

Dockets: 2007-2495(IT)G
2008-1085(IT)G

BETWEEN:

ANDREW A. DONATO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application made in writing

Counsel for the Appellant: William I. Innes
Douglas B.B. Stewart

Counsel for the Respondent: Craig Maw
Diana Aird

ORDER

IT IS ORDERED that costs shall be payable by the respondent in a fixed amount of \$40,000, inclusive of disbursements.

Signed at Toronto, Ontario this 12th day of January 2010.

“J. M. Woods”

Woods J.

Citation: 2010 TCC 16
Date: 20100112
Dockets: 2007-2495(IT)G
2008-1085(IT)G

BETWEEN:

ANDREW A. DONATO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Woods J.

[1] Reasons for judgment in the above appeal, issued on November 13, 2009 (2009 TCC 590), directed the parties to make written submissions on costs following the appellant's request. After reviewing submissions and responses from both parties, my conclusions are set out below.

[2] First, the appellant should be entitled to costs as the party who was primarily successful at trial.

[3] The respondent submits that each party should bear their own costs because success was divided, based on the number of taxation years involved and the number of issues. Although the appellant was primarily successful measured by the amounts at issue, this was largely happenstance, it is suggested.

[4] In my view, the quantum should be the predominant factor here. The appellant was successful on a statute bar issue for the 1999 taxation year where the amount at issue was more than double the amount at issue for the 2001 taxation year in which the respondent was successful. This was not divided success. It was a substantial win for the appellant.

[5] The respondent submits that, if costs are awarded to the appellant, they should be on a party and party basis under Class B of the Tariffs.

[6] The correct principle to be applied, the respondent suggests, was described by Justice Bowman in *Continental Bank of Canada v. The Queen*, 94 DTC 1858, at 1876:

[...] It must have been obvious to the members of the Rules Committee who prepared the tariff that the party and party costs recoverable are small in relation to a litigant's actual costs. Many cases that come before this court are large and complex. Tax litigation is a complex and specialized area of the law and the drafters of our Rules must be taken to have known that.

In the normal course the tariff is to be respected unless exceptional circumstances dictate a departure from it. Such circumstances could be misconduct by one of the parties, undue delay, inappropriate prolongation of the proceedings, unnecessary procedural wrangling, to mention only a few. None of these elements exists here.

[7] According to the appellant, costs in accordance with the tariffs would be \$10,775.91. It is submitted that a larger award should be granted because an offer to settle was made by the appellant that was identical to the outcome at trial. Counsel cites a recent decision of Boyle J. in support: *Langille v. The Queen*, 2009 TCC 540.

[8] The appellant suggests that an award of \$67,890.66 is appropriate. This represents 75 percent of counsel fees (plus GST) and 100 percent of disbursements. It is also noted that senior counsel, Mr. Innes, waived his fee in this matter.

[9] Recently, the Rules Committee of this Court has endorsed an increase in costs when a written settlement offer has been made that is no less favourable than the actual outcome.

[10] Although no specific rule has been promulgated yet, the current thinking of the Rules Committee does provide useful guidance.

[11] In the circumstances, I would award costs to the appellant in a lump sum amount of \$40,000, inclusive of disbursements.

Signed at Toronto, Ontario this 12th day of January 2010.

“J. M. Woods”

Woods J.

CITATION: 2010 TCC 16

COURT FILE NOs.: 2007-2495(IT)G and 2008-1085(IT)G

STYLE OF CAUSE: ANDREW A. DONATO and
HER MAJESTY THE QUEEN

PLACE OF HEARING: n/a

DATES OF HEARING: n/a

REASONS FOR ORDER BY: The Honourable Justice J. M. Woods

DATE OF ORDER: January 12, 2010

APPEARANCES: n/a

COUNSEL OF RECORD:

For the Appellant:

Name: William I. Innes

Firm: Fraser Milner Casgrain LLP
Toronto, Ontario

For the Respondent:

John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada