Citation: 2015 TCC 92
Date: 20150416
Docket: 2013-385(GST)G

BETWEEN:

INVESCO CANADA LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS RESPECTING SUBMISSIONS ON COSTS

Campbell J.

[1] On December 23, 2014, I issued reasons allowing these appeals with costs to the Appellant. The issue involved a determination of the correct value of the consideration paid by various mutual fund trusts to the Appellant for the management services it provided to those funds. In allowing the appeals, I concluded that the management fees had been reduced at the point of sale and that the net fees consisted of the reduced amounts. Consequently, the Appellant had properly collected and remitted Goods and Services Tax ("GST") on the reduced amount of the management fees, being the correct value of the consideration.

[2] On January 22, 2015, the Appellant filed a Notice of Motion, by way of written representations, seeking a lump sum award of costs on a party-party basis pursuant to Rule 147(1) of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*") in the amount of $347,448. This amount represents 60 percent of the Appellant's actual legal fees of $481,299 and the HST on those reduced fees, as well as all of the disbursements, in the amount of $18,886, and applicable HST on those disbursements.

[3] On February 11, 2015, the Respondent filed its Written Representations Regarding Costs opposing the Appellant's motion and proposing an award of costs

in accordance with the Tariff. In the alternative, the Respondent submitted that an award in the range of 15 to 20 percent of the Appellant's fees and disbursements would be appropriate. The Respondent's alternative proposal would result in a costs award ranging between $71,478 and $95,304.

[4] On March 2, 2015, the Appellant wrote to the Court conceding an error, which the Respondent had brought to its attention, respecting costs incurred in meeting with another law firm in preparation for the hearing. The concession of $5,399 represents $4,778 in legal fees and $621 in Harmonized Sales Tax ("HST") on those fees. The Appellant was claiming 60 percent of this aggregate adjustment or $3,239. Consequently, the revised total party-party costs that the Appellant is seeking is reduced to $344,209.

[5] Section 147 of the *Rules* vests judges of this Court with broad discretionary power in awarding costs beyond amounts set out in the Tariff. A number of factors are listed in Rule 147(3) that should be considered in awarding costs in excess of the Tariff. The Federal Court of Appeal in *The Queen v Landry*, 2010 FCA 135, 2010 DTC 5093, at paragraph 22, confirmed that "discretion must be exercised on a principled basis" to prevent it from being exercised in an arbitrary manner. The underlying principle in awarding costs to a successful litigant is that it be fair and reasonable in light of the application of the factors in Rule 147(3), specific to the particular facts of the appeal, as well as any other factors that the Court may consider to be relevant. The Federal Court of Appeal in *Consorzio del Prosciutto di Parma v Maple Leaf Meats*, 2002 FCA 417, [2002] FCJ No. 1504, at paragraph 10, states that an award of costs is not a mere accounting exercise but a matter of judgment as to what is appropriate in the circumstances. The decision of Justice Boyle in *Spruce Credit Union v The Queen*, 2014 TCC 42, 2014 DTC 1063, provides a comprehensive review of the law to date in relation to awards of costs. The main principles that were highlighted in those reasons include the following:

(a) a lump sum may be awarded after consideration of the amounts at issue together with the complexity and the importance of those issues, the work generated and a party's success (*Scavuzzo v The Queen*, 2006 TCC 902006 DTC 2311, *Dickie v The Queen*, 2012 TCC 327, 2012 DTC 1276, and *Blackburn Radio Inc. v The Queen*, 2013 TCC 98, 2013 DTC 1098);

(b) the court must consider the Rule 147(3) factors although the amounts and complexity of the issues alone may not be a reason for departing

from the costs set out in the Tariff (*Jolly Farmer Products Inc. v The Queen*, 2008 TCC 693, 2009 DTC 1040);

(c) there must be egregious circumstances for a court to consider an award of solicitor-client costs (*Sommerer v The Queen*, 2012 TCC 212, Transcript of Oral Reasons delivered by conference call on July 14, 2011);

(d) increased costs generally vary between 50 to 75 percent of solicitor-client costs (*Zeller Estate v The Queen*, 2009 TCC 135, 2009 DTC 1106);

(e) increased costs are not meant to be punitive (*General Electric Capital Canada Inc. v The Queen*, 2010 TCC 490, 2010 DTC 1353) but an award is not limited to instances of misconduct (*Teelucksingh v The Queen*, 2011 TCC 253, [2011] TCJ No. 476); and

(f) exceptional circumstances need not exist for an award of costs to move beyond the Tariff (*Velcro Canada Inc. v The Queen*, 2012 TCC 273, [2012] TCJ No. 219).

[6] A discussion of the factors set out in Rule 147(3), as they relate to the appeals that were before me, follows.

A. Result of the Proceeding

[7] The Court agreed entirely with the Appellant's interpretation of the nature of the relevant transactions and payments that were at issue. In doing so, the Court accepted the documentary and oral evidence adduced by the Appellant. The Respondent relied upon, what I concluded, were flawed assumptions in its pleadings and, consequently, incorrect interpretations of the agreements and transactions.

B. The Amounts in Issue

[8] The amount of $9,745,987 in GST was at issue together with interest and penalties of over $13,000,000. The Appellant did not pursue the assessments in respect to Aim Funds Management Inc. With respect to subsequent years, which are under objection, there is an additional amount of $685,553 to consider. This brings the total in GST, interest and penalties to almost $24,000,000.

[9] In addition, another appeal before this Court, *Fidelity Investments Canada ULC v The Queen* (Docket 2013-1147(GST)G), was held in abeyance pending the outcome of the *Invesco Canada Ltd.* appeals. The amount in issue in *Fidelity Investments* is $9,294,665, thereby adding this to the final amounts in issue. In *Spruce Credit Union*, Justice Boyle, at paragraph 35, favoured considering the aggregate amounts at issue in a lead case appeal:

> [35] It is appropriate in a lead case appeal such as this to consider the aggregate amount being contested by all bound taxpayers when fixing costs. It is equally appropriate to consider that each taxpayer generally has the right to pursue its own appeal to the Court, and that if each other taxpayer pursued an appeal and were successful, they would generally expect to be entitled to a costs award. The prudent and efficient use of public resources through lead cases or otherwise in resolving tax disputes is to be generally encouraged, not discouraged in any way.

[10] The Respondent, citing *Daishowa-Marubeni International Ltd. v The Queen*, 2013 TCC 275, 2013 DTC 1222, asks that judicial notice be taken of the fact that, although the amounts in issue are in the millions, they are nominal in comparison to the overall revenues and assets of the Appellant and Fidelity Investments. In *Daishowa*, Justice Miller, at paragraph 8, stated that the size of the amount in issue must be contextualized:

> [8] The amount in issue of approximately $14,000,000 of proceeds seems a large number, but it must be contextualized. It was approximately six percent of the proceeds of the major transaction in issue; it resulted, due to the use of losses, in minimal tax in the years in issue; Daishawa is a multi-million dollar business. So, what is a significant amount in this regard, a small business facing a $100,000 tax bill that could bankrupt it, or a large multi-national organization, bringing a case based on principle, regardless of the numbers? I conclude the amount is not such a significant factor in this case to justify increased costs.

[11] Although the Respondent submits that enhanced costs are not justified when the amount in issue is considered in context, I do not believe that the size of the corporation alone can be used to completely undermine the significance of an assessment of almost $25,000,000 in GST and approximately $10,000,000 in interest and penalties. I fully support the comments of Justice Miller that a lesser amount could effectively bankrupt a much smaller business. However, where the amount in dispute is of particular importance to the taxpayer, affecting the way in which it may conduct its business in the future, increased costs may be justified under the factor, "importance of issues", which I will address next (*Zeller Estates*).

[12] Considering both the aggregate amounts in issue, the significance of these amounts to the Appellant and the fact that the Appellant sought an advance tax ruling but not a GST ruling, this factor tends only slightly in favour of increased costs.

C. The Importance of the Issues

[13] The Respondent submits that the impact of the decision is limited to this Appellant and to one other mutual fund manager, Fidelity Investments. The Appellant contends that the case is of significant importance not only to the Appellant but to the mutual fund industry as a whole. The Respondent's position on assessment effectively increased the cost of offering a product to its investors, thereby affecting the Appellant's competitive position in the industry.

[14] The outcome of the appeal was of importance to the mutual fund industry as a whole, given that the type of fees and transactions in issue were a common occurrence throughout the industry. As the Appellant noted during the hearing, reference was made to ATR-65, a published advance tax ruling, which contained similar ruling requests. In addition, the Appellant's witness, David Warren, testified that the management fee rebates and distributions were widely used throughout the industry.

[15] In addition, it provided the Court with its first opportunity to comment on the Supreme Court of Canada decision in *Sattva Capital Corp. v Moly Creston Corp.*, 2014 SCC 53, respecting the proper interpretation of contracts.

D. Offer of Settlement

[16] There were no offers of settlement made.

E. The Value of the Work / The Complexity of the Issues

[17] I would characterize this matter as a moderately complex appeal requiring a fairly significant volume of work. The examinations for discovery took two days and the hearing lasted three days. The parties put together a lengthy Joint Book of Documents which, I suspect, required considerable time and effort. The Appellant submitted that "[t]he sheer number of funds involved (each with its own documentation that needed to be assembled and analyzed) combined with the number of taxation periods at issue created the need for significant extra effort." (Appellant's Notice of Motion, Tab 2, page 5). Two experienced counsel had

conduct of the Appellant's case. John Tobin focussed on the tax issues while Stuart Svonkin addressed the evidentiary matters.

[18] In addition, the Court invited written submissions subsequent to the hearing respecting the recently issued Supreme Court of Canada decision in *Sattva*.

F. Conduct of any Party that Tended to Shorten or Lengthen Unnecessarily the Duration of the Proceedings

[19] These appeals had a lengthy history, with the audit commencing in 2002 and the first reassessments occurring in 2003. The Appellant's main argument respecting this factor is that, because the Appellant has been cooperative throughout and was ultimately successful in the appeals, the Respondent should have known the frailties of its own case and allowed the Appellant's objection. Thus, the appeals could have been prevented. I do not believe the Appellant's view of the Respondent's conduct, in these circumstances, should influence an award of costs. The Respondent differed from the Appellant in its view of the documentation and the Court concluded that the Respondent's view was erroneous, but this does not amount to misconduct on the Respondent's part or mean that its position was frivolous or vexatious.

G. Any Other Matter Relevant to the Question of Costs

[20] There is some confusion about the time period for which the Appellant is seeking costs. Although the Appellant states that it is seeking costs from the date the Notice of Appeal was filed, the Respondent argues that costs should not be awarded that relate to the period of time pre-dating the preparation and filing of the Notice of Appeal.

[21] The earliest notation listed in the Bill of Costs is $4,277.05 for 3.8 hours relating to the "Notice of Appeal and other Preliminary Work" (Appellant's Notice of Motion, Tab 3, page 37). The Respondent may be directing its comments to the "other Preliminary Work" term and, in particular, the 2.3 hours that were spent "reviewing audit request; drafting response" (Appellant's Notice of Motion, Tab 4, page 96).

[22] In addition to the above factor, the Respondent states that the Appellant's costs, that were incurred in respect to documents acquired pursuant to an Access to Information request, are not proper charges as they could have been obtained from the Respondent during examinations for discovery. I do not have a response from

the Appellant concerning this, but I note that the Appellant, even if it could have obtained those documents as the Respondent suggests, would still, in all likelihood, have had to organize and review those documents.

[23] The Respondent also points out that the Bill of Costs contains legal fees for five counsel although only two were present in Court. The Respondent argues that this is unnecessary and unreasonable and points to potential inefficient billing practices and duplication of effort.

[24] I have taken these items into consideration in my final award of costs.

Summary

[25] The Tariff is to be used as a reference point but, in these appeals, it is an unsatisfactory starting point as it could provide for only a small percentage of the Appellant's actual costs. A review of the Rule 147(3) factors warrants the exercise of my discretion to award lump sum costs to the Appellant in excess of the Tariff. However, in this case, they do not support an award at the higher end. Given the success of the Appellant, the importance of the issues to the mutual fund industry, the moderate complexity and the significant volume of work, the appropriate award of costs is 40 percent of the Appellant's costs of $476,521 or $190,608, together with HST on those costs. The Appellant is also entitled to 100 percent of its disbursements in the amount of $18,886, together with applicable HST on those disbursements. There were no inordinate delays, settlement offers to consider or improper conduct that would support a higher percentage. Consequently, this award is appropriate, fair and reasonable in the circumstances.

Signed at Ottawa, Canada, this 16th day of April 2015.

"Diane Campbell"

Campbell J.

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COURT FILE NO.:	2013-385(GST)G
STYLE OF CAUSE:	INVESCO CANADA LTD. and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
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REASONS RESPECTING SUBMISSIONS ON COSTS:	The Honourable Justice Diane Campbell
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DATE OF REASONS RESPECTING SUBMISSIONS ON COSTS:	April 16, 2015

SUBMISSIONS:

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