Docket: 2015-3545(GST)G

BETWEEN:

JAYCO, INC.,

Applicant/Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard by videoconference on September 24, 2018
at Ottawa, Ontario.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Applicant/Appellant:	Jonathan Ip David Douglas Robertson Evelyn Tang
Counsel for the Respondent:	Mary Softley

ORDER

UPON Motion by the Applicant/Appellant, pursuant to section 147 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, for an Order requiring the Respondent to pay its costs of this appeal as well as the costs of this Motion;

AND UPON reading the Applicant/Appellant's Motion record and the Respondent's written submissions;

AND UPON hearing the parties' oral submissions:

The Applicant/Appellant Jayco is awarded:

- an amount of $347,856.80 as substantial indemnity pursuant to subsection 147(3.1) of the *Rules*;

- an amount of $20,000 for the period pre-settlement pursuant to subsection 147(3) of the *Rules*;

- an amount of $59,365.62 as disbursements;

For a total of $427,222.42 plus applicable taxes.

Without costs.

Signed at Ottawa, Canada, this 28th day of November 2018.

"Johanne D'Auray"

D'Auray J.

Citation: 2018 TCC 239
Date: 20181128
Docket: 2015-3545(GST)G

BETWEEN:

JAYCO, INC.,

Applicant/Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

D'Auray J.

I. BACKGROUND

[1] In my judgment dated February 16, 2018, I decided that Jayco, Inc. ("Jayco") had delivered or made available supplies of recreational vehicles outside of Canada pursuant to paragraph 142(2)(a) of the *Excise Tax Act* ("*ETA*"), as had been submitted by Jayco. With respect to Jayco's supplies of parts, I decided that it had delivered or made them available in Canada pursuant to paragraph 142(1)(a) of the *ETA*, as had been argued by the Respondent. Accordingly, Jayco was not required to collect and remit GST/HST on its sales of the recreational vehicles but was required to do so, on its sales of the parts.

[2] The Respondent had assessed Jayco $14,178,034.81 for uncollected GST/HST, not including interest, on the sales of the recreational vehicles and parts. Of that amount, $13,958,611.14 related to the sales of the recreational vehicles. Therefore, Jayco was substantially successful (98%) in its appeal before this Court.

II. COSTS REQUESTED BY JAYCO

[3] Jayco is asking this Court to order the Respondent to pay it costs in a lump sum of $1,925,069.32.

[4] Alternatively, Jayco seeks an order requiring the Respondent to pay the following costs:

> a) Tariff A fees for services prior to its March 15, 2016 offer of settlement in the amount of $700.00;
>
> b) Fees on a substantial indemnity basis from March 15, 2016 onwards in the amount of $347,856.80;
>
> c) Tariff B disbursements in the amount of $1,480,112.42[1]; and
>
> d) Goods and services tax in the amount of $91,433.46 on the award of costs.

[5] Tariff B disbursements in the amount of $1,480,112.42 includes an amount of $1,409,710.52 paid by Jayco to JP Morgan Chase Bank in order to obtain a letter of credit to secure the GST/HST it owed ("letter of credit").

[6] At the hearing, Jayco stated that the amount of interest incurred from August 17, 2012 to the cancellation of the letter of credit on March 22, 2018 was $1,474,173.02 and not $1,409,710.52 as previously requested in its Bill of Costs.[2]

[7] Under subsection 315(2) of the *ETA*, any amount assessed for GST/HST remaining unpaid at the time of the assessment is payable forthwith to the Receiver General. Therefore, Jayco either had to pay the GST/HST owing forthwith with its own funds, or under subsection 314 of the *ETA*, offer security for the amount owing in a form satisfactory to the Minister. Jayco chose the latter option and provided the letter of credit.

[8] Jayco also requests the costs of this Motion.

[9] The respondent concedes that Jayco is entitled to receive the Tariff A fees in the amount of $700.00 as well as a substantial indemnity in the amount of $347,856.80 for the period after the offer of settlement, namely, March 15, 2016.

III. APPLICABLE LAW

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1 According to my calculation, the total amount for Tariff B disbursements is $1,479,552.42. In any event, the difference is not material.

2 I will use in my Reasons the amount of $1,409,710.02 as interest, since this is the amount that the parties used in their written submissions and to make their calculations.

[10] I will first describe the provisions of the *Tax Court of Canada Rules (General Procedure)*, ("the "*Rules*"), applicable in this Motion.

[11] Under section 2 of the *Rules*, the word "proceeding" is defined:

> Proceeding means an appeal or a reference.

[12] Subsections 147(1), (4) and (5) of the *Rules* give the Court a broad discretion in awarding costs. These *Rules* state as follows:

> 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.
>
> 147(4) The Court may fix all or part of the costs with or without reference to Schedule II, Tariff B and, further, it may award a lump sum in lieu of or in addition to any taxed costs.
>
> (5) Notwithstanding any other provision in these rules, the Court has the discretionary power,
>
> > (a) to award or refuse costs in respect of a particular issue or part of a proceeding,
> >
> > (b) to award a percentage of taxed costs or award taxed costs up to and for a particular stage of a proceeding, or
> >
> > (c) to award all or part of the costs on a solicitor and client basis.
>
> [Emphasis added.]

[13] Subsection 147(3.1) of the *Rules* deals with offers of settlement. It states that a party is entitled to "substantial indemnity" costs, if the judgment is as favourable or more favourable than its offer of settlement. The *Rule* reads as follows:

> 147(3.1) Unless otherwise ordered by the Court, if an appellant makes an offer of settlement and obtains a judgment as favourable as or more favourable than the terms of the offer of settlement, the appellant is entitled to party and party costs to the date of service of the offer and substantial indemnity costs after that date, as determined by the Court, plus reasonable disbursements and applicable taxes.

[Emphasis added.]

[14] Subsection 147(3.5) of the *Rules* states that *substantial indemnity costs* means 80% of solicitor and client costs.

[15] Subsection 147(3) of the *Rules* set out factors that the Court may consider in exercising its discretion to award costs beyond the Tariff:

> (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 proceeding, its public significance and any need to clarify the law,
>
> (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.

[16] In *Velcro Canada Inc*. v *The Queen*,[3] Chief Justice Rossiter noted that the award of costs is generally not intended to fully compensate a party for its actual costs.[4] He stated that the *Rules* give the Court broad discretionary powers in awarding costs: "So broad that the Tariff is an item for referral only". At paragraph 16 of his reasons, he elaborated:

> [16] Under the *Rules*, the Tax Court of Canada does not even have to make any reference to Schedule II, Tariff B in awarding costs. The Court may fix all or part of the costs, with or without reference to Schedule II of Tariff B and it can award a lump sum in lieu of or in addition to taxed costs. The *Rules* do not state or even suggest that the Court follow or make reference to the Tariff. If the Tax Court of Canada Rules Committee had felt the Tariff was so significant, the *Rules* could easily have said that the Tariff shall be applied in all circumstances unless the Court is of the view otherwise. The Rules Committee did not do this, not even close. In fact, it is hard to imagine how the Tax Court of Canada's discretionary power could be broader for awarding costs given the wording in Rules 147(1), (3), (4) and (5). These particular provisions of Rule 147 really make reference to Schedule II, Tariff B a totally discretionary matter.

[Emphasis added.]

[17] That said, in *The Queen v Landry*,[5] Justice Letourneau, in an unanimous judgment of the Federal Court of Appeal, stated that the discretion afforded by the Court must be grounded in established principles to prevent it from being exercised in an arbitrary manner.

[18] In determining whether to award costs beyond the Tariff, the Court is guided by the factors set out in subsection 147(3) of the *Rules*. However, paragraph 147(3)(j) allows the Court to take into account any other matter relevant to the question of costs. Chief Justice Rossiter discussed this paragraph in *Velcro Canada Inc.*:

> Rule 147(3) provides the factors to be considered in exercising the Court's discretionary power. After enumerating a list of factors, it specifies that the Court may consider "any other matter relevant to the question of costs", thereby

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3 *Velcro Canada Inc. v The Queen*, 2012 TCC 273.

4 *Ibid*, paragraph 29.

5 *The Queen* v *Landry*, 2010 FCA 135 at para. 54.

> providing the Court with even broader discretion to consider other factors it thinks relevant on a case by case basis. Such other factors that may be relevant could include, but are not limited to:
>
> > 1. the actual costs incurred by a litigant and their breakdown including the experience of counsel, rates charged, and time spent on the appeal;
> >
> > 2. the amount of costs an unsuccessful party could reasonably expect to pay in relation to the proceeding for which costs are being fixed; and
> >
> > 3. whether the expense incurred for an expert witness to give evidence was justified.
>
> [Emphasis added.]

[19] Further guidance on the scope of subsection 147(3)(j) of the *Rules* can be found in the Supreme Court of Canada's decision in *Walker v Ritchie*.[6] There, the Supreme Court reviewed a cost rule in the *Ontario Rules of Civil Procedure*, Rule 57.01(1)(i), which is similar to paragraph 147(3)(j) of the *Rules* of this Court. Rule 57.01(1)(i) reads as follows:

> 57.01(1) In exercising its direction under section 131 of the Courts of Justice Act, to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
>
> > (i) any other matter relevant to the question of costs.

[20] In *Walker v Ritchie*, *supra*, the successful party, Mr. Ritchie, asked to be awarded a premium of $192,600 given that his counsel had carried the litigation for four years without remuneration since he had not been able to pay for the services. Writing for the Court, Justice Rothstein concluded that the premium did not fall within the ambit of Rule 57.01(1)(i), namely "any other matter relevant to the question of costs", since it did not have anything in common with the other factors relating to costs enumerated in Rule 57.01(1) (a) to (h). Justice Rothstein stated that these other factors provided guidance as to the type of matters that might be considered relevant in Rule 57.01(i). At paragraph 24 of his Reasons, Justice Rothstein discussed what should be considered appropriate under Rule 57.01(1)(i):

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6 2006 SCC 45.

24. Risk of non-payment to plaintiffs' counsel is not an enumerated factor under Rule 57.01(1). Can it be said that such risk falls within clause (i) as "any other matter relevant to the question of costs"? While these words are broad, from the scheme of Rule 57.01(1) I infer they are not unlimited. If the court's discretion to consider costs was unlimited, there would have been no need for clauses (a) to (h). On the contrary, I think the enumerated considerations in clauses (a) to (h) provide guidance as to matters that might be considered relevant in clause (i).

25. Indeed, the Latin maxim *ejusdem generis*, or the limited class rule, is helpful in determining legislative intent when a court is faced with a list of items followed by a general term. As R. Sullivan explains in *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 175-77, the scope of the general term may be limited to any genus or class to which the specific items all belong. An examination of the factors that were expressly included at the time the costs award was fixed in this case reveals some common features among them.

26. First, the factors in place at the relevant time could be described as neutral. They applied to either a plaintiff or a defendant and typically either increased or decreased a costs award against one of those parties. Risk of non-payment to plaintiff's counsel lacks such neutrality. Taking risk into consideration would result in an increase in the costs awarded only against the defendant.

27. Second, the enumerated factors in place at the relevant time fell within one of two categories. hey dealt either with the nature of the case or the conduct of the parties in the litigation. Parties to litigation have knowledge about the nature of the case and can control their own conduct in the litigation. Therefore, the parties are capable of predicting, generally, how such factors would affect a costs award against them, and may thereby be guided as to whether or not to settle or to proceed. By contrast, a risk premium is a financial arrangement between the plaintiffs and their counsel. It is not a matter about which the defendant would normally have knowledge, nor is it a matter about which the defendant is entitled to know. The risk premium does not fall within either of the categories of knowledge or control. It is a function of either the plaintiff's financial circumstances or simply the fee agreement between the plaintiff and counsel.

28. Application of the *ejusdem generis* rule would suggest that it was not the intention of its framers that clause (i) would include the risk of non-payment to plaintiffs' counsel as a relevant factor to consider in an award of costs against an unsuccessful defendant. Unsuccessful defendants should expect to pay similar amounts by way of costs across similar pieces of litigation involving similar conduct and counsel, regardless of what arrangements the particular plaintiff may have concluded with counsel.

[Emphasis added.]

IV. POSITION OF THE PARTIES

[21] Jayco seeks an order granting it lump sum costs in the amount of $1,925,069.32.

[22] Alternatively, Jayco requested an order granting the following specific costs:

a) Tariff A fees for services prior to the March 15, 2016 settlement offer in the amount of $700.00;

b) Fees on a substantial indemnity basis from March 15, 2016 onwards in the amount of $347,856.80;

c) Tariff B disbursements in the amount of $1,480,112.42; and

for a total of $1,828,669.22.

[23] The Tariff B disbursements claimed consist of:

a) Air transportation for counsel in the amount of $3,045.05;

b) Ground transportation for counsel in the amount of $1,117.82;

c) Accommodations for counsel in the amount of $5,836.43;

d) Meals for counsel in the amount of $3,112.14;

e) Un-itemized routine expenses in the amount of $17,793.74;

f) Air transportation for John Wolf and an individual named Michael Ritchie in the amount of $7,347.10;

g) Other travel expenses of John Wolf in the amount of $5,701.79;

h) Other travel expenses of Michael Ritchie in the amount of $4,990.50;

i) Un-itemized miscellaneous expenses in the amount of $270.00;

j) Expert witness fees and disbursements for Paul Borghesani in the amount of $13,931.75;

k) Court reporting service payment in the amount of $3,980.78;

l) Printing and binding service payment in the amount of $1,349.80;

m) Fee for service of a subpoena in the amount of $165.00;

n) Witness fee in the amount of $1,200.00;

o) Interest payments on the letter of credit provided to the Minister as security, in the amount of $1,409,710.52.[7]

for a total of $1,479,552.42. As can be seen, the interest on the letter of credit makes up all but $69,841.90 of the disbursements claimed.

[24] The principal issue in this Motion is whether Jayco is entitled to recover the interest paid on the letter of credit as costs. There is no issue with respect to Jayco's entitlement to the Tariff A fees of the *Rules* and the substantial indemnity costs.

A. Interest on Letter of Credit

[25] Jayco submits that the interest it paid on the letter of credit is a "cost of proceedings" that falls within the ambit of paragraph 147(3)(j) of the *Rules*, namely under "any other matter relevant to the question of costs".

[26] In its written submissions, Jayco explains why in its view paragraph 147(3)(j) of the *Rules* applies:[8]

- Due to the collections action taken by the CRA in respect of the amounts in dispute, Jayco suffered a financial costs and damages in the amount of $1,474.173.02 (the amount of interest paid by Jayco from August 12, 2012 to March 2018) pursuant to the letter of credit pending the dispute between Jayco and the CRA. Under section 222(1) of the *ETA* the amounts collected by a registrant are deemed trust monies for Her Majesty the Queen. In this appeal,

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7 Jayco pointed out that the amount of interest was $1,474.173 (from August 12, 2012 to March 2018). In my Reasons for Order, I used the amount $1,409,710.52 since it was the number that parties used, in their oral submissions knowing however, that the number had changed. All the calculations were based on $1,409,710.52.

8 These arguments are found in the written submissions of Jayco. In order to shorten my reasons, I consolidated the arguments found in some of the paragraphs of Jayco's written submissions namely, paragraphs 133, 134, 135, 138, 140, 142 and 156.

since Jayco did not charged or collected any amounts from the Canadian Dealers, the amount assessed were not trust monies for Her Majesty in right of Canada.

- The amounts in dispute did not result in any net revenue loss for the Federal Government, since the amounts assessed were fully recoverable as ITCs by Canadian Dealers, it was essentially an issue of cash flow for the Minister. Ssubsection 315(2) of the *ETA* states that a registrant shall pay any amount forthwith when a notice of assessment is issued. Under subsection 315(3) of the *ETA*, the Minister may postpone collection action against a person. In this appeal, the Minister knowing that there would not be any revenue loss for the Government of Canada did not postpone collection actions, instead the Minister required Jayco to post security, which caused Jayco a real and substantial financial cost. Jayco submits that as a statutory agent for Her Majesty in right of Canada, it should be reimbursed by its principal the Minister, since it is the Minister that required a letter of credit, in an appeal where they were no real revenues losses for the government of Canada.

- In addition, the conduct of CRA prior and during the appeal limited the possibility of the appeal to be resolved in an expeditated manner. All attempts to reach a settlement failed, since it was always the same CRA people that were treating Jayco's file from the assessment up to the appeal before this Court. This resulted, in having Jayco posting a letter of credit. This could have been avoided, if CRA acted in different manner.

- Therefore, the interest paid by Jayco for the letter of credit is a cost in determining the cost award.

[27] Jayco's alternative argument is that the interest was a proper disbursement under Tariff B of the *Rules* as it was an essential and reasonable expense. Without the letter of credit, the Canada Revenue Agency ("CRA") would have taken collection action to recover the amount of GST/HST owing. This would have damaged Jayco's relationship with its Canadian Dealers and disrupted its business. The letter of credit was therefore essential in order for Jayco to challenge the assessment, without unduly affecting its business operations.

[28] The Respondent's position is that interest on the letter of credit cannot be awarded as a "cost" in the proceedings before this Court pursuant to 147(1) of the *Rules*. She also submits that if Jayco was of the view that the Minister had exercised her discretion improperly by accepting a security rather than halting collections entirely, its recourse was to bring an application for judicial review before the Federal Court. Jayco's failure to do so does not make the interest

expenditures a cost incurred for the appeal on the assessment. In Jayco's appeal, the issue was the correctness of the assessment, not whether the Minister had properly taken collection actions. This Court does not have jurisdiction to review collection actions taken by the Minister.

[29] The Respondent further submits that costs are awarded for expenses paid to conduct court proceedings and cannot be used as a disguised claim for purported damages. If Jayco wishes to seek damages because of any alleged misconduct on the part of CRA officials, it must do so before the Federal Court.

[30] The Respondent also disputes Jayco's alternative argument that the interest should be treated as a disbursement under Tariff B of the *Rules*. The Respondent submits that the interest was not an essential expense for the conduct of the proceedings.

V. ANALYSIS

[31] As I have stated above, Jayco provided the letter of credit to secure its unpaid GST/HST arising from the assessment. On being assessed, it was required under subsection 315(2) of the *ETA* to pay any amount remaining unpaid forthwith to the Receiver General. That said, under subsection 315(3) of the *ETA*, "the Minister may, subject to such terms and conditions as the Minister may stipulate, postpone collection action against a person in respect of all or any part of any amount assessed that is subject of a dispute between the Minister and the person". Under section 314(2) of the *ETA*, "where a person objects to or appeals from an assessment, the Minister shall accept security, in an amount and form satisfactory to the Minister, furnished by or on behalf of the person, for the payment of any amount that is in controversy". Jayco decided to provide the letter of security in lieu of paying the assessment while it challenged the assessment.

[32] In my view, Jayco is not entitled to claim the interest on the letter of credit as "costs of proceedings" under paragraph 147(3)j) of the *Rules*.

[33] The language of subsection 147(1) of the *Rules* is clear: "the Court may determine the amount of the costs of all parties involved in any proceeding." The word "proceeding" is defined in the *Rules* as an appeal before this Court. The interest paid by Jayco on the letter of credit relates to the GST/HST it owed, and

not to its appeal before this Court, which dealt solely with the correctness of the assessment.

[34] Jayco is in the same situation as a person who pays the amount of the GST/HST owing from funds that he or she borrows from a financial institution. The interest on such a loan would not be a cost with respect to a proceeding, since the interest was incurred to pay the amount of GST/HST owing and not for the costs of proceedings before this Court**.**

[35] Jayco could have filed an appeal and challenged the assessment before this Court even had it failed to pay the assessed amount or provide the letter of credit. The Minister might have taken collection action against Jayco if either event had occurred but the appeal before this Court would have continued.

[36] Moreover, as was pointed out in in *Walker v Ritchie*, discussed above, paragraph 147(3)(j) of the *Rules* must be read in the light of the other factors described in clause (a) to (i) of subsection 147(3) of the *Rules*. The interest claimed by Jayco does not have any commonality with those other factors.

[37] As part of its argument using *Rule* 147(3)(j), Jayco submits that the Court should take into account the Minister's exercise of discretion in requiring a letter of credit rather than simply forgoing collection action as well as the conduct of CRA officials.

[38] Jayco argues that in so doing, it is not challenging the Minister's discretion but rather asking the Court to ensure that the Minister's discretion is "exercised for the good the administration of the Act, with reason, justice and legal principles."[9] In support of its position, Jayco refers to the following passage in the decision of *Joseph Baptiste Wilfrid Jolicoeur* v *Minister of National Revenue*,[10] dealing with the Minister's duty to assess with all due dispatch:

> There is no doubt that the Minister is bound by time limits when they are imposed by statute, but, in my view, the words "with all due dispatch" are not to be interpreted as meaning a fixed period time. The "with all due dispatch" time limit purports a discretion of the Minister to be exercised, for the good administration of the Act, with reason, justice and legal principles.

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9 Written submissions of Jayco, page 32, paragraph 145.

10 60 DTC 1254 (Ex CT) at 1260.

[39] I do not accept this argument. On an appeal from an assessment, it is not the role of this this Court to sit in review of the Minister's decisions on how best to effect collection of, or obtain security for, unpaid GST/HST. This is what Jayco is asking the Court to do.

[40] Jayco's argument questions why the Minister did not postpone collection action against it given that the Government of Canada would not be out of pocket if the GST/HST was not collected from Jayco, since Jayco's Canadian dealers were entitled to claim an ITC. In essence, Jayco is submitting that the Minister ought to have exercised her discretion differently and not taken any collection action on the GST/HST assessed. Had she done so, Jayco would not have had to obtain the letter of credit and pay interest on it.

[41] In my view, this amounts to an attack on the exercise of the Minister's discretion. The Minister has the power to take collection actions against a person under the *ETA* once a person is assessed and unpaid amounts of tax remain. This Court does not have jurisdiction to review the Minister's exercise of that power—that jurisdiction rests with the Federal Court. Therefore, I do not agree with Jayco's view that the collection actions of the Minister are a factor, let alone a determining factor, in determining costs under paragraph 147(3)(j) of the *Rules*.

[42] In a similar vein, Jayco argued that the interest should be included in the award of costs to reflect the conduct of the CRA officials. According to Jayco, CRA officials made it impossible to settle the appeal, and forced Jayco to incur unnecessary expenses at the audit stage and ultimately to incur the interest expense. While I do not agree that the interest paid to secure the GST/HST owing was linked to the conduct CRA's officials, I need not decide this issue. If Jayco is of the view that it suffered financial damages due to the conduct of the officials, it may file a claim for damages before the Federal Court. This Court does not have jurisdiction to award damages.

[43] I also do not agree with Jayco's alternative argument namely, that the interest paid on the letter of credit was a disbursement essential for the conduct of the proceedings under Tariff B of the *Rules.*

[44] The *Rules* are clear that disbursements will only be awarded if they are essential to the conduct of the proceedings. A party has to establish that the disbursements have arisen inherently and directly from the issues in the appeal.

That is not the case here. The interest was not paid by Jayco to establish that the Minister's assessment was incorrect and therefore did not arise from the appeal filed before this Court.

[45] In addition, the disbursements contemplated by the *Rules* are expenses that are directly connected with the litigation, for example, witness fees and expenses, expert witnesses fees, fees for copies of documents and authorities. Interest paid to secure the GST/HST owing upon assessment is not of this nature. It is not directly connected and essential to the conduct of the proceedings before this Court. If a person decided not to pay its GST/HST owing on assessment or to provide security for the debt, it is true that collection actions may be taken by the Minister. But the collection actions would not prevent a person from filing an appeal against the assessment with this Court.

[46] I find support for this conclusion in the decisions of provincial Courts of Appeal holding that interest incurred on money borrowed to fund the litigation of a party is not a disbursement.[11] In my view, if such interest which arguably has a link to litigation is not a disbursement, then interest to secure a letter of credit on GST/HST owing which has no link to the litigation before this Court cannot be a disbursement.

[47] Accordingly, Jayco is not entitled to claim the interest on the letter of credit as a "cost of proceedings" or as "disbursement".

A. Enhanced Costs beyond Substantial Indemnity

[48] Jayco is also requesting that enhanced costs be awarded beyond the substantial indemnity costs of $347,856.80 conceded by the Respondent.

[49] The amount of $347,856.70 represents 80% of counsel fees after the date of the first offer of settlement, namely March 15, 2016. It may be noted that most of the fees with respect to Jayco's appeal before this Court were incurred after March 15, 2016.

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[11] *MacKenzie, Chandi v Rogalaski, Atwell,* 2014 BCCA 446. *Do v Sheffer,* (2010) 495 A.R. 107 (Q.B).

[50] It is accepted that enhanced costs may be awarded over and above substantial indemnity costs by taking into account the factors under subsection 147(3) of the *Rules*.

[51] In making such an award, it is important to keep in mind that the purpose of subsections 147(3) and 147(3.1) of the *Rules* is not to fully compensate a party for its costs but rather to allow the Court to award costs other beyond Tariff, or in some instances, to award enhanced costs, beyond substantial indemnity costs. As was explained by Justice Campbell Miller in *Repsol* v *HMQ,*[12] the Court has to be proceed with caution in allowing enhanced costs above substantial indemnity costs. On this issue, Justice Miller wrote:

> (iii) Enhanced costs over and above the substantial indemnity costs
>
> [10] I find the Court is not limited in exercising its discretion towards something greater than the substantial indemnity costs set out in Rule 147(3.1) of the Rules. This is evident from the opening words "Unless otherwise ordered by the Court…". This is in keeping with the overriding principle that costs are in the judge's discretion. I interpret *Rule* 147(3.1) of the *Rules* as providing neither an end point nor a starting point for the cost determination. It is though a question of degree when awarding enhanced costs beyond Tariff or enhanced costs beyond substantial indemnity. It does not follow that because I may exercise my discretion to award costs beyond Tariff for the pre-Settlement Offer period, that I must increase costs beyond substantial indemnity costs for the post-Settlement Offer period. Awarding costs beyond 80% is skirting with costs on a full solicitor-client basis and, I believe, we should proceed with caution. Those factors implying questionable behaviour of a party become, I suggest, more significant: conduct lengthening the duration, refusal to admit, improper, vexatious or unnecessary conduct – all these should be considered. I would go so far as to suggest it is the egregious nature of behaviour that would cause me to exercise my discretion beyond substantial indemnity. In the case before me, I do not see behaviour that would justify inching towards full indemnity. The Appellants rely on the comment of Justice Bocock in the case of *Thomas O'Dwyer v The Queen*, in which he awarded costs of 90% of solicitor-client costs given that he found the Crown to engage in "myopic, perfunctory and hasty evaluations of the merits of the assessment throughout (ultimately reflected in the Reply)". I note that award was in connection with a motion in which the court struck the Reply in its entirety for failure to show reasonable grounds. This is simply not the situation before me. This was a hard fought trial and I was left with no impression of behaviour on the part of the Respondent that she was unjustifiably or intentionally

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12 *Repsol* v *HMQ*, 2015 TCC 154.

> flogging a dead horse. There was some behaviour I will address in my review of the pre-Settlement Offer that influences my finding with regards to that time period. But I am not prepared to move beyond the 80% award for the post-Settlement Offer period, which I find is $264,334, plus costs of this Motion at 80% of solicitor-client costs incurred for the Motion.
>
> [Emphasis added.]

[52] In this Motion, 80% of the counsel fees are awarded with respect to the period post-settlement. To use the words of my colleague Justice C. Miller in *Repsol*, awarding costs beyond 80% is shirting with costs on a full solicitor-client basis. In such circumstances, the Court has to be cautious. In my view, enhanced costs beyond substantial indemnity should be granted only where:

- under paragraph 147(3)g) of the *Rules*, that the conduct of a party tended to shorten, or to lengthen unnecessarily, the duration of the proceedings;

- under paragraph 174(3)h) of the *Rules*, that a party refused or neglected to admit a fact that should have been admitted; or

- under paragraph 147(3)i) of the *Rules*, that any stage in the proceedings was: (i) improper, vexatious, or unnecessary, or (ii) taken through negligence, mistake or excessive caution.

[53] Jayco relies on paragraphs 147(3)g) and 147(3)h) of the *Rules* in support of its claim.

[54] With respect to paragraph 147(3)g) of the *Rules*, Jayco's position is that the CRA officials made it impossible to settle the case at the audit stage, the objection stage and the litigation stage because they failed to conduct an impartial review as the appeal progressed. Jayco alleged that at the audit stage, the auditors relied on the GST Technical Advisor and the opinion he had rendered to reassess Jayco. At the objection stage, the Appeal Officer consulted the same Advisor and, according to Jayco, relied on the opinion of the Advisor to confirm Jayco's Notice of Objection.

[55] In addition, the Appeal Officer who confirmed Jayco's Notice of Objection acted as Litigation Officer responsible at the CRA for liaising with the Department of Justice on Jayco's appeal to this Court.

[56] The Appeal Officer did not testify at the hearing. Therefore, it is difficult for me to know if the Officer did in fact only rely on the opinion of the GST Technical Advisor to confirm the Notice of Objection of Jayco. In addition, it is not clear that impartiality plays any role at the litigation stage, once an appeal has been filed with this Court. The CRA's written policy was not tendered in evidence.

[57] In addition, in costs matters, it is only in exceptional circumstances that the Court may take into account the conduct of the parties prior to the proceedings, including the conduct of the officials of the Minister.[13] The evidence does not support a conclusion that exceptional circumstances exist here.

[58] Relying on paragraph 147(3)h) of the *Rules*, Jayco argues that costs could have been avoided had the Respondent admitted certain facts, namely:

(a) that the documents did not contain any provisions specifying when or where delivery of the products sold by Jayco to the Canadian dealers would take place;

(b) that the Dealership Agreement between Jayco and the Canadian dealers was governed by the law of Indiana;

(c) facts describing Jayco's process with respect to parts;

(d) the CRA's published administrative policy on place of supply and relevant provisions of sale of goods legislation; and

(e) the foreign law on sale of goods legislation.

[59] This rule is difficult to apply as the Court is asked to second guess counsel's decision not to admit a fact. There could very well be valid reasons why counsel decides not to admit a fact that the Court is not aware of. This suggests that a Court must be cautious before concluding that some facts should have been admitted.

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13 *Canada* v *Landry*, [2010] FCA 135.

[60] Taking into account the position of the Respondent in this appeal, I understand why she did not admit the facts in paragraphs 58(a) and (c) above. The facts in paragraph 58(a) were at the core of the litigation while the facts in paragraph 58(c) required examination as the parts process was confusing.

[61] As for the CRA's policy mentioned in paragraph 58(d), it is a publicly available document. The Respondent did not dispute that it existed but rather its interpretation and weight. This was appropriate on her part.

[62] However, it is difficult to understand why the Respondent refused to admit the fact in paragraph 58(b), namely that the agreement between Jayco and its Canadian dealers was governed by the law of State of Indiana. This was one of the indicia used to determine where the delivery of the recreational vehicles occurred**.** I do not however consider it appropriate to award enhanced costs for this item given that it did not entail much in the way of additional time and effort on the part of Jayco.

[63] It is also difficult to understand why the Respondent refused to admit foreign law. As a consequence, Jayco was required to call an expert witness and tender an expert report on foreign law on the sales of goods legislation. That said, the evidence of the expert witness was quite short at trial. In addition, Jayco has already been compensated. The expenses with respect to the expert are included in Jayco's disbursements and although some work had to be performed by counsel for Jayco, I am of the view that such efforts does not justify to enhancing fees beyond the substantial indemnity.

[64] Therefore, I am not awarding enhanced costs above substantial indemnity for the period after the offer of settlement, namely March 15, 2016.

[65] However, for the period before the offer of settlement, under the Tariff B of the *Rules*, the award of costs for that period is $700.00. Taking into account, the factors under 147(3) of the *Rules*, I am of the view that the costs should be enhanced to $20,000 for that period. Many of the factors under subsection 147(3) of the *Rules* play in favour of Jayco, such as the outcome of the proceedings, the amounts in issue, the importance of the issues, the complexity of the issues and the volume of work.

B. Disbursements

[66] Excluding the claim for interest on the letter of credit, Jayco is claiming disbursements in the amount of $69,841.90. The Respondent challenged some of these disbursements as being improper and unreasonable.

[67] In particular, the Respondent submitted that the claim for administration service fees was not proper. Counsel for Jayco explained that instead of charging for photocopies and printing, it included these charges under the heading administration services fees. I accept Jayco's submissions.

[68] The Respondent also argued that the expense associated with business airfares was not a proper cost and that some of the other lesser expenses were not reasonable.

[69] Counsel for Jayco submitted that in order to avoid more work and costs to its client, he would be ready to have the disbursements discounted by 10% to 20%. The Respondent favoured the 20% discount. I have reviewed the invoices, as well as those related to administration fees.

[70] I accept the solution proposed by the parties. A lot of time and efforts have been expended in this Motion. It would be an unnecessary additional expense to send the disbursements to be reviewed by a taxing officer of this Court. After carefully reviewing the invoices, I am of the view that if I were to discount the disbursements by 15%, the outcome would be a fair and a reasonable one for both parties.

[71] I therefore award an amount of $59,365.62 as disbursements.

VI. DISPOSITION

[72] Jayco is awarded:

- an amount of $347,856.80 as a substantial indemnity pursuant to subsection 147(3.1) of the *Rules*;

- an amount of $20,000 for the period pre-settlement pursuant to subsection 147(3) of the *Rules*;

- an amount of $59,365.62 as disbursements;

For a total of $427,222.42 plus applicable taxes.

[73] I am not allowing costs on this Motion, since, in my view, this Motion would have not been necessary had Jayco not claimed the interest on the letter of credit as “costs of proceedings” or alternatively as “disbursement”.

Signed at Ottawa, Canada, this 28th day of November 2018.

“Johanne D’Auray”

D’Auray J.

CITATION:	
COURT FILE NO.:	2015-3545(GST)G
STYLE OF CAUSE:	JAYCO, INC. v THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 24, 2018
REASONS FOR ORDER BY:	The Honourable Justice Johanne D'Auray
DATE OF ORDER:	November 28, 2018

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