Docket: 2014-4359(IT)G

BETWEEN:

ALTA ENERGY LUXEMBOURG S.A.R.L,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Before: The Honourable Justice Robert J. Hogan

Participants:

Counsel for the Appellant:	Warren J.A. Mitchell Matthew G. Williams E. Rebecca Potter
Counsel for the Respondent:	S. Patricia Lee Christopher M. Bartlett

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ORDER

Whereas a judgment was rendered on August 22, 2018;

Whereas the parties were to provide me with submissions on costs;

And whereas the submissions have been received and considered;

It is hereby ordered that the Appellant be awarded costs of $816,384 and disbursements of $376,129 for a total of $1,192,513, the whole in accordance with the attached reasons for order.

Signed at Ottawa, Canada, this 22nd day of November 2018.

"Robert J. Hogan"

Hogan J.

Citation: 2018 TCC 235
Date: 20181122
Docket: 2014-4359(IT)G

BETWEEN:

ALTA ENERGY LUXEMBOURG S.A.R.L,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Hogan J.

I. Overview

[1] In my judgment disposing of the appeal, I invited the parties to provide me with representations on costs. Both parties filed written submissions and I am now prepared to rule on the matter.

II. Factual Background

[2] The appeal involved a five-day hearing with each side represented by two or three counsel. Prior to the hearing, the Respondent filed a Notice of Motion requesting that the Court direct the Appellant to complete additional steps in the examination for discovery process and that the hearing be adjourned *sine die* to complete those steps. The issues giving rise to the motion were resolved before the date of the motion and the Court granted the adjournment. The parties filed a 30 page Statement of Agreed Facts. No settlement offers were made.

[3] There were two issues in the appeal:

(a) Whether a capital gain was realized by the Appellant as a result of the sale of the shares taxable in Canada, in view of Article 13(4) of the Canada-Luxembourg Income Tax Convention 1999 (the "Treaty"); and

(b) Whether the general anti-avoidance rule (the "GAAR") applied to override the application of the Treaty.

[4] The Appellant was wholly successful in the appeal and was awarded costs.

III. Positions of the Parties

A. The Appellant's Position

[5] The Appellant requested a lump sum costs award of $1,630,645.22 inclusive of (selected) counsel fees, estimated fees for on submissions costs, and disbursements.[1] The Appellant is seeking to be indemnified at the high end of the partial indemnity scale in asking for 75% of (selected) counsel fees.

[6] The Appellant relies on the following factors under subsection 147(3) of *Tax Court of Canada Rules (General Procedure)* (the "Rules") to justify its request for a lump sum award:

(a) The Appellant was successful in its appeal.

(b) The amount in issue was large.

(c) The appeal dealt with issues of broad application.

(d) The Appellant produced thousands of documents for discovery. Two nominees were examined for discovery over a total of seven days and answers were given to numerous undertakings were made. Four witnesses were called during a five-day hearing.

(e) Extensive research, including a detailed factual analysis of Alta Canada's operations, was necessary as this Court was the first to consider Article 13(4) of the Treaty. Also, the question as to whether or not the Appellant was a resident of Luxembourg was a live issue until a month before hearing.

(f) The Respondent unnecessarily lengthened the proceedings by veering outside the agreed-upon scope of follow-up examinations for discovery and by insisting:

(i) on full disclosure under section 82 of the Rules.

[1] Appellant's Written Submissions on Costs at paras 4 and 40. The Appellant is seeking reimbursement of 75% of legal costs for counsel that have billed in excess of 200 hours on the appeal, estimated counsel fees of $30,000 for costs submissions on costs, and $376,129.35 of disbursements.

(ii) on discovery of a third party;

(iii) that follow-up questions to answers given to undertakings be done via *viva voce* examinations; and

(iv) on a further discovery of Joseph Greenberg six months after the delivery of Mr. Greenberg's answers to undertakings.

(g) The Respondent's expansive and unfocused approach to discoveries contributed to excessive costs and delay.

(h) The expense incurred for an expert witness report was justified.

(i) The appeal should have been unnecessary. The Appellant was entitled to rely on a stated government position on the development of oil and gas reserves in Canada. The Appellant observes as well that the Court also noted that the Respondent lacked understanding of how resource assets are developed and exploited in Canada. The Appellant submits that this failure is inexcusable given the extensive discovery process. Lastly, the Appellant argues that the Respondent should not have utilized the GAAR to deal with what the Department of Finance now believes is an unintended gap in the Treaty.

B. The Respondent's Position

[7] Counsel for the Respondent concedes that an award of costs in favour of the Appellant is appropriate and requests that a lump sum of $735,000 be awarded inclusive of (selected) counsel fees and disbursements.[2] This amount is in excess of Tariff B.

[8] The Respondent acknowledges the following:

(a) The appeal was allowed, which supports an award of costs to the Appellant.

(b) The amount at issue is substantial for the average taxpayer.

[2] Respondent's Submissions on Costs at para. 3 and 4. The Respondent requests that the Appellant be reimbursed for 30% of legal costs billed by one senior counsel and one junior counsel in each litigation ste, and for disbursements.

(c) The decision in this appeal was the first judicial consideration of the excluded property exception in Article 13(4) of the Treaty, and the application of the general anti-avoidance rule is an important issue.

[9] The Respondent does not take issue with the Appellant's request for disbursements.

[10] The Respondent's position is that the result of the proceeding as well as the importance of the issues may support an enhanced costs award but not a significantly enhanced one.

[11] The Respondent relies on the following factors to justify a reduction to the Appellant's costs request:

(a) The $48,318,680.14 at issue is not significant given the size of the two private equity funds (18.2 billion) that had an indirect 80% interest in the Appellant.

(b) The importance of the excluded property issue is limited as application of the exemption is fact-specific and will be determined on a case-by-case basis.

(c) Full disclosure was necessary as a full audit was not conducted before the assessment and the Appellant appealed directly to the Court before the objection process was completed. The Appellant hired a third party service provider to assist with discoveries and only 6.3% of the total hours billed was spent on preparing the Appellant's List of Documents (Full Disclosure). Other than the additional disclosure obligations, the volume of work in this appeal was consistent with that of most Class C proceedings in the Tax Court of Canada.

(d) The matter regarding the application of Article 13(4) was fact-intensive; however, as a result of thorough discoveries, the facts were largely agreed upon before the hearing. Also, while the application of the GAAR to the Treaty raised complex issues, these issues had been considered already by the Courts.

(e) The Appellant lengthened the proceedings by:

(i) refusing the Respondent's request to arrange a follow-up examination of Joseph Greenberg and the third party

representative for questions that arose from responses to undertakings and to questions taken under advisement during their examination for discovery; and

(ii) admitting that the restructuring and the sale of shares to Chevron Canada Ltd. was an "avoidance transaction" almost two years after the appeal was instituted.

(f) The Respondent shortened the proceedings by accepting that the Appellant was resident in Luxembourg[3] and by filing a Statement of Agreed Facts.

(g) A party cannot reasonably be expected to pay for the other party's decision to staff a file with more than two lawyers: one senior and one junior. The Appellant can only claim costs in respect of two counsel for each step of the litigation[4].

(h) Enhanced costs for the Appellant's submissions on costs are not justified. The parties were given 20 days to arrive at an agreement on costs. The Appellant did not inform the Respondent that it was seeking enhanced costs until the 14th day and did not provide a breakdown or supporting documentation until the 19th day.

IV. Analysis

[12] The parties agree that the Court is empowered to make a lump sum costs award under section 147 of the Rules and that such an award is appropriate here.

[13] This Court has broad discretion in determining costs and, as I indicated in the Reasons for Order in *Rio Tinto Alcan Inc. v. The Queen* 2016 TCC 258, that discretion must be exercised on a principled basis, giving proper weight to the factors listed in section 147 of the Rules and such other factors as must be considered in order to produce a just result.

[14] The parties have each addressed the factors listed in 147(3) of the Rules in their submissions. I will now apply the factors that are relevant in this case.

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[3] On the basis of paragraph 7.2 of the report of the Appellant's expert.

[4] This effectively reduces the billable hours for the Appellant from 2,663.05 to 2,108.3, with counsel fees decreasing from $1,632,687.83 to $1,196,208.

A. The result of the proceeding

[15] I agree with the parties that the result wholly in favour of the Appellant supports increased costs.

B. The amounts in issue

[16] The amount in issue was $48,318,680.14. This amount was paid to the Respondent to obtain a clearance certificate a number of years ago. I agree with the Respondent that the amount must be contextualized but disagree with her conclusion.

[17] Contrary to the position put forward by the Respondent in her submissions, In my opinion it is not appropriate to look beyond the Appellant to its investors when assessing the amount in relative terms. The combined size of the Blackstone Capital Partners VI LP and Blackstone Energy Partners LP funds is not relevant here.

[18] I conclude that the amount of $48,318,680.14 is significant. This factor favours an enhanced award.

C. The importance of the issues

[19] The appeal raised novel questions regarding the interpretation of provisions of the Treaty which have broad application. I rejected the Respondent's arguments on how to interpret the word "in" in the phrase "property" in which the business was "carried on" in Article 13(4). Interpreting the excluded property exception under Article 13(4) has implications for numerous taxpayers that exploit rights granted under licenses issued by government bodies to exploit minerals and other natural resources in Canada.

[20] I accept the Respondent's submission that the applicability of the excluded property exemption is fact-specific. However, this does not negate the importance of the interpretation issue.

[21] A decision on the applicability of the GAAR has precedential importance as the GAAR is a provision of last resort and its successful application often affects a multitude of transactions. Further, the Respondent has acknowledged that the application of the GAAR was an important issue.

[22] I conclude that this factor supports increased costs for the Appellant.

D. The volume of work

[23] The Respondent submits that the volume of work, aside from the obligations relating to the preparation of a full disclosure list of documents, was consistent with most Class C proceedings in this Court. I disagree.

[24] The time spent on this appeal is not typical, even for a Class C proceeding. The Appellant states that four partners spent 2,663.05 hours on the appeal, in addition to the 489.7 hours spent on it by other lawyers and students. In this appeal, the partners spent 1,618.2 hours on the appeal from the close of pleadings to the close of discoveries and spent the majority of the remaining hours on trial preparation.

[25] While document production only accounted for a small percentage of the time spent by the partners on the file, the examinations were extensive. Thousands of questions were asked and hundreds of undertakings were given. Further, the Appellant had to prepare each of its four lay witnesses for the hearing.

[26] I recognize that the Respondent's decision to proceed under section 82 of the Rules was motivated by the inability of the Aggressive Tax Planning Division and the Canada Revenue Agency's Income Tax Rulings Directorate to complete their review of the sale before the Appellant filed its notice of objection and before it instituted its direct appeal to this Court. However, that work was done by the Appellant all the same. In addition, the Canada Revenue Agency had a lot of time to consider these issues at earlier stages of the assessing process.

[27] The appeal required a substantial amount of work on the part of the Appellant, which favours an appropriate award of costs to the Appellant.

E. The complexity of the issues

[28] This appeal was the first judicial consideration of the application of Article 13(4) of the Treaty. There were no decided cases in this area.

[29] For the purposes of the GAAR, the issue was whether the "avoidance transaction" gave rise to an "abuse" or "misuse" of the *Income Tax Act* and the Treaty. This is also a complex issue.

[30] I agree with the Appellant that this factor supports an increased award of costs.

F. The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding

[31] Each party has accused the other of unnecessarily lengthening the proceedings. The Appellant is critical of the Respondent's conduct during discoveries and the Respondent's delay in conceding on the residency issue. In contrast, the Respondent is critical of the Appellant refused certain requests during discoveries and the Appellant's delay in conceding that the "series of transactions" constituted avoidance transactions.

[32] As Miller J. states in *Henco Industries Limited v. The Queen* 2014 TCC 278, at paragraph 20, for this factor to be determinative it must be clear that a party is conduct has been unreasonable.

[33] I believe that the Respondent's actions during the discovery process caused delays and costs for the Appellant. I note the following points in this regard:

- The Respondent's insistence that follow-up questions regarding undertakings be posed via *viva voce* examinations.
    - This was contrary to the Appellant's expectations (see Tab E, affidavit of Timothy Barrett, pages 56-57). The Appellant stated that follow-up questions regarding undertakings are typically given in writing. This is indeed often the case.
- Veering outside the agreed upon scope for discoveries when examining the Blackstone Capital Partners representative.
    - The Appellant states that the Respondent repeatedly asked the deponent questions about the Appellant that should have been put to Mr. Greenberg. They provided instances of this in Tab E and Tab F of Timothy Barrett's affidavit. I agree with the Appellant's observations on this point.
- The Respondent's request for further discovery of Mr. Greenberg six months after the delivery of answers pursuant to undertakings.
    - On May 31, 2016 the parties wrote a joint letter to the hearings coordinator stating that:

- 1) ". . . the parties expect the Respondent to have follow-up questions to certain answers given as undertakings during the examinations for discovery, the parties expect this to be done in the next two months";

- 2) the parties requested that the hearing be set down for seven days in November 2016; and

- 3) the parties requested that a case management judge be assigned.

- Answers to undertakings and questions taken under advisement during the examination of the Blackstone representative were provided on July 22, 2016.

- The hearing was scheduled for October 31, 2016.

- On July 27, 2016 the Respondent advised the Appellant that she had follow-up questions for both the Blackstone representative and Mr. Greenberg. The Appellant advised the Respondent that it considered discoveries to be closed given the short time remaining prior to trial (in line with the position in the joint letter, i.e., that discoveries would be completed by July 31, 2016).

- On August 4, 2016 the parties requested that the Court appoint a case management judge to resolve the issues.

- The parties did not hear back from case management and the Respondent brought a motion on September 23, 2016.

- The parties settled the motion on September 30, 2016. The Court granted an adjournment to complete the additional litigation steps.

- Further examinations occurred in November 2016. The Appellant responded in February of 2017 to questions taken under advisement and questions for which answers had been refused. The Respondent requested further information in April 2017. The Appellant provided the additional information by April 28, 2017.

From the above, it is clear that the Respondent severely underestimated the amount of time she required to satisfactorily complete discoveries.

G. Whether any step of the proceedings was (i) improper, vexatious, or unnecessary, or (ii) taken through negligence, mistake or excessive caution

[34] The Respondent's position is that this factor is not applicable. In contrast, the Appellant's position is that certain discovery steps were unnecessary.

[35] Boyle J. gave this factor significant consideration in awarding costs in *Ford Motor Company of Canada, Limited v The Queen*, 2015 TCC 185, at paragraph 20, resulting from the Respondent's "disappointing failure" to file written representations in advance despite committing to do so during case management.

[36] I agree with the Respondent that this factor is not applicable here. I see no evidence of this type of conduct.

H. Any other matter relevant to the question of costs

[37] I do not agree with the Respondent's contention that it is unreasonable to compensate the Appellant for deciding to staff a file with more than two lawyers.

[38] Owen J. disposed of a similar argument in *CIT Group Securities (Canada) Inc. v. The Queen* 2017 TCC 86, at paragraph 30 by determining that this type of arguments fell under the thoroughness comments he made under the "volume of work" factor. In paragraph 16, he states that "in the absence of obvious excess, it is not the role of the Court to second-guess counsel's judgment regarding the work required to fully prepare for such a case." I share this view.

[39] The Appellant alludes to paragraphs 56, 57 and 98 of my judgment disposing of the appeal to support its position that the Respondent should not have issued the assessment leading to this appeal. Boyle J. examined except from reasons for judgment fixing blame on the Respondent for what Bowman C.J. (in *Jolly Farmer Products Inc. v The Queen, 2008 TCC 409)* considered to be an unnecessary trial, in *Jolly Farmer Products Inc. v. The Queen* 2008 TCC 693, at paragraph 3, which was a factor in Boyle's decision to award costs in excess of the tariff.

[40] In addition, the Appellant characterizes as inexcusable Respondent's failure to form a sufficient understanding of resource asset development and exploitation given the extensive examinations conducted by the Respondent.

[41] Both of the Appellant's arguments under this factor support a finding of increased costs.

[42] I agree with the Respondent that enhanced costs with respect to the Appellant's submissions on costs are not justified. The Appellant made a substantial request for enhanced costs and the Respondent had limited time to review the request before submissions were required to be filed.

V. Conclusion

[43] After applying each of the relevant factors described above, I have concluded that a lump sum award to the Appellant is appropriate.

[44] I award a lump sum amount of $1,192,513 inclusive of costs of $376,129. This amount is approximately 50% of (selected) counsel fees of $1,632,688, plus disbursements of $376,129.

Signed at Ottawa, Canada, this 22nd day of November 2018.

"Robert J. Hogan"

Hogan J.

CITATION:	2018 TCC 235
COURT FILE NO.:	2014-4359(IT)G
STYLE OF CAUSE:	Alta Energy Luxembourg S.A.R.L. v. Her Majesty the Queen
PLACE OF HEARING:	
DATE OF HEARING:	
REASONS FOR ORDER BY:	The Honourable Justice Robert J. Hogan
DATE OF ORDER:	November 22, 2018

APPEARANCES:

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