

Citation: 2004TCC472
Date: 20040628
Dockets: 2001-4026(IT)G
2001-4030(IT)G

BETWEEN:

CANUTILITIES HOLDINGS LTD.,
CANADIAN UTILITIES LIMITED,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Hershfield J.

[1] These Reasons are in respect of a Motion by the Appellants for lump sum costs of \$200,000.00 (being approximately one-third of solicitor-client costs) or in the alternative costs in the amount of four times the taxed tariff costs of some \$12,500.00. Submissions on the motion were filed prior to the hearing conducted by telephone conference.

[2] After considering the submissions and responses to questions I posed on points not covered or not fully covered in the submissions, an award of additional costs was made to the Appellants in the amount of \$20,000.00. Nothing in the submissions of the Appellants or circumstances of the appeals justified costs in the order of the lump sum requested. However, there were four factors that in my view merited consideration.¹

¹ A fifth factor discussed at length at the hearing at my insistence concerned the impact on costs of a settlement offer and counter-offer. Ultimately I determined that the settlement issues did not warrant any weight in my determination of costs. Neither the offer nor the counter-offer afforded any realistic settlement opportunities.

[3] Firstly, in my view, the tariff did not provide for or adequately provide for costs for the preparation of the Agreed Statement of Facts filed at the hearing of the appeals. I expressed the view at the hearing of the motion that the time invested by the parties in that exercise was of considerable value and importance in the efficient and expeditious conduct of the hearing of the appeals. Indeed I expressed the view, having heard several days of testimony from witnesses for the Appellants at the hearing of the appeals, that the case might have gone in as a stated case. That is, and this leads me to the second factor that merited consideration, I expressed the view that the testimony of the Appellants' witnesses added little or nothing to their case. To the contrary it seemed only to confirm much of what the Respondent was relying on in terms of the factual context of its argument. Similarly, little of the documentation filed was ultimately relied on by either party or by me, the relevant contents of same having been largely covered in the Agreed Statement of Facts. This is not to criticize the manner in which the Appellants chose to conduct their appeals or even to second-guess their decisions in this regard. However it does, in my view, bear to the question of costs. Proceedings were somewhat drawn out by the approach decided on and to that extent a contribution by the Respondent beyond tariff was not persuasively presented in terms of my having regard to the length of the trial and the bulk of documentation in evidence.

[4] Thirdly, I observed that in my view this was a test case. The appeals required applying the notion of a "series" to a factual situation never before heard. The appeals also concerned resolving attribution, ordering or pro-rata issues in respect of dividend recipients where the *Income Tax Act* (the "Act") was silent on the point. That is, there was a gap in the legislation that the Court was being asked, in the Respondent's alternative assessing position, to fill. The Appellants were the guinea pigs through which the Respondent could determine or test an assessing theory. On the other hand, and this takes me to my fourth factor, I observed that the Appellants embarked on a sophisticated tax plan in respect of which the cost of implementing could reasonably be expected to include defending it. This was a carefully plotted complex tax avoidance plan in respect of which some war chest reserves might have been expected to be required. It was likely not a plan, for example, that a favourable advance income tax ruling might have been obtained. This again is not a criticism of pursuing the plan. Taxpayers are free to follow the advice of their advisors. Indeed they should never feel compelled to bow to a particular construction of the *Act* just because the Canada Customs and Revenue Agency administers it on that basis. However seeking extraordinary or even contributory costs beyond tariff costs in these cases on the basis of complexity is not always reasonable in my view. This is one of those cases. Success in these appeals seems to warrant little in terms of extra costs except in recognizing the importance of the case to the Respondent and taxpayers in

general – which is simply another way of saying some special cost considerations might be merited in a test case like this regardless that the Appellant might have knowingly walked into it. On balance, in this case, these two factors tend to offset each other. I would not give either much weight.

[5] This leads me back to costs in respect of the Agreed Statement of Facts. On this point the Respondent argues that it fully cooperated and assisted in this exercise and should not bear extra costs in respect of matters that would have to be heard at trial in any event. Appellant's counsel estimated some \$60,000.00 of costs were incurred by the Appellants in regard to its input to the Agreed Statement of Facts. This suggests to me that Appellants' counsel did a substantial amount of work in advancing the Agreed Statement of Facts. It was a very helpful exercise to all concerned and assisted in the hearing of the appeals. A reasonable additional contribution to costs by the Respondent is called for.

[6] Considering all these factors and the submissions, an *additional* contribution to the costs of the Appellants in the amount of \$20,000.00 is, in my view, appropriate. This reflects a reasonable degree of proportionality in my view.

Signed at Ottawa, Canada, this 28th day of June 2004.

"J.E. Hershfield"

Hershfield J.

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COURT FILE NO.: 2001-4026(IT)G; 2001-4030(IT)G

STYLE OF CAUSE: Canutilities Holdings Ltd.,
Canadian Utilities Limited and Her
Majesty the Queen

PLACE OF MOTION: Ottawa, Ontario

DATE OF HEARING: December 1, 2003

REASONS FOR ORDER BY: The Honourable Justice J.E. Hershfield

DATE OF ORDER: December 1, 2003

APPEARANCES:

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