elements, including the Oakley machines. The

Oakley machines were needed to meet certain steps in the production of the tubular elements; these machines basically fill the elements and reduce their diameters. Tempora also built itself some other machines that it needed for the project at a lower cost (for example, an annealing oven), rather than purchasing them from other suppliers.

[187] According to Shady, even if Tempora bought machines from other suppliers, it still had to go through all the steps from developing and testing to making the tubular elements.

[188] According to Maged, Tempora spent thousands of dollars on coils so they could learn how to use the machines properly. After solving these issues, Maged added that they had to proceed again with rounds of trials and testing, and all the data and process was recorded on an Excel program that Tempora created for tubular element specifications.

[189] Exhibit A-2 (Tempora Tubular Specifications), which was adduced in evidence at trial, is an extract of the Excel program illustrating the complexities of that project, and all the tests performed by Tempora. Maged testified that there were uncertainties on all the points described under Exhibit A-2, and that Exhibit A-2 is a roadmap on how to make tubular elements. By using that Excel program, Tempora had the results and recipe to build a thousand different tubular elements.

[190] Shady provided further insight on the tests Tempora performed with respect to certain aspects of the project as found under Exhibit A-2, for example:

- the “elongation factor”, abbreviated as “EF”, is proprietary information to Tempora, can be obtained only after extensive testing, and is not a static number; and

- the “resistance”, i.e., the number of ohms before and after manufacturing the heater, is also proprietary information to Tempora: the longer the tube, the lower the resistance.

[191] Shady also testified that to determine the “stretch goal”, which in turn helps them to determine how many loops of wire to use to make a spring, Tempora performed extensive testing and a few calculations. More specifically, using Ohm’s law calculations, Tempora determined that the minimum stretch value must be 2, and that the highest is 4.409. Everything else shown on Exhibit A-2 was determined by testing various materials.

[192] Tempora was eventually able to manufacture a “heating element” able to withstand temperatures of -70℃. Maged claims that Tempora was the only company in Canada with that capacity because of the knowledge they obtained from tubular elements. He also testified that this would surpass previous technological limitations encountered by Manitoba Hydro. Maged did not indicate whether other companies have this manufacturing capacity.

[193] In reviewing the documentation submitted with the SR&ED claim as well as the documentation and materials seized by the CRA, Mr. Lussier testified that he could not find any evidence in support of any statements made in the project description, materials consumed, and experimentation conducted. More particularly, although the Oakley machine specifications were attached to the claim, Mr. Lussier could not find (1) any documentation on the data from the thousands of trials and tests performed, (2) any thermodynamics calculation mentioned as part of the technological advancement, or (3) any difficulties (or uncertainties) Tempora encountered in rolling out the Oakley machines (welding or filling methods or cap problems).

[194] Mr. Lussier testified that although technical problems may arise in rolling out a commercial machine, these activities do not qualify as SR&ED if solutions can be found using known techniques. However, he acknowledged that SR&ED may be necessary to solve other technical problems. He also stated that he did not find any documentation or materials showing any of the above-stated uncertainties.

[195] Further, Mr. Lussier concluded that a review of all the documentation and materials seized did not show any link between the materials consumed and the work allegedly done, any experimentation with respect to tens of thousands of heating elements manufactured, or any innovation from the current method of operating the Oakley machines or manufacturing heating elements.

(b) ***Qualification:***

[196] For the following reasons, I find that, on a balance of probabilities, the project qualifies under the SR&ED requirements. The evidence showed that there were technological uncertainties that could not be removed by applying routine engineering, and technological advancement. Further, I find that the procedure Tempora used was mostly consistent with the scientific method. However, I agree with Mr. Justin that given that the Oakley machines were received after the end of Tempora’s 2007 taxation year, Tempora could claim their costs as SR&ED expenditures (and corresponding ITCs) only for the 2008 taxation year.

[197] Although Tempora bought machines from manufacturers or manufactured them itself, that does not mean the project contains no technological uncertainties. I accept Maged's testimony that the Oakley machines were necessary for approximately 40% of the activities undertaken as part of that project.

[198] I also accept Shady's testimony that the elongation factor and the resistance, as shown on Exhibit A-2, are proprietary information to Tempora. I find that Shady's testimony on Exhibit A-2 was credible and established technological uncertainties as part of this project, as well as advancement that was realized with the results of the project. More particularly, Shady's testimony on the elongation factor, which is proprietary to Tempora, showed the uncertainties, which are problems that could not be solved using routine engineering, and the further advancement that the project brought to tubular element heaters. I also accept Maged's testimony that most of the information shown on Exhibit A-2 illustrated technological uncertainties as part of this project.

[199] The evidence showed that Tempora was looking at improving tubular element heaters by finding out how to build tubular elements with various lengths, wattages and voltages, with various sheaths and material requirements, meeting CSA accreditations. Tempora was looking at improving tubular elements as found on the market, and hence, the criterion of technological advancement was met. Case law has determined that even incremental advancement to a product or process may qualify as SR&ED, as provided in the definition of SR&ED.

[200] Further, the evidence showed that Tempora's understanding of the manufacturing line and tubular elements so manufactured did make them the first company generally—and not just in Canada—to manufacture heating elements capable of withstanding -70℃, and this constitutes technological advancement (*Northwest Hydraulic*, at para. 16).

[201] According to Maged, a good deal of data had to be collected for Tempora to be able to pursue its project. I therefore also find that data collection Tempora performed qualified as SR&ED, because it was necessary for and directly in support of the project to be conducted by Tempora.

[202] Mr. Lussier's testimony again was limited to his review of Form T661 and the technical report attached thereto, and his examination of the seized materials and documents. He acknowledged having seen an Excel program similar to the extract found under Exhibit A-2, but he was not able to review the program.

[203] Mr. Lussier also concluded that the Oakley machine specifications showed that they were machines used for commercial production. According to his report, the Oakley machines were not machines used during all or substantially all of their operating time in their expected useful life for SR&ED.

[204] However, according to Shady's testimony, they made many modifications and changes to the Oakley machines to meet Tempora's objective of improving tubular elements. Shady's testimony indicates that the Oakley machines were not used for commercial purposes, given the extensive modifications made to them. This also confirms the reliability of Mr. Guidara's statement found in the SR&ED evaluation form adduced in evidence (Exhibit R-1, Respondent's Book of Documents, tab 35) to the effect that Tempora could not directly use the Oakley machines for commercial production because of their size and changes to their configuration.

[205] I can also infer from Shady's testimony that to put the Oakley machines back in commercial production would necessitate many modifications and changes. I do not accept Mr. Lussier's testimony that the Oakley machines were used for Tempora's commercial production.

[206] Maged testified that Tempora did a great deal of testing and calculation to determine the project's desired parameters, such as wire thickness, elongation factor, resistance and stretch goal. Tempora selected the desired parameters and calculated some of their limits before engaging in any testing. In other words, Tempora (1) had a fixed objective of creating heating elements bearing specific traits such that they could withstand extreme weather or fulfill other conditions, and (2) worked systematically towards that objective.

[207] More specifically, to achieve this objective, Maged and Shady started by determining the relevant parameters to vary. They then calculated the minimum and maximum stretch values to delineate the scope of these parameters. Only after that did they start conducting tests to observe whether each set of measurements brought them closer to or further from this objective, adjusted the parameters accordingly, and experimented again.

[208] This suggests that the Appellant did more than mere blind trials and errors and has followed a scientific method, i.e., "trained and systematic observation, measurement and experiment, and the formulation, testing and modification of hypotheses" (*Northwest Hydraulic*, at para. 16).

(4) **2008 taxation year: "Flexible Silicone Rubber and Kapton Heating Elements", "Straight and Bent Annealed Tubular & Finned Heating Elements" and "Hi-Density Cartridge Heaters"**

[209] For the 2008 taxation year, Tempora claimed three SR&ED projects: "Flexible Silicone Rubber and Kapton Heating Elements" (project 2008-01), "Straight and Bent Annealed Tubular & Finned Heating Elements" (continuation of the 2007 project) (project 2008-02), and "Hi-Density Cartridge Heaters" (project 2008-03).

[210] For the project entitled "Flexible Silicone Rubber and Kapton Heating Elements", Tempora obtained a preliminary approval from the CRA (Exhibit A-1, Appellant's Book of Documents, tab 9; Exhibit R-1, Respondent's Book of Documents, tab 50).

[211] Again, a CRA research and technology agent reviewed all three projects and concluded that a more thorough scientific examination of the projects should be performed (Exhibit R-1, Respondent's Book of Documents, tab 51) and referred the matter to Mr. Guidara.

[212] Mr. Guidara conducted a scientific examination at the CRA office and concluded that the project entitled "Hi-Density Cartridge Heaters" did not qualify for SR&ED purposes, but that the other two projects did qualify under the SR&ED requirements (Exhibit R-1, Respondent's Book of Documents, tab 54). He further determined that the costs of the Oakley machines, which were disallowed in 2007 for the project entitled "Tubular Element Manufacturing Line", could now be claimed in 2008 as the activities had been performed during the 2008 taxation year.

(a) ***"Flexible Silicone Rubber and Kapton Heating Elements" project (project 2008-01):***

(i) ***Description:***

[213] The objective of this project was to create a silicone-based heater that would operate outdoors in various adverse conditions. The flexible heating elements were contained in a vulcanized silicone-based rubber material.

[214] Tempora developed this project to adequately heat exterior structures, such as train tracks and stations, during cold weather. If successful, the silicone rubber (which is heated) could then replace salt, which is corrosive to structures. The

silicone rubber would provide a structure with the constant heat it needs under various circumstances. The silicone rubber would be integrated in a concrete mould and would be activated by remotely controlled sensors.

[215] According to Maged, a professor was involved to determine the chemical composition and the type and size of the concrete to be used in this project.

[216] Tempora's results and tests were recorded in an Excel program, which indicated the data inputs, as well as data from suppliers of the wires to be used. An extract of the Excel program was adduced in evidence under Exhibit A-3. The mould was outsourced.

[217] According to Tempora, the uncertainties of this project included controlling coiling at extreme diameters with fine wire mend binding the heater to the material with adhesive materials. In terms of technological advancement, Tempora submitted that the project provided for the creation of a new kind of heating element that will provide heat in an adverse environment.

[218] According to Shady, determining the parameters such as minimum gap, space, and resistance required a good deal of testing. Namely, the proprietary information recorded in the Excel program (Exhibit A-3) under the columns "runs needed", "solid width", etc. was identified by Tempora only after many tests were performed. Other proprietary information includes the types of wires, the spacing and the uses of the wire.

[219] Shady also testified that Tempora had to design a prototype, build it, and then test it. They built many prototypes, and each time one failed, Tempora attempted to understand the cause of its failure and proceeded to a further prototype.

[220] Tempora succeeded in its research and in implementing these new heaters with various projects for its clients.

[221] According to Mr. Lussier, the documents attached to Form T661 contain information of a general nature or product specifications. The documents also contain pages outlining various results of experimentation, with charts that do not indicate the data units used. Mr. Lussier testified that he could not know what they refer to. Further, there are no analyses, explanations or interpretations of these data. Moreover, the third page of results (page 19) contains calculations that are easy enough for any first-year engineering student. Mr. Lussier testified that he could not

determine what was done, what underlying analysis was performed, nor whether the project achieved any technological advancement.

[222] Mr. Lussier concluded that the seized documents and materials do not demonstrate the technological uncertainties Tempora alleged, nor that all or substantially all of the capital expenses are attributable to SR&ED activities.

(ii) ***Qualification:***

[223] For the following reasons, I find that, on a balance of probabilities, this project qualifies as SR&ED. The evidence showed, on a balance of probabilities, that there were technological uncertainties because the heating method Tempora intended to develop had never been designed nor used in adverse environments and these uncertainties could not be removed by routine engineering. I also find that the criteria of technological advancement and the use of a scientific method are met.

[224] Despite Mr. Lussier's findings from the seized documents and materials that the technological uncertainties are not supported by the documentation, I find that Maged and Shady's testimonies were clear and uncontradicted and that they showed, on a balance of probabilities, technological uncertainties in this project that could not be solved by routine engineering, and a resulting technological advancement.

[225] The technological advancement Tempora achieved involves the installation of this structure (a silicone-based heater integrated in a concrete mould and activated by remotely controlled sensors), thus prolonging the lifespan of infrastructures exposed to the cold during winter. The evidence also showed that it was a well-regulated system capable of achieving the desired temperature within 20 minutes and maintaining it for a prolonged period, which, according to Shady, was not possible using the old maintenance method.

[226] Even if a component of the project (the type of concrete to be used in the structure) was designed by a professor, the resolution of technological uncertainties related to this project was nevertheless not reasonably predictable using standard procedure or routine engineering. According to the evidence adduced at the hearing, although the old methods of salting and manpower surveying incur significant costs, no one seems to have developed an alternative.

[227] The evidence showed that the project involved designing, building and testing prototypes, carrying out analysis to identify the reasons prototypes failed, and integrating a remote-control system. In addition, Tempora performed tests in a

scientific manner, namely by replicating real-life conditions, making changes to adjust proportions in response to results obtained, and using the Excel program to calculate and input the different measurements. I therefore conclude that Tempora followed procedures consistent with the scientific method "with a view to removing a technological uncertainty through the formulation and testing of innovative and untested hypotheses" (*Northwest Hydraulic*, at para. 16).

[228] I am of the view that the trial-and-error method was therefore not used in this project.

[229] I also note that this project was documented in a technical report attached to Form T661 filed with the CRA, as well as in the Excel program (Exhibit A-3) adduced in evidence at the hearing. Although Mr. Lussier found the Excel program to be vague, namely on account of want of units accompanying the data, I find that Maged and Shady's testimonies sufficiently supplemented the records. This is also confirmed by the existence of a technological advancement, since it "should also be permissible to infer that a taxpayer had conducted systematic research where it is established that such research led to a technological advancement" (*R I S-Christie*, at para. 15).

(b) ***"Straight and Bent Annealed Tubular & Finned Heating Elements" project (project 2008-02):***

(i) ***Description***

[230] The evidence showed that this project is a continuation of the 2007 project called "Tubular Element Manufacturing Line", using, *inter alia*, the Oakley machines and other machines Tempora built (e.g. annealing oven) to design and build tubular element heaters of various lengths, wattages and voltages, with various sheaths and material requirements, meeting CSA accreditations.

[231] As mentioned above, Exhibit A-2 was adduced in evidence to show various uncertainties raised by the 2007 project, as well as by this project. Tempora proposed to continue carrying on its activities, adding different features to its project (annealing and bending of tubular elements for various uses).

[232] The technical report attached to Form T661 (Exhibit A-1, Appellant's Book of Documents, tab 18) includes pictures of material consumed in the course of the project, as well as pictures of an annealing oven as designed by Shady (Annex 2 of the technical report).

[233] The technical report refers to the parameters to be considered to build a tubular element (see the section entitled “Scientific and technological content”); these parameters are all replicated in Exhibit A-2, as discussed as part of the 2007 project.

[234] In the technical report section entitled “The Specific procedures and Partial analysis & of results obtained”, Maged described various activities performed as part of the project, including the number of heating elements built using different parameters and materials.

[235] According to Mr. Lussier, he could not find, from the documentation submitted with the SR&ED claim as well as from the seized materials and documents, any documentation supporting the tests allegedly done, the materials allegedly consumed, raw data, statistical analysis, or results. Mr. Lussier testified that on the basis of Tempora’s available workforce and gross income, it would not have been possible to create as many heating elements, namely 800,000 heating elements according to his calculations as referred to in the technical report section “The Specific procedures and Partial analysis & of results obtained”.

[236] Furthermore, according to Mr. Lussier, one of the described uncertainties of determining the “wire gauge” is a well-known standard engineering practice. This determination requires two easy steps: (1) calculate the electrical current’s power with Ohm’s law (this calculation requires only secondary school physics knowledge); and (2) apply international standards for wire gauges to that result to determine the wire gauge (Exhibit R-1, Respondent’s Book of Documents, tab 78, p. 21).

(ii) ***Qualification:***

[237] For the same reasons as the reasons given in respect of the 2007 project, and for the following additional reasons, I find that this project qualifies as SR&ED, being a continuation of the 2007 project. The evidence showed, on a balance of probabilities, that there were technological uncertainties that could not be resolved using routine engineering, and this project also resulted in a technological advancement. I also find that the criterion of the use of a scientific method was met.

[238] As indicated in my analysis of the 2007 project, Exhibit A-2 and both Maged and Shady’s testimonies convinced the Court that there were technological uncertainties in building tubular element heaters, given the various materials and other parameters to be considered, and that routine engineering could not solve the

uncertainties. The parameters are shown on Exhibit A-2, as well as in the technical report.

[239] Although Mr. Lussier testified that the "wire gauge" can be determined using a well-known engineering practice, I find that other technological uncertainties as shown on Exhibit A-2 were raised with this project, as mentioned in my analysis of the 2007 project.

[240] I also consider the fact that Mr. Lussier's testimony again was limited to his review of Form T661 and the technical report attached thereto, and his examination of the seized materials and documents.

[241] Further, I note that counsel for the Appellant advised the Respondent by letter dated June 15, 2023, of an error appearing in the technical report with respect to the number of elements built as part of this project (Exhibit R-3). Because of this correction, I did not consider Mr. Lussier's testimony that given Tempora's workforce and gross income, it would have been impossible to build 800,000 tubular elements.

[242] Finally, I find that the evidence showed that Tempora kept adequate records of the process of testing the various elements (as shown with Exhibit A-2 and Shady's testimony), and that the tests were performed in a systematic fashion (*R I S-Christie*, para. 14).

(c) ***"Hi-Density Cartridge Heaters" project (project 2008-03):***

[243] This project went on for two years (project 2008-03 and project 2009-01), during the 2008 and 2009 taxation years. The following description and qualification findings apply to the project for the 2008 and 2009 taxation years.

(i) ***Description:***

[244] According to Maged's testimony, a high-density cartridge heater "is a heating element where both connectors are coming from [one side]", with an application in dialysis machines, among other things. According to Shady, cartridge heaters can be of a very small length, and they are used in different applications than tubular elements.

[245] Tempora produced in evidence Exhibit A-4, which is an extract of the Excel program detailing the data and results of the testing conducted as part of that project.

[246] The documents attached to the Appellant's Form T661 for 2008 included the technical report, to which is attached general documentation on cartridge heaters; this documentation includes information on their standard specifications and tolerance. However, the documents included no analysis of data, nor any charts. Furthermore, part of the supporting documentation was already submitted for the SR&ED claim filed in 2005.

[247] For the 2009-01 project, the Appellant submitted in the technical report attached to its Form T661 a step-by-step process to manufacture high-density cartridge heaters (Exhibit A-1, Appellant's Book of Documents, tab 20). Furthermore, part of the supporting documentation attached to the 2009-01 project claim had already been submitted for the SR&ED claim filed in 2005 as well as the claim filed in 2008.

[248] After reviewing the documents attached to Form T661 and the documents and materials seized by the CRA, Mr. Lussier was not able to determine the material used or the activities performed by Tempora as part of this project.

[249] According to evidence adduced at the hearing, Mr. Guidara disallowed that project for the 2008 taxation year (Exhibit R-1, Respondent's Book of Documents, tab 51). As mentioned above, no scientific examination was performed by the CRA for the 2009 taxation year.

(ii) ***Qualification:***

[250] For the following reasons, I find that, on a balance of probabilities, the project does not qualify under the SR&ED requirements for the 2008 and 2009 taxation years.

[251] The Appellant did not provide sufficient evidence to show the existence of technological uncertainties and technological advancement for this project carried out over two taxation years (2008 and 2009).

[252] Maged did provide relatively detailed testimony on how to manufacture a cartridge heater. This description provides no insight as to if and to what extent it relates to Tempora's project, any hypotheses they helped form, or any technological advancement they made it possible to achieve. The same can be said with respect to Tempora's documentary evidence.

[253] According to Tempora, the main "technological uncertainty" relates to obtaining a core design that is fit for a cartridge heater, i.e., a core that has the same diameter as the cartridge heater's inner tube. However, the evidence showed that cores are readily available on the market, and that one can purchase a core of the required diameter and length. The Appellant does not seem to have an issue with respect to the material of the core purchased, that is, ceramic.

[254] It is not possible to determine the technological advancement that Tempora was seeking during the 2008 taxation year, or the technological uncertainties that Tempora was facing.

[255] For the 2009 taxation year, the anticipated technological advancement was described in box 240 of the CRA's newly issued Form T661 filed by Tempora (Exhibit A-1, Appellant's Book of Documents, tab 14) and reads as follows:

> To design[,] engineer and create a swaged in cart[r]idge heater. With premium materials and tight manufacturing controls to provide superior heat transfer, uniform temperatures and resistance to oxidation and corrosion even at high temperature.

[256] Box 242 of the same form describes the technological obstacles or uncertainties of the project, which included the following: to determine "the core design needed…by putting [an] almost same size core to inner tube Dia".

[257] Documentation taken from other suppliers or manufacturers' websites and submitted as part of the T661 forms may have shown some uncertainties in the form of limitations that Tempora had, but not limitations of specialists in the same domain. Further, this documentation may have shown hypotheses formed, scientific methods used, and technological advancements achieved. However, Maged and Shady provided very limited testimony explaining the documentation attached to the T661 forms filed for the 2008 and 2009 taxation years.

[258] I find that Tempora used routine engineering to solve their problems, that is "techniques, procedures and data that are generally accessible to competent professionals in the field" (*Northwest Hydraulic*, at para. 16). I also find that the evidence showed that the relevant uncertainties could be solved with products (cores) already commonly available on the market, and that there are therefore no technological uncertainties and no resulting technological advancement.

[259] Here, the result of the testing undertaken was a cartridge heater with specifications that correspond to the client's exact demands (e.g. maximum

resistance of 40 ohms). Even if these given specifications may not have previously existed, the Appellant did not establish that the method used to find them was not generally accessible to competent professionals in the field.

[260] Further, Shady's testimony does not lead to the conclusion that the parameters that they adjusted to reach the wanted specifications (e.g. type of wire, voltage, thickness of the wire) were unknown. In other words, Shady has not established that a competent professional in the field possessing the same materials and equipment could not have performed the same tests to achieve the client's desired specifications. Consequently, this project is more likely an application of existing principles, which is an activity that does not qualify as SR&ED (*R I S-Christie*, at para. 13).

[261] I also find that the project was commercial in nature. It appears that this project pertains to the manufacturing of cartridge heaters, and not to their specialization for specific purposes such as dialysis machines. The testimony of both Maged and Shady shows that manufacturing such cartridge heaters has been part of Tempora's operations. In fact, the Appellant's documentary evidence on this project is partly about the manufacturing of cartridge heaters.

[262] Furthermore, the Appellant did not provide sufficient evidence to demonstrate that it used the scientific method to carry out its activities. I find that all the adjustments to cartridge heaters as part of this project were made using a trial-and-error method where Tempora designed (or adjusted the design of), manufactured and tested their products.

(5) 2009 taxation year: "Hi-Density Cartridge Heaters" (project 2009-01, a continuation of project 2008-03), "Tubular Process Heaters" (project 2009-02) and "Coil & Cable Heaters" (project 2009-03)

[263] For the 2009 taxation year, three SR&ED projects were claimed by Tempora: "Hi-Density Cartridge Heaters" (project 2009-01), which was a continuation of and the same project as the 2008-03 project; "Tubular Process Heaters" (project 2009-02); and "Coil & Cable Heaters" (project 2009-03).

[264] A CRA research and technology agent, who reviewed the 2009 SR&ED claim, recommended that a detailed scientific examination of the projects be performed (Exhibit R-1, Respondent's Book of Documents, tab 66).

[265] However, because of a lack of resources, the three projects were not further examined on the scientific side but were approved as SR&ED projects. However, Ms. Jacques performed an audit of the SR&ED expenses claimed and the corresponding ITCs. As indicated in her auditor's report (T20) (Exhibit R-1, Respondent's Book of Documents, tab 74), Ms. Jacques, after having discussed the various projects with Mr. Guidara, increased the amount Tempora claimed. The three SR&ED claims as increased by Ms. Jacques were approved (Exhibit R-1, Respondent's Book of Documents, tab 67).

(a) ***"Hi-Density Cartridge Heaters" project (2009-01 – continuation of project 2008-03):***

[266] As indicated above, this project is the same project and a continuation of the 2008 project entitled "Hi-Density Cartridge Heaters". For the same reasons as indicated for the 2008-03 project, I find that, on a balance of probabilities, the project does not qualify as SR&ED.

(b) ***"Tubular Process Heaters" project (2009-02):***

(i) ***Description:***

[267] This project appears to be a continuation of the tubular element heaters projects that were claimed as SR&ED for the 2007 and 2008 taxation years. However, Maged testified that he would rather call this project "Tubular Circulation Immersion", as it is a different project dealing with tubular elements. Tempora was looking at how tubular element heaters can work properly when immersed in various substances.

[268] Maged testified that on the basis of the CRA's advice (Mr. Guidara and Mr. Justin), he changed the project's presentation: he included a summary of the project that incorporated the uncertainties and steps undertaken. Particularly for this project, Maged testified that he included a description of a 15-step process, followed by "theory" from other suppliers and manufacturers' websites.

[269] As indicated in the project's Form T661 (Exhibit A-1, Appellant's Book of Documents, tab 14), the technological obstacle or uncertainty relates to the determination of the magnesium oxide's temperature-resistant grade (box 242) and the technological advancement includes "[t]o design[,] engineer and create a Tubular Elements and as[s]emblies of multiples configured with a variety of watt and volt

ratings, terminations, sheath materials and mounting options to various diameters…" (box 240).

[270] The description of the technological advancement found in Form T661 (box 240) comes mostly from documentation issued by Watlow, a supplier or manufacturer of heating elements (Exhibit R-1, Respondent's Book of Documents, tab 170).

[271] Specifically, the technological advancement description continued with the following, which consists of different excerpts of Watlow's documentation that the Appellant took out and pieced together: "...for direct immersion in water, oils, viscous materials, solvents, process solutions and molten materials as well as air and gases. All of which would consist of 36 standard bend formations to enable designing the heating element around available space to maximize heating efficie[n]cy with [w]attages from 95 watts to 2.2 megawatts" (box 240).

[272] In the same Form T661, Tempora described the work undertaken for that project (box 244).

[273] Following the description of the 15-step process, the technical report includes various steps for manufacturing a tubular process heater from other suppliers or manufacturers of tubular heaters.

[274] According to Mr. Lussier, the supporting documentation attached to the technical report contained general information. In addition, two pages (pp. 16–17) were already found in the 2008 project entitled "Straight and Bent Annealed Tubular & Finned Heating Elements". Further, Mr. Lussier testified that he could not find, within the materials and documents seized, any data bank relating to the millions of tests purportedly done.

(ii) ***Qualification:***

[275] For the following reasons, I find that, on a balance of probabilities, this project does not qualify as SR&ED. The Appellant did not convince me that it encountered any technological uncertainty that could not be solved using routine engineering, or that it made any technological advancement as part of this project.

[276] Further, Tempora did not adduce sufficient evidence to show that in carrying out the activities as part of this project, it posed hypotheses specifically aimed at

reducing or eliminating any uncertainty with a procedure consistent with the scientific method.

[277] As indicated above, Tempora described the uncertainties as part of this project as consisting of the determination of the temperature-resistant grade of magnesium oxide. However, Tempora did not indicate whether this remains an uncertainty "to those knowledgeable and experienced in the relevant field" (*Logix*, at para. 69). In fact, the Appellant did not adduce any evidence to that effect.

[278] If the magnesium oxide's temperature-resistant grade was in fact a technological uncertainty, it remains unclear what hypotheses the Appellant formed to specifically reduce or eliminate it. Magnesium oxide's temperature-resistant grade or rate was not subsequently mentioned in the project summary Maged wrote.

[279] Because I find that, on a balance of probabilities, there is a lack of technological uncertainty, I must conclude, in accordance with the case law, that there can be no technological advancement, since these two criteria are interrelated (*Abeilles*, at para. 142; *Béton mobile*, at para. 51).

[280] Furthermore, the fact that the project's theoretical basis comes from Watlow's publications also indicates that this project raises no technological uncertainties. If Watlow has already solved the problem, then the solution becomes "generally accessible to competent professionals in the field," i.e., "routine engineering" inadmissible for technological uncertainty (the Circular as cited in *Northwest Hydraulic*, at para. 16), and also fails the technological advancement criterion (*Béton mobile*, at para. 53).

[281] Since the rest of the technical report constitutes information taken from other suppliers and manufacturers' websites, it does not refer to the Appellant's hypotheses.

[282] Further, the Appellant did not provide enough evidence to show that it used any procedure consistent with the scientific method to solve uncertainties, if any. The documentation found in the technical report, which was copied from other publicly available sources, might mention such eligible procedures, but it provides no description as to what the Appellant did. Consequently, it is not possible to compare the Appellant's methodology with those recognized in the scientific field and verify whether it "accord[s] with established and objective principles of scientific method, characterized by trained and systematic observation,

measurement and experiment, and the formulation, testing and modification of hypotheses" (*Northwest Hydraulic*, at para. 16).

[283] Overall, the evidence was silent as to whether there was any "formulation of an hypothesis or hypotheses designed to reduce or eliminate the uncertainty" or if there was any "methodical and systematic testing of the hypotheses" (*Northwest Hydraulic*, at para. 16).

(c) ***"Coil & Cable Heaters" project (2009-03):***

(i) ***Description:***

[284] According to Maged, coil and cable heaters are specialized tubular elements with very small diameters that require several steps of annealing because of their rectangular shape. In addition, because the diameter is so small, the intricacies of coil and cable heaters far exceed those of tubular elements on account of material manoeuvrability. An example of where coil and cable heaters would be used is in car bumpers.

[285] The Appellant adduced in evidence extracts of Excel programs under Exhibits A-5 and A-6, which are two examples of coil and cable heaters. Again, according to Maged's testimony, these represent the roadmap to create two different elements.

[286] The technical report attached to Form T661 included a step-by-step process, as well as documents from other suppliers and manufacturers of heating elements (Tempco and Watlow) taken from the Internet. According to Maged's testimony, the attached documents came from other suppliers and manufacturers to demonstrate coil and cable heaters' usage in the industry and to explain the project's relevance.

[287] According to Shady's testimony, the uncertainty in this project resides in the development of the product, given its small size and the difficulty of manufacturing the product. Tempora was able to fix the uncertainties in the production process after much testing.

[288] Box 240 of the project's Form T661 describes the technological advancement as being "[t]o design & engineer a Cable heater, a small diameter, 0.062" diameter so the heater can be formed into a compact coiled nozzle heater for use on plastic in[j]ection molding equipment supplying a full 360 degrees of heat with optional distributed wattage."

[289] Box 240 is almost a carbon copy of an excerpt of Watlow's documents found on the Internet. To the extent that they differ, it is because the Appellant (i) specified the heaters' specific applications in its projects, (ii) replaced a general statement with an example (e.g. substituting "semiconductor" for "high-end"), or (iii) added nonsensical phrases to Watlow's words (e.g. who is "them" in "to replace the exiting big and energy loss created by them"?).

[290] Box 242 of the project's Form T661 describes the technological obstacles/uncertainties as follows: "Determining the core required caused much trouble due to its fragility and its low tolerance to pressure when [i]ntroducing it in the SS tube or the coil and TC in question inside of its wholes [sic]. It was found that it must be highly compact as to allow uniform crushing and thus preserving the heaters integrity but in return very fragile when manipulating."

[291] According to Mr. Lussier, the documentation attached to the technical report is of a general nature relating to coil and cable heaters. Further, the technical report mentioned that Tempora built many heating elements to test their lifespan, but it failed to mention the tests' relevant variable and any analysis of the tests' results. In addition, the technical report was incoherent. It failed to mention measurements that were taken, the experimentations' underlying analysis and accompanying technological advancements. Mr. Lussier did not find any connection between the materials consumed and the work performed. Neither could he find any documentation within the seized materials and documents that would evidence work performed, including any raw data, statistical analysis or conclusions on the heaters' lifespan.

(ii) ***Qualification:***

[292] For the following reasons, I find that, on a balance of probabilities, this project does not qualify as SR&ED. The evidence failed to show the technological uncertainties and any technological advancement for this project. Further, the evidence did not establish that Tempora used any scientific method in performing its testing, if any.

[293] I also find that the project relates to the manufacturing of coil and cable heaters, an activity that does not qualify as SR&ED.

[294] Maged's extensive testimony on coil and cable heaters did not identify the technological uncertainties that Tempora faced in this project, the hypotheses that it

formed, the testing that it conducted, the method that it used in performing the activities, and the technological advancement that it achieved, if any.

[295] Form T661 showed that the technological uncertainty relates to "[d]etermining the core required" (box 242 of Form T661, found in Exhibit A-1, Appellant's Book of Documents, tab 14) and that the technological advancements achieved through this project are those listed in pages taken from other suppliers and manufacturers' documentation on the Internet, and more specifically from Watlow's website (Exhibit R-1, Respondent's Book of Documents, tabs 168 and 169).

[296] However, as mentioned above, I find that the evidence adduced at the hearing failed to show any technological uncertainty with respect to this project. Further, without technological uncertainty, there can hardly be any technological advancement (*Abeilles*, at para. 142).

[297] Further, because the technological advancements description was taken from another supplier's website, I can infer that competent professionals in the field could resolve these issues (the technological uncertainties) with predictability using standard and established techniques, and hence, the criterion of technological uncertainty is not met.

[298] Technological advancement refers to the incorporation of "a characteristic or capability not previously existing or available in standard practice…" (*Béton mobile*, at para. 53, citing the Circular). If a few other suppliers or manufacturers have already achieved these advancements, then these advancements have become "previously existing or available in standard practice".

[299] Further, Tempora adduced into evidence Exhibits A-5 and A-6, which Maged described as a roadmap on how to build the element. Maged then provided a brief explanation of the numbers and abbreviations. However, I find that information found under Exhibits A-5 and A-6 is mostly parameters of the coil and cable heaters manufactured and does not relate to any technological uncertainties, hypotheses formed, methodology or technological advancement.

C. **Penalties under subsection 163(2)**

[300] Subsection 163(2) provides that "[e]very person who, knowingly, or under circumstances amounting to gross negligence, has made…a false statement or omission in a return, form, certificate, statement or answer" is liable to a penalty.

[301] To justify the penalties under subsection 163(2), the Respondent submits that Maged and Shady never bothered to inquire about whether the projects qualified as SR&ED. More specifically, even after the CRA told him that the project presentation was inappropriate (e.g. because there was too much theory), Maged never changed his presentation method. He kept presenting nothing else but plagiarized documents with Tempora's SR&ED claims. Moreover, neither Maged nor Shady ever bothered to read the T4088 CRA guide on SR&ED or otherwise inquire about the SR&ED requirements. Further, they did not verify Tempora's income tax returns before they were filed.

[302] The report recommending the penalties under subsection 163(2), which was prepared by Mr. Lussier, was adduced in evidence at the hearing (Exhibit R-1, Respondent's Book of Documents, tab 79). Mr. Lussier looked at the proportion of pages plagiarized from suppliers and manufacturers' websites found in the Appellant's supporting documentation attached to its T661 forms. Given the number of documents copied from other suppliers and manufacturers' websites, Mr. Lussier recommended the penalties for the 2006 to 2009 taxation years.

[303] Under subsection 163(3), the burden of establishing the facts justifying the assessment of the penalty is on the Minister.

[304] The penalties assessed under subsection 163(2) of the Act must be imposed only where the evidence clearly justifies it. If the evidence leaves any doubt that the penalties should be applied in the circumstances of the appeal, then the only fair conclusion is that the taxpayer must receive the benefit of the doubt in those circumstances (see *Farm Business Consultants Inc. v. The Queen*, [1994] 2 C.T.C. 2450, 95 D.T.C. 200, at para. 27).

[305] Also, as indicated by the Supreme Court of Canada at paragraph 61 of *Guindon v. Canada*, 2015 SCC 41, the penalties "are meant to capture serious conduct, not ordinary negligence or simple mistakes...".

[306] The concept of "gross negligence" was defined by Strayer J. in *Venne v. The Queen*, [1984] F.C.J. No. 314 (QL), 84 D.T.C. 6247 at 6256 (F.C.T.D.):

> "Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not.

[307] According to the very wording of subsection 163(2) of the Act, two elements are required for a penalty to apply: (1) a mental element ("knowingly, or under circumstances amounting to gross negligence") and (2) a material element ("has made...a false statement or omission in a return, form, certificate, statement or answer").

[308] Regarding the material element, I find that Tempora made false statements in the T661 forms filed for the 2006 to 2009 taxation years because documentation either attached to, or forming part of, the technical reports submitted with the T661 forms was greatly plagiarized from other suppliers and manufacturers' websites. Further, as mentioned above, that documentation was prescribed information under the Act. For these reasons, the material element is thus met in the case at bar.

[309] Regarding the mental element, two possible scenarios have to be examined for penalties to apply: did Tempora knowingly make a false statement, or did Tempora make a false statement under circumstances amounting to gross negligence?

[310] For the following reasons, I find that Tempora made false statements in Form T661 under circumstances amounting to gross negligence. Tempora's conduct fell markedly below what would be expected of a reasonable person, and thus, Tempora was grossly negligent (*Wynter v. The Queen*, 2017 FCA 195, at para. 18 [*Wynter*]). The "gross negligence" standard is an objective test (*Wynter*, at para. 21). Gross negligence will be assessed by taking into account the expected conduct of a reasonable person in the same circumstances.

[311] In the case at bar, the extent of plagiarism found in the documentation attached to the technical reports submitted with the T661 forms justifies the assessment of the penalties under subsection 163(2) for the 2006 to 2009 taxation years, because claiming SR&ED expenditures (and corresponding ITCs) using plagiarized documentation from other suppliers and manufacturers' websites to justify those claims showed a marked departure from the conduct of a reasonable person in the same circumstances.

D. **Assessments under section 160**

[312] As indicated above, counsel for Maged and Shady acknowledged that the sole issue with respect to the assessments issued under section 160 to both Maged (notice of assessment number 4083671) and Shady (notice of assessment number 4083655)

was the existence of Tempora's tax debt at the time that Tempora had paid personal tax debts owed by Maged and Shady.

[313] According to assumptions relied upon by the Minister to issue the assessments under section 160:

- between July 30, 2008, and July 8, 2016, Tempora paid personal tax debts owned by Maged in the amount of $44,166.95, and Maged did not reimburse that amount to Tempora; and

- between October 25, 2009, and April 15, 2014, Tempora paid personal tax debts owed by Shady in the amount of $27,860, and Shady did not reimburse that amount to Tempora.

[314] For the reasons detailed above, because the appeals of the reassessments issued by the Minister to Tempora for the taxation years ending July 31, 2006, and July 31, 2009, were dismissed, Tempora has a resulting tax debt in respect of both taxation years. Specifically, for the taxation year ending July 31, 2006, Tempora's tax debt in the amount of $170,649 exceeds the amount assessed to both Maged and Shady under section 160 (para. 160(1)(e)).

[315] For these reasons, the appeals of the assessments issued under section 160 to both Maged (notice of assessment number 4083671) and Shady (notice of assessment number 4083655) are dismissed.

VIII. **CONCLUSION**

[316] For all of the above reasons:

1. the Minister has met his burden to reassess Tempora's 2006 to 2009 taxation years beyond the normal reassessment period under subparagraph 152(4)(a)(i) and to assess penalties under subsection 163(2);

2. the appeals from the reassessments made under the Act for Tempora's 2006 and 2009 taxation years are dismissed;

3. the appeals from the reassessments made under the Act for Tempora's 2007 and 2008 taxation years are allowed, and the reassessments are referred back to the Minister for reconsideration and reassessment on the basis that Tempora's following projects were SR&ED projects, that Tempora incurred

SR&ED expenditures and that Tempora was entitled to corresponding ITCs for these projects:

(i) for the 2007 taxation year: "Tubular Element Manufacturing Line" project, with ITCs totalling $173,540; and

(ii) for the 2008 taxation year: "Flexible Silicone Rubber and Kapton Heating Elements" and "Straight and Bent Annealed Tubular & Finned Heating Elements" projects, with ITCs totalling $242,328;

4. given the Appellant's concessions, and given Tempora has a tax debt in respect of its 2006 and 2009 taxation years, the appeals from the assessments made under section 160, notices of which are dated November 9, 2016, and bearing number 4083671 (Maged) and number 4083655 (Shady) are dismissed; and

5. each party shall bear their own costs.

Signed this 20th day of November 2025.

"Dominique Lafleur"

Lafleur J.

CITATION:	2025 TCC 173
COURT FILE NOS.:	2021-1701(IT)G, 2021-1703(IT)G, AND 2021-1704(IT)G
STYLE OF CAUSE:	LES ÉLÉMENTS CHAUFFANTS TEMPORA INC., SHADY ELHAMI, AND MAGED ELHAMI v. HIS MAJESTY THE KING
PLACE OF HEARING:	Montreal, Quebec
DATES OF HEARING:	February 3, 4, 5 and 6, and March 17, 18, and 19, 2025
REASONS FOR JUDGMENT BY:	The Honourable Justice Dominique Lafleur
DATE OF JUDGMENT:	November 20, 2025

APPEARANCES:

Counsel for the Appellants:	Christopher Mostovac Olivier Verdon
Counsel for the Respondent:	Marie-Aimée Cantin Noémie Vespignani Alexandre MacBeth

COUNSEL OF RECORD:

For the Appellants:

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Firm:	Starnino Mostovac S.E.N.C.

For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada