Docket: 2011-1810(IT)G

BETWEEN:

HENCO INDUSTRIES LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application determined pursuant to *Rule* 147 of the
Tax Court of Canada Rules (General Procedure)

By: The Honourable Justice Campbell J. Miller

Counsel for the Appellant:	Geoffrey B. Shaw, Eric Mayzel
Counsel for the Respondent:	Samantha Hurst, Christian Cheong

ORDER

WHEREAS a Judgment was rendered on the 9th day of June, 2014;

AND WHEREAS the Parties were to provide written submissions on costs;

AND WHEREAS having received and considered such submissions;

IT IS HEREBY ORDERED THAT the Appellant is awarded costs including disbursements in the amount of $576,673 in accordance with the attached Reasons.

Signed at Toronto, Ontario, this 18th day of September 2014.

"Campbell J. Miller"

C. Miller J.

Citation: 2014 TCC 278
Date: 20140918
Docket: 2011-1810(IT)G

BETWEEN:

HENCO INDUSTRIES LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

C. Miller J.

[1] Henco Industries Limited ("Henco"), having been successful for the most part in its action against Her Majesty, seeks a lump sum costs award equal to 75% of its actual costs (75% of $1,203,770) plus disbursements of $56,517.76 for a total cost award of $959,345.82. The Respondent argues the appropriate award is the amount based on Tariff of $27,550 plus disbursements of $19,913.77, though in the alternative requesting an award between 20% to 50% of actual costs.

[2] There has been considerable jurisprudence recently with respect to costs awards from the Tax Court of Canada (see for example *Spruce Credit Union v The Queen*,[1] *Velcro Canada Inc. v The Queen*,[2] *Peter Sommerer v The Queen*,[3] *Jolly Farmer Products Inc. v Canada*,[4] *General Electric Capital Canada Inc. v Canada*,[5] and *Dickie v The Queen*).[6] The *Spruce Credit Union* decision provides a

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1 2014 TCC 42.

2 2012 TCC 273.

3 2011 TCC 212.

4 2008 TCC 693.

5 2010 TCC 490.

particularly good summary of recent trends and the award of costs in the Tax Court of Canada. It is unnecessary to reproduce the views put forward by all these cases, suffice it to say, the Tax Court of Canada is quite prepared to put aside Tariff in favour of a more detailed analysis based on the factors set forth in Rule 147(1) of the *Tax Court of Canada Rules (General Procedure)*. As Justice Rothstein succinctly put it as long ago as 2002 in the *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc.*[7] decision:

> An award of party-party costs is not an exercise in exact science. It is only an estimate of the amount the court considers appropriate as a contribution towards a successful party's solicitor-client costs.

[3] So, in this case, considering the Rule 147 factors, what is a fair and appropriate costs award?

Result of the proceeding

[4] While Henco was not successful on all issues, it was wholly successful on the major issue of the characterization of the $15,800,000 payment received by Henco. On the remaining four issues it was successful on two of them. But these four issues were minor in comparison to the $15,800,000 issue. There was also considerable time spent on procedural issues, again with some mixed success for the Appellant. However, I would describe the major procedural tussle was with respect to the admission of "factual matrix" evidence. On this point the Appellant was successful, and this indeed had a significant bearing on the conduct of the trial.

[5] I conclude the result in all these respects not only gives rise to a costs award to the Appellant but does indeed justify something greater than the Court's Tariff.

Amounts in issue

[6] The Respondent acknowledges that the amount of tax is significant and does favour a higher costs award.

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6 2012 TCC 327.

7 2002 FCA 417.

Importance of issues

[7] The Respondent argues, given the uniqueness of the circumstances, the case will have limited jurisprudential value. Further, given legislative amendments to the mirror-imaging test, my reasons in that regard are likely the last word to be heard.

[8] The Appellant counters that the issue of a non-taxable receipt, requiring a review of income from a sale of a business, income pursuant to section 23(1) of the *Income Tax Act* (the "*Act*"), categorization of an amount for the sterilization of a business and, if capital, whether eligible capital amount or simply non-taxable is of significant and precedential value. The Appellant further contends the procedural issues were weighty and will have relevance beyond this Appeal alone.

[9] I agree with the Appellant. Finding a payment to be a non-taxable capital receipt is not something any Tax Court of Canada judge does lightly. It can have serious repercussions in our overall system of taxation as to what is a source of income that is subject to Government taxation. Circumstances are rare that a payment, perhaps shrouded in a commercial light, is non-taxable. But cases that peak under that shroud, and give both Government and taxpayers alike guidance as to what can and cannot be swept into the taxing regime, should be of keen interest.

[10] Further, the interpretation of contracts, key to the resolution of this matter, touches on so many aspects of law. Yet our Court is unique in having to interpret contracts, not to determine the rights and obligations between the parties to the contract that may be in dispute, but to determine whether the transaction is such that the Government of Canada is justified in imposing tax. Again, any guidance the Tax Court of Canada can provide to taxpayers and the Government in this regard should be welcomed: it is guidance that is not by its nature any more advantageous to one side or the other.

[11] Both the substantive and procedural issues were worthy of the considerable time put into them by the litigants. They were well-researched, well-presented and well-argued. Time spent is illustrative of the importance attached. I conclude this factor justifies an award beyond Tariff.

Settlement offer

[12] Not applicable. It is worth noting, however, that it is clear from recent changes to our rules that where a settlement offer is in play this is given significant weight in a costs award.

Volume of work

[13] The Appellant describes the volume of work as enormous, while the Respondent describes it as typical. This is where the concept of more art than science comes into play, as there is no exact gradation of markers of volume such as enormous versus typical. Presumably, enormous equates to solicitor-client costs while typical equates to Tariff costs.

[14] The Appellant casts some blame on the Respondent for causing a greater workload by not agreeing to allow extrinsic evidence, not conducting a more in depth audit, refusing to produce certain documents and refusing to admit press releases. With respect, these are all matters that are within the normal thrust and parry of litigation: I am not convinced blame is a factor in this costs deliberation. This is especially so as the Appellant itself raised the issue regarding extrinsic evidence specifically in its own pleadings.

[15] I do, however, accept there was considerable volume of work. A lot of this, both at trial and in productions leading up to trial, was in establishing the factual matrix underlying the transaction. It is difficult for counsel to accurately predict how exhaustive the evidence must be to satisfy any particular judge on a certain point. I had some concerns, and expressed them to counsel both before and during trial, as to overkill in describing the circumstances which culminated in the $15,800,000 payment to Henco. I understand Appellant's counsel adjusted, but clearly, to my mind, erred on the side of more is better. I do not state this as a criticism, but as a vagary of trial management being somewhat judge dependant. It is a conundrum to determine just how much of a successful litigant's exhaustive exploration of evidence is justifiably to be footed by the losing side.

[16] I conclude in this case that while volume is a factor it is not a driving one.

Complexity of issues

[17] While there were a number of issues, only the issue with respect to the characterization of the $15,800,000 payment presented serious complexities. The

Appellant maintains the unique fact situation, and how it ultimately impacted on the result, added to the complexity. Somewhat. However, once I determined I had to consider the factual matrix, the result flowed more readily. The issue of capital versus income was not unduly complicated though the issue of eligible capital property and the mirror-imaging rules were not exactly straightforward. I agree with the Respondent that the complexity is not of the same nature as found in *Spruce Credit Union* or *Velcro*, but overall this factor does justify some increase over Tariff though not to the extent suggested by the Appellant.

Conduct of Party that tended to shorten or lengthen unnecessarily the duration of the proceeding

[18] The Appellant cites a number of examples where it is of the view the Respondent unnecessarily lengthened the proceeding:

a) Before trial, the Minister of National Revenue (the "Minister") refused to produce documents from other departments;

b) The Minister refused to file a joint application for a three week trial requiring Justice Hogan to consider such;

c) The Minister abandoned work on an Agreed Statement of Facts;

d) The Minister refused to admit press releases, which I ultimately let in; and

e) The Canada Revenue Agency ("CRA") instructed the auditor not to interview representatives of the Government of Ontario about the Agreement in issue.

[19] The Respondent, in turn, suggests:

a) That it was the Appellant who lengthened the proceeding by adducing repetitive and unnecessary evidence;

b) That the Appellant refused to admit facts in its own Notice of Appeal; and

c) The Appellant refused to admit the authenticity of certain documents.

[20] With respect to both Parties, they both chose to conduct their litigation in a manner to represent their respective client's best interest as keenly as possible. None of these accusations flying both ways do either side credit. It smacks more of schoolyard haggling than respectful acknowledgment of how an opponent chooses to run his or her case. For this factor to be determinative, it must be clear, I would respectfully suggest, that a party has acted unreasonably in its conduct. I have not been convinced that either side has so acted. This factor plays no role in my deliberations.

[21] There are no other factors that I deem relevant in determining costs. With no settlement offer playing into this award, no vexatious or egregious behaviour and no behaviour tending to lengthen the proceeding unjustifiably, I am left to weigh the factors of the successful result, the significant amount and the importance of the issues, with some lesser weight given to the volume of work and complexity of issues. These do not justify the percentage of solicitor-client costs sought by the Appellant, but fall more within the range the Respondent suggests, as an alternative, is appropriate in such cases – 20% to 50%, albeit at the higher end of that scale. I set the award at 45% of the solicitor-client costs.

[22] The Respondent wants me to go through a number of specific items in the Appellant's bill of costs in connection with calculating total fees of $1,203,770.64 (including HST) and deducting amounts before applying a percentage. I prefer not to take that approach. By awarding a lump sum on a percentage of solicitor-client costs basis, I find it unnecessary to go into the detail suggested by the Respondent. I have taken into account the Respondent's views on Mr. Parks involvement at trial, where he appears to have been more observer than contributor, though clearly still available for consulting with his co-counsel. I have also considered the Respondent's comments with respect to the contribution of a minor nature of many other lawyers. This too has had some impact on my determination of the percentage.

[23] With respect to disbursements, the Respondent requests that I disallow:

a) $10,408 for Freedom of Information requests, on the basis most of what the Appellant obtained was irrelevant to the issues. The Appellant responds that, given the destruction of Henco's model home

and records, this was the only way to gather evidence even if not all of it was used at the trial itself;

b) $105 fee for certification of the motion record from the Ontario Court on the basis I ruled such material was inadmissible;

c) $14,399 being the real estate lawyer's fee for an expert report, on the basis I ruled against letting that evidence in. The Appellant responds that it pleaded this deal was not a typical real estate deal, and this was how it intended to prove that point; and

d) 50% of $3,864 being the cost of transcripts from trial ordered on an expedited basis on the basis an expedited transcript was unnecessary.

[24] With respect to the Freedom of Information costs and transcript costs, I find these could be shared by the Parties so I reduce disbursements by 50% of $10,408 and 50% of $3,864 or in total $7,136. I also cut out the $105 fee as well as the real estate lawyer's expert report of $14,399. The Court is not in the habit of receiving a Canadian lawyer's advice in an expert report with respect to Canadian law. This was made clear.

[25] Disbursements are therefore reduced by a total $21,540.

[26] I award the Appellant costs of 45% of $1,203,770 being $541,696 plus disbursements of $34,977 for a total of $576,673.

Signed at Toronto, Ontario, this 18th day of September 2014.

"Campbell J. Miller"

C. Miller J.

CITATION:	2014 TCC 278
COURT FILE NO.:	2011-1810(IT)G
STYLE OF CAUSE:	HENCO INDUSTRIES LIMITED AND HER MAJESTY THE QUEEN
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REASONS FOR ORDER BY:	The Honourable Justice Campbell J. Miller
DATE OF ORDER:	September 18, 2014
APPEARANCES:	
	n/a

COUNSEL OF RECORD:

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