Docket: 2003-3262(IT)G

BETWEEN:

KRUGER INCORPORATED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion with respect to the merits and quantum of the award of costs heard on November 24, 2015 at Montréal, Québec.

Before: The Honourable Justice Gerald J. Rip

Appearances:

Counsel for the Appellant:	Roger Taylor
Counsel for the Respondent:	Josée Tremblay

ORDER

The respondent shall be awarded costs with respect to witnesses O'Mally and Klein as to 50 percent of all other costs.

Signed at Ottawa, Canada, this 18th day of January 2016.

"Gerald J. Rip"

Rip J.

Citation: 2016 TCC 14
Date: 20160118
Docket: 2003-3262(IT)G

BETWEEN:

KRUGER INCORPORATED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS RESPECTING SUBMISSIONS ON COSTS

Rip J.

[1] In my Judgment dated May 26, 2015,[1] I allowed the appellant's appeal from an income tax assessment for the 1998 taxation year and referred the assessment back to the Minister of National Revenue for reconsideration and reassessment on the basis that the appellant be permitted to value purchased foreign exchange option contracts in accordance with subsection 10(1) of the *Income Tax Act* and section 1801 of the *Income Tax Act Regulations*. However, the appellant was not permitted to value the bulk of its option contracts for the year, that is, written foreign exchange option contracts on a mark-to-market basis, but was held to have to report the contracts on a realization basis, as assessed. Another issue, concerning Part 1.3 of the *Act*, was dependant on the valuation issue. The number of written contracts to purchased contracts in 1998 was approximately 4:1.

[2] I gave the parties 30 days, or such longer delay as I may approve, to make submissions as to costs. I had hoped, quite frankly, that the parties would have agreed to costs. However, they did not and on November 24, 2015, counsel made their submissions as to costs.

[3] I should note that the Judgment of May 26, 2015 has been appealed.

[1] Judgment and Reasons for Judgment were amended on June 10, 2015, rearranging paragraphs 9 and 10 of the original Reasons for Judgment.

[4] At the request of respondent's counsel, Mr. Denis Dionne, an officer of the Canada Revenue Agency responsible for providing instructions to the Appeals Division of the Montreal Tax Services Office for purposes of executing the Judgment, made calculations affecting inventory under subsection 10(1) of the *Act* and section 1801 of the *Regulations*. The result of his calculations was that the assessment appealed from was not to be disturbed, that is, there would be no reassessment as a result of the Judgment. Appellant's counsel agreed.

[5] Each party is asking for costs, the appellant because the appeal was allowed, the respondent because the result of the proceeding was substantially in its favour as to the amounts in issue and the determination of the issue.

[6] The appellant submitted that since success was divided, each party should bear its own costs. Appellant's counsel referred in argument to several reported cases in support of its position: *Bonik Inc. et al v The Queen*,[2] *General Electric Capital Canada Inc. v The Queen*,[3] *Ouellette Sea Products Ltd. v Cap-Pelé Herring Export Inc.*[4], *AlliedSignal Inc.(previously Allied-Signal Inc.) v. du Pont Canada Inc.*[5] and *RMM Canadian Enterprises Inc. v The Queen*.[6]

[7] Notwithstanding the appellant's success in *Bonik*, the appellants were not awarded costs since, among other reasons, their aggregate success was less than 5 percent. McArthur J. also found that much of the delay in getting to trial was caused by the appellants. The trial judge also noted that no costs were awarded to the respondent "who was overwhelmingly successful". But where success is divided, he stated that it is not unusual for no order of costs to be made.

[8] In *GE Capital*, Hogan J., at paragraph 31, found that "[t]here is a strong tendency in the case law to accept the principle that costs awards should not be distributive, with the amounts being based on the outcome of particular arguments." He referred to the decision of Bowman J., as he then was, in *RMM*:

> [5] … It frequently happens in litigation that arguments are advanced in support of positions that, with the benefit of hindsight, turn out to have been unnecessary. Unless such arguments are plainly frivolous or untenable, I do not think that a litigant should be penalized in costs simply because its counsel decides to pull out

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[2] 2007 TCC 267, [2007] TCJ No. 583 [*Bonik*]
[3] 2010 TCC 490, [2010 TCJ No. 402] [*GE Capital*]
[4] 2010 NBCA 12, [2010] NBJ No. 42 [*Ouellette*]
[5] [1998] FCJ No. 190 [*AlliedSignal*]
[6] 97 DTC 420, [1997] TCJ No. 445 [*RMM*]

> all the stops, nor do I think that it is my place to second guess counsel's judgment, after the event, and say, in effect, "If you had had the prescience to realize how I was going to decide we could have saved a lot of time by confining the case to one issue." Moreover, one of counsel's responsibilities is to build a record which will enable an appellate court to consider all of the issues.[7] [Emphasis added]

[9] The New Brunswick Court of Appeal was of the view that in a Pyrrhic victory, no costs should be allowed: *Ouelette*.[8]

[10] Appellant's counsel conceded that notwithstanding in future years the number of contracts may be reversed, that is, Kruger may write more option contracts than it purchases, I have to rule on what was done in 1998, not what the situation may be in other taxation years.

[11] The Crown takes the position that it was entirely successful and that it is entitled to party and party costs.

[12] Referring to section 147 of the *Tax Court of Canada Rules (General Procedure)*,[9] Crown's counsel submitted that a) the results favoured the

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[7] *Opt. cit.*, para. 5
[8] *Opt. cit.*, para. 29

[9] 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.

[…]

(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,
- (i.1) whether the expense required to have an expert witness give evidence was justified given
  - (i) the nature of the proceedings, its public significance and any need to clarify the law,

respondent; b) the amounts in issue were decided in favour of the respondent; and c) the issue was important: whether the appellant can mark to market foreign exchange contracts at the end of its fiscal year. The evidence at trial was related to the issue of mark-to-market versus realization valuations. The Crown was successful in maintaining the valuation of 80 percent of the option contracts on a realization basis; the taxpayer was permitted to value 20 percent of its option contracts other than mark to market. Furthermore, the assessment appealed from was left undisturbed by the Judgment. Thus, the Crown succeeded in defending the assessment and is entitled to 100 percent of the costs. Counsel cited *SWS Communication Inc. v The Queen*,[10] where Hogan J., referring to his comments in *GE Capital*, repeated that costs should not be distributive. The global result is what is pertinent.

[13] As appellant's counsel stated, nobody knew that the assessment would not change as a result of the Judgment. That the assessment was left untouched after reconsideration of the assessment by the Minister is an anomaly. One normally expects that a reassessment in accordance with a judgment granting the taxpayer some relief would result in a lower amount of tax.

[14] The amounts of money in issue in an appeal before the Court may be relevant in determining costs. It is a leading factor in subsection 147(3) of the *Rules*. Of course, the amounts in issue are usually irrelevant to a judge when deciding an appeal: he or she is concerned with the merits of the appeal and whether an assessment is good or not.

[15] However, to the parties, the amounts in issue are important. They influence the parties in how they will prepare and finance the appeal. Where the amounts are appreciable, as in this appeal, the issue in law may be more complex, the facts more complicated or involved, resulting in more documents, lengthier examinations for discovery, expert evidence, etc. And a successful party is entitled to his or her costs of prosecuting or defending the appeal.

[16] My task in this appeal was to determine whether the appellant was permitted to value foreign exchange option contracts on a mark-to-market basis at the end of the year or on a realization basis. The decision was split but because of the type of

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(ii) the number, complexity or technical nature of the issues in dispute, or
(iii) the amount in dispute; and

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

[10] 2012 CCI 377, [2012] GSTC 107

option contracts and their monetary value, as well as the result of the Minister's reconsideration of the assessment appealed from, it was the Crown who was the successful party, notwithstanding the appeal was allowed.

[17] Kruger did purchase four times as many contracts in 1998 as it wrote and the aggregate amount of the purchased contracts would be significantly higher than those it wrote. The volume of the work in preparation for the appeal was significant and, as I appreciate it, equal on both sides. The matter was complex, requiring four expert witnesses, two by each party. The parties' arguments were not frivolous or untenable. Neither party was dilatory in getting the appeal to trial. This appeal was not a Pyrrhic victory for either party. Each was successful but to different degrees.

[18] The matters suggested in subsection 147(3) of the *Rules* for a judge to consider in exercising her or her discretionary power to determine the amount of costs assist me but the list is not limited to what is set out in that provision.

[19] The determination of costs, like other cases, must also be decided on its own facts. During the hearing of the appeal and in preparing my reasons, I found the testimony of Ms. O'Mally and Professor Klein of significant assistance and their contributions were important and should be recognized in considering costs.

[20] There is no rule that I could find that prohibits a judge from distributing costs between the parties, although it is not encouraged. The issue in this appeal and the proportion of allocation of success ought to be recognized in costs. I would award the Crown its costs with respect to witnesses O'Mally and Klein and as to 50 percent of all other costs. This may not be convention but I believe it is reasonable.

Signed at Ottawa, Canada, this 18th day of January 2016.

"Gerald J. Rip"

Rip J.

CITATION:	2016 TCC 14
COURT FILE NO.:	2003-3262(IT)G
STYLE OF CAUSE:	KRUGER INCORPORATED and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	November 24, 2015
REASONS RESPECTING SUBMISSIONS ON COSTS BY:	The Honourable Justice Gerald J. Rip
DATE OF REASONS RESPECTING SUBMISSIONS ON COSTS :	January 18, 2016

APPEARANCES:

Counsel for the Appellant:	Roger Taylor
Counsel for the Respondent:	Josée Tremblay

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