Docket: 2005-2386(IT)G

BETWEEN:

MICHEL GUIBORD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2005-2388(IT)G

BETWEEN:

GEORGE S. SZETO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2005-2389(IT)G

BETWEEN:

MEI GUIBORD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2005-2390(GST)G

BETWEEN:

GEORGE S. SZETO INVESTMENTS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent

Docket: 2005-2392(IT)G

BETWEEN:

GEORGE S. SZETO INVESTMENTS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Counsel for the Appellant:	Charles M. Gibson Ian Houle
Counsel for the Respondent:	Josée Tremblay Natasha Wallace

ORDER

In accordance with the attached Reasons Respecting Submission on Costs, the Appellants are awarded one set of costs in the total amount of $50,000.

Signed at Ottawa, Canada, this 27th day of January 2011.

"V.A. Miller"

V.A. Miller J.

Citation : 2011TCC53
Date: 20110127
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Docket: 2005-2392(IT)G

BETWEEN:

GEORGE S. SZETO INVESTMENTS LIMITED,

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REASONS RESPECTING SUBMISSIONS ON COSTS

V.A. Miller J.

[1] In my Judgment in these appeals, I invited the parties to submit written submissions if they were unable to reach an agreement with respect to costs.

[2] The appeals were heard on common evidence. The Minister of National Revenue used the net worth method to reassess the individual Appellants' income tax liability. He then reassessed the corporate Appellant to include in its income the total of the unreported income for the individual Appellants. The corporate Appellant's taxation year ends on October 31. The following amounts were included in the Appellants' income:

YEAR	Michel Guibord	Mei Guibord	George Szeto	George S. Szeto Investments Limited
1995	$157,970	$157,970	$8,752	$336,967
1996	$136,440	$136,439	$55,016	$408,074
1997	$31,745	$31,746	$131,684	$173,410

The Minister also assessed subsection 163(2) penalties and he relied on subsection 152(4) to reassess the Appellants beyond the statutory limitation period.

[3] The corporate Appellant's GST appeal related to the reporting period November 1, 1994 to October 31, 1997 and $62,650 of unreported GST was assessed.

[4] The appeals were allowed, in part, to reduce the amounts included in each of the individual Appellant's net worth and to delete subsection 163(2) penalties for each of the individual Appellants.

[5] Counsel for the Appellants seeks costs on either a substantial indemnity basis or a lump sum basis as follows:

A. Substantial Indemnity

George S. Szeto Investments	George Szeto	Mei Guibord	Michel Guibord	Total
$170,320.03	$56,773.34	$56,773.34	$56,773.34	$340,640.06

B. Lump Sum Award

George S. Szeto Investments	George Szeto	Mei Guibord	Michel Guibord	Total
$113,546.69	$37,848.90	$37,848.90	$37,848.90	$227,093.37

[6] The Respondent requests that she be awarded costs as a lump sum award in the amount of $255,721.10; or, in the alternative that she be granted costs in accordance with the tariff in the total amount of $98,693.65.

[7] Section 147 of the *Tax Court of Canada Rules (General Procedure)* (the *Rules*) gives the Court a broad discretion in awarding costs but that discretion must be exercised on a principled basis[1]. Section 147 of the *Rules* reads:

GENERAL PRINCIPLES

> **147.** (1) The Court may determine the amount of the costs of all parties involved in any proceeding, the allocation of those costs and the persons required to pay them.
>
> (2) Costs may be awarded to or against the Crown.

(3) In exercising its discretionary power pursuant to subsection (1) the Court may consider,

(*a*) the result of the proceeding,

(*b*) the amounts in issue,

(*c*) the importance of the issues,

(*d*) any offer of settlement made in writing,

(*e*) the volume of work,

(*f*) the complexity of the issues,

(*g*) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding,

(*h*) the denial or the neglect or refusal of any party to admit anything that should have been admitted,

(*i*) whether any stage in the proceedings was,

(i) improper, vexatious, or unnecessary, or

(ii) taken through negligence, mistake or excessive caution,

(*j*) any other matter relevant to the question of costs.

(4) The Court may fix all or part of the costs with or without reference to Schedule II, Tariff B and, further, it may award a lump sum in lieu of or in addition to any taxed costs.

(5) Notwithstanding any other provision in these rules, the Court has the discretionary power,

(*a*) to award or refuse costs in respect of a particular issue or part of a proceeding,

(*b*) to award a percentage of taxed costs or award taxed costs up to and for a particular stage of a proceeding, or

(*c*) to award all or part of the costs on a solicitor and client basis.

(6) The Court may give directions to the taxing officer and, without limiting the generality of the foregoing, the Court in any particular proceeding may give directions,

(*a*) respecting increases over the amounts specified for the items in Schedule II, Tariff B,

> (*b*) respecting services rendered or disbursements incurred that are not included in Schedule II, Tariff B, and
>
> (*c*) to permit the taxing officer to consider factors other than those specified in section 154 when the costs are taxed.

[8] The general rule for awarding costs is in accordance with the Tariff. As stated by Bowman J. in *Merchant v. Canada*[2], at paragraph 58:

> The general rule is that a successful litigant is entitled to party and party costs. Where success is divided it is not unusual for no order to be made for costs.

[9] The Court has the discretion to award costs beyond the Tariff where there are unusual circumstances to justify doing so[3]. Solicitor and client costs (substantial indemnity) are generally awarded only where there has been reprehensible, scandalous or outrageous conduct by one of the parties[4]

[10] According to the submissions of the Appellants, the total fees and disbursements incurred by the Appellants were $378,488.95. Counsel for the Appellants has argued that costs on a substantial indemnity basis are warranted in these appeals. In support of his position, he stated that the Minister of National Revenue's (the Minister) conduct was reprehensible as he had tried to intimidate the individual Appellants with the threat of incarceration and fines; and, counsel for the Minister would not consider settlement of the appeals while there was a malicious prosecution action outstanding. I will give a brief history to clarify counsel's argument.

[11] Counsel for the Appellant relied on the fact that the Appellants had been charged with tax evasion pursuant to paragraphs 239(1)(*a*) and (*d*) of the *Income Tax Act* and paragraphs 327(1)(*a*) and (*c*) of the *Excise Tax Act*. The trial on those charges took place in 2004 before Dempsey J. of the Ontario Court of Justice. At the end of 13 days of trial and after the fourth day of cross examination of the auditor, Crown counsel informed Dempsey J. that the Crown did not intend to offer any further evidence and he invited the court to dismiss the charges against the Appellants.

[12] On February 17, 2005, the Appellants initiated an action in malicious prosecution and negligent investigation against the Minister, the auditor and others. In a letter dated January 9, 2009 addressed to counsel for the Respondent, counsel for the Appellants wrote the following:

> "I hereby would like to confirm that your client cannot consider settlement of the above-mentioned actions because of the outstanding malicious prosecution brought by my clients against the CRA et al. I do not see what the link is between the two.

> There is a different standard of proof and different tests with respect to the liability for tax evasion and that to establish that there was an unreported income."

The Appellants state that the Respondent did not reply to this letter. It is my opinion that the Respondent's failure to reply to this letter does not indicate that it was unwilling or refused to attempt to settle these appeals. Nor does the Respondent's failure to reply to this letter signify that she agreed with the contents of the letter.

[13] In fact, the letters which the Appellants have included in their submissions do not support their position that counsel for the Minister would not consider settlement of the appeals. In a letter dated January 8, 2009, counsel for the Minister wrote:

> "Please be advised that the Respondent cannot accept the Appellants' global offer of settlement made during the pre-trial conference held on December 19, 2008. Considering the amounts in issue in each of these appeals and the rule to the effect that the Crown can only settle tax appeals based on the facts and the law, your offer to pay a lump sum of $100,000 is hereby rejected.
>
> However, with respect to the penalties levied on the Appellants and for settlement purpose only, we are proposing to settle the above noted matters on the following bases:
>
> - All four Appellants' reassessments in issue will be maintained with respect to the income tax and GST assessed and interest accruing thereon; and
> - The Respondent will renounce the penalties levied pursuant to subsection 163(2) of the *ITA* and sections 280 and 285 of the *ETA* with respect to George S. Szeto Investments Ltd.
>
> …
>
> Last, we wish to apologize for the delay in responding to the appellants' offer of settlement. The delay was due to the fact that it was necessary to obtain the details of the amounts in issue for each of the appellant at a time when a number of persons were on vacation."

[14] The grounds put forward by the Appellants do not support its position that a substantial indemnity award is appropriate in the circumstances of these appeals. The correspondence from counsel for the Respondent disclosed that the Respondent was willing to attempt to settle these appeals, albeit on grounds which were not acceptable to the Appellants. It is acknowledged that conduct which occurred prior to the commencement of the proceedings before this court may be taken into account in the assessment of costs[5] in exceptional cases. As stated by the Federal Court of Appeal in *The Queen v. Landry*[6] at paragraph 24:

> The judge has the power to fix a lump sum for costs, in excess of the sum that would have resulted from the usual application of the Tariff provided for in the Rules. To

> do so, the judge must normally consider the conduct of the parties during the proceedings. This can be seen from the factors listed at Rule 147 and the case law: see *Hunter v. R.* (2002), 2003 D.T.C. 51 (T.C.C. [General Procedure]) and the case law cited therein. Only in exceptional cases may the Court take into account conduct prior to the proceedings: *ibidem*, see also *Merchant v. R.*, 2001 FCA 19 (Fed. C.A.), where the taxpayer's conduct frustrated the audit process, and unduly and unnecessarily prolonged the hearing, *Merchant v. R.*, [1998] 3 C.T.C. 2505, 98 D.T.C. 1734 (T.C.C.).

[15] However, the fact that the Crown brought an unsuccessful criminal prosecution against the Appellants is not conduct that warrants a substantial indemnity award in the proceedings before the Tax Court of Canada.

[16] The Appellants have calculated their party and party costs to be $65,007.41 and they have, alternatively, requested costs in excess of the Tariff in accordance with Subsection 147(4) of the *Rules*. After a consideration of the factors in subsection 147(3) of the *Rules* and the facts in these appeals, I am satisfied that costs should not be awarded to the Appellants in excess of the tariff. I have considered the following:

a) The result of the proceeding:

All appeals were allowed in part. The individual Appellants were substantially successful in their appeals, while the corporate Appellant was successful in part. Gross negligence penalties imposed against the individual Appellants were deleted.

b) The amounts in issue:

The amounts in issue were significant. The total amount of taxes and penalties at issue under the *Income Tax Act*, as of May 5, 2008 was $499,960.02. The amount of net tax and penalties at issue under the *Excise Tax Act*, as of May 5, 2008, was $114,034.83.

c) The importance of the issues:

The result of the issues was important to the Appellants. However, the issue was not important from a legal point of view.

d) Written settlement offers:

The first written settlement offer was made by the Respondent on January 8, 2009 and it was quoted in paragraph 13 herein. The Respondent made a further written offer to settle on April 8, 2009. In this offer, the Respondent offered to reduce the net worth calculation for each individual Appellant by the amount of the cash deposits which appeared in their shareholder loan account.
On December 10, 2009, after the hearing of these appeals had started, the individual Appellants offered to settle their appeals, with costs, on the basis that their unreported income was zero. The corporate Appellant offered to settle its appeals on the basis that it had failed to declare income in each of its taxation years. The offers were rejected. The corporate Appellant made another offer to settle on January 11, 2010. This offer was similar to the one made on December 10, 2009 and was rejected.

The Respondent's offer to settle on April 8, 2009 was not unreasonable given the eventual outcome of these appeals and it ought to have served as starting point for the Appellants to try to negotiate a settlement. The individual Appellants did not make any meaningful attempt to settle their appeals. Their "offers to settle" were really requests to the Respondent to vacate the assessments and to pay costs.

e) The volume of the work:

There were numerous documents presented at the hearing of these appeals. Many of the documents were duplicated and many were not referred to by either party. The production of a joint book of documents would have facilitated the hearing. According to submissions made by counsel for the Respondent, it was her understanding that counsel for the Appellants had originally agreed to a joint production of documents. However, six days before the start of the hearing of these appeals, counsel for the Appellants informed the Respondent that he was not prepared to forward his book of documents as he was still receiving documents from the Appellants.

f) The complexity of the issues:

The Appellants were reassessed on a net worth basis and as such the issue was not complicated.

g) The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding:

> The trial of these appeals were originally set for five days but took thirteen days. Originally it was proposed that there would be twelve witnesses called, two of whom were experts. I am satisfied that five days of hearing would not have been sufficient. However, the hearing of these appeals ought not to have taken thirteen days. The hearing was lengthened by counsel for the Appellants' attempt to introduce documents at the hearing that had not been produced during the examination for discovery.
>
> h) The denial or the neglect or refusal of any party to admit anything that should have been admitted:

The Respondent served the Appellants with a request to admit on September 5, 2009 which was supposed to be answered prior to the hearing of these appeals on September 21, 2009. The Appellants provided qualified answers to the request to admit and it was not until the twelfth day of the hearing that the Respondent's request to admit was submitted to the court.

[17] In view of the above considerations, I am not persuaded to exercise my discretion to award the Appellants costs in excess of the tariff. However, the individual Appellants were substantially successful in their appeals. In the circumstances, I award the Appellants one set of costs in the total amount of $50,000.

Signed at Ottawa, Canada, this 27th day of January 2011.

"V.A. Miller"

V.A. Miller J.

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[1] *The Queen v. Lau*, [2004] G.S.T.C. 5 (FCA)
[2] [1998] 3 C.T.C. 2505 (TCC)
[3] *Crystal Beach Park Limited v. The Queen*, 2006 TCC 615 at paragraph 4
[4] *Young v. Young*, [1993] 4 S.C.R. 3 at paragraph 134
[5] *Scavuzzo v. The Queen*, 2006 TCC 90 at paragraph 2
[6] 2010 D.T.C. 6967 (FCA)

CITATION:	2011TCC53
COURT FILE NO.:	2005-2386(IT)G 2005-2388(IT)G 2005-2389(IT)G 2005-2390(GST)G 2005-2392(IT)G
STYLE OF CAUSE:	MICHEL GUIBORD AND THE QUEEN GEORGE S. SZETO AND THE QUEEN MEI GUIBORD AND THE QUEEN GEORGE S. SZETO INVESTMENTS LIMITED AND THE QUEEN GEORGE S. SZETO INVESTMENTS LIMITED AND THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATES OF HEARING:	September 21-25, 2009 January 18-22, 2010 January 25, 27, 28, 2010
REASONS RESPECTING SUBMISSIONS ON COSTS:	The Honourable Justice Valerie Miller
DATE OF JUDGMENT:	August 19, 2010
DATE OF REASONS RESPECTING SUBMISSIONS ON COSTS:	January 27, 2011
SUBMISSIONS:	
Counsel for the Appellant:	Charles M. Gibson Ian Houle
Counsel for the Respondent:	Josée Tremblay Natasha Wallace
COUNSEL OF RECORD:	

For the Appellant:

Name:	Charles M. Gibson Ian Houle
Firm:	Vincent Dagenais Gibson

For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada