

Docket: 2017-4032(IT)G

BETWEEN:

MICHAEL KALLIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 17, 2020, at Calgary, Alberta
Written submissions on s. 98(3) of the *Income Tax Act* filed on October
1, 2020 (Appellant's) and October 8, 2020 (Respondent's)

Before: The Honourable Justice Susan Wong

Appearances:

Counsel for the Appellant: Matthew Clark

Counsel for the Respondent: Valerie Meier

ORDER

The Respondent is awarded costs in the amount of \$13,639.58, plus reasonable disbursements and applicable taxes.

Signed at Ottawa, Canada, this 25th day of April 2022.

“Susan Wong”

Wong J.

Citation: 2022 TCC 47
Date: April 25, 2022
Docket: 2017-4032(IT)G

BETWEEN:

MICHAEL KALLIS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER ON COSTS

Wong J.

Introduction/Overview

[1] In my September 1, 2021 judgment dismissing the appeal with costs to the respondent, I gave the parties time to reach an agreement on costs failing which they were directed to file written submissions for my consideration. I also directed that if I did not hear from the parties with respect to costs, costs would be awarded to the respondent in accordance with Tariff B.¹

[2] The parties did not reach an agreement as to costs so they have provided written submissions. The respondent proposes: (1) tariff costs up to the date on which she served a formal settlement offer, (2) tariff costs after judgment was issued, and (3) substantial indemnity costs² from the day after service of a settlement offer to the date that judgment was issued. The appellant disagrees and says that tariff costs are appropriate.

Background and timeline of events

[3] The one-day hearing took place on September 17, 2020 and was a Class C proceeding. The main issue was whether the appellant was in the business of lending money or whether he was an investor from 2010 to 2014, which in turn determined whether his losses were on account of income or capital in those years. There was

also a secondary issue of whether legal fees incurred by him to try to recover monies were deductible.

[4] The respondent served a written settlement offer on June 10, 2020. The offer proposed that with respect to the secondary issue, the appellant be allowed a capital loss of \$25,000 which was an allowable capital loss of \$12,500. Before the respondent served her offer, the parties completed their pre-litigation steps including a written examination of the appellant, the respondent's request to admit, and the appellant's responses to the request.

[5] The appellant agrees that the timing requirements under subsection 147(3.3) of the *Tax Court of Canada Rules (General Procedure)* have been met with respect to the written offer.

Respondent's claim for costs

[6] The respondent's claim for Tariff B costs³ is broken down as follows:

1.(1)(a)	For all services in a proceeding prior to examination for discovery not otherwise listed	\$700.00
1.(1)(b)	For a discovery of documents or inspection of property	\$200.00
1.(1)(f)	For a notice to admit	\$500.00
1.(1)(i)	For all services after judgment	\$450.00

[7] The respondent also seeks \$700 under heading 1.(1)(c) for the preparation of their cost submissions, as being comparable to a motion. Therefore, the respondent seeks tariff costs totalling \$2,550.

[8] With respect to the substantial indemnity portion of the respondent's claim for costs, the respondent seeks \$11,089.58⁴ based on the following:

- a. Respondent counsel's recorded time of 56.73 hours (being 63.68 hours less 6.95 hours for travel) from July 7, 2020 to October 8, 2020;⁵
- b. Respondent counsel's hourly rate of \$244.35, based on the Treasury Board of Canada's published hourly rate for LP-2 level counsel in the 2020-21 fiscal year;⁶ and
- c. 80 percent of (56.73 hours x \$244.35) being \$11,089.58.⁷

Legal context

[9] Subsections 147(3.1) and (3.2) are mirror images with respect to substantial indemnity and differ only with respect to which party makes the triggering offer. In the present situation where the respondent made the offer, subsection 3.2 applies. The specific wording is important and reads as follows:

147. (3.2) Unless otherwise ordered by the Court, if a respondent makes an offer of settlement and the appellant obtains a judgment as favourable as or less favourable than the terms of the offer of settlement or fails to obtain judgment, the respondent is entitled to party and party costs to the date of service of the offer and substantial indemnity costs after that date, as determined by the Court, plus reasonable disbursements and applicable taxes.

[10] Therefore, subsection 147(3.2) creates a default entitlement to substantial indemnity while preserving the Court's discretionary power. The purpose is to encourage settlement at an early stage where possible by virtue of the default entitlement, which removes the usual impediments to (or conditions for) an award of enhanced costs.⁸ The default entitlement must be balanced against the Court's general discretion to fashion a just and appropriate cost award suited for the particular circumstances of an individual case.⁹ The discretion to override the default entitlement should be made on a principled basis and the default entitlement should not be taken away lightly.¹⁰

Discussion

[11] With respect to the income-versus-capital issue, the respondent took issue with the characterization of the outlays but did not dispute that they were incurred. On the other hand, with respect to the secondary issue of legal fees, the reply to the notice of appeal asserted that the appellant had not proven he personally incurred the legal fees but that if he did, they were a capital outlay.¹¹

[12] At the hearing, the respondent continued to take issue with respect to whether the legal fees were incurred, noting in cross-examination¹² and closing argument that the appellant's evidence consisted of a bank draft paid to the trustee in bankruptcy. Although the secondary issue was worth significantly less than the primary issue, it was a live issue for both parties. The respondent's offer proposed to concede that the legal fees were incurred (and were a capital outlay) while at the hearing, the respondent did not concede that they were incurred. Therefore, the respondent's offer cannot be viewed as an offer to capitulate, as asserted by the appellant.

[13] I can appreciate how the appellant may view the relative magnitude of the respondent's offer as being equivalent to an offer to capitulate. However, both parties chose to take an all-or-nothing approach with respect to the primary issue of income versus capital, which was their prerogative. I can find no principled basis to override the respondent's default entitlement to substantial indemnity in the circumstances.

Conclusion

[14] The respondent is entitled to costs totalling \$13,639.58, comprised of tariff costs in the amount of \$2,550 and substantial indemnity costs in the amount of \$11,089.58, plus reasonable disbursements and applicable taxes.

Signed at Ottawa, Canada, this 25th day of April 2022.

“Susan Wong”

Wong J.

CITATION: 2022 TCC 47
COURT FILE NO.: 2017-4032(IT)G
STYLE OF CAUSE: MICHAEL KALLIS AND THE QUEEN
PLACE OF HEARING: Calgary, Alberta
DATE OF HEARING: September 17, 2020 Written submissions on s. 98(3) of the *Income Tax Act* filed on October 1, 2020 (Appellant's) and October 8, 2020 (Respondent's)
REASONS FOR ORDER BY: The Honourable Justice Susan Wong
DATE OF ORDER: April 25, 2022

APPEARANCES:

Counsel for the Appellant: Matthew Clark
Counsel for the Respondent: Valerie Meier

COUNSEL OF RECORD:

For the Appellant:

Name: Matthew Clark

Firm: Matthew Clark Professional Corporation
Calgary, Alberta

For the Respondent:

François Daigle
Deputy Attorney General of Canada
Ottawa, Canada

¹ Schedule II, Tariff B, *Tax Court of Canada Rules (General Procedure)*

² Subsection 147(3.2), *Tax Court of Canada Rules (General Procedure)*

³ Affidavit of Linda Plitt sworn on November 25, 2021, Exhibit D (Respondent's Bill of Costs)

⁴ Affidavit of Linda Plitt sworn on November 25, 2021, Exhibit D (Respondent's Bill of Costs)

⁵ Affidavit of Linda Plitt sworn on November 25, 2021, Exhibit E

⁶ Affidavit of Nicolas Wojcik sworn on November 24, 2021, paragraph 14

⁷ Subsection 147(3.5), *Tax Court of Canada Rules (General Procedure)*

⁸ *Sun Life Assurance Company of Canada v. The Queen*, 2015 TCC 171 (CanLII) at paragraph 8; *Ike Enterprises Inc v. The Queen*, 2017 TCC 160 at paragraph 15

⁹ *Transalta Corporation v. Canada*, 2013 FCA 285 (CanLII) at paragraph 31

¹⁰ *Sun Life Assurance Company of Canada v. The Queen*, 2015 TCC 171 (CanLII) at paragraphs 10 and 11

¹¹ Reply to the notice of appeal, paragraphs 32 and 33

¹² Transcript of hearing, page 56 at lines 22 to 28, page 58 at lines 9 to 13, page 95 at lines 7 to 8, page 109 at lines 6 to 28, page 110 at lines 1 to 4