Docket: 2016-2606(GST)G

BETWEEN:

CIBC WORLD MARKETS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion for Costs heard in writing

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Al Meghji
	Al-Nawaz Nanji
Counsel for the Respondent:	Justine Malone

COST ORDER

UPON ISSUING Reasons for Order after reading the written submissions of counsel for the Appellant and the Respondent regarding costs in the appeal:

THIS COURT ORDERS THAT:

1. the Appellant shall be entitled to costs in its appeal before the Tax Court of Canada, awarded after a successful appeal before the Federal Court of Appeal on the following basis:

    a) costs under the Tariff for a Class C proceeding;

b) disbursements in the amount of $691.00; and

c) the additional lump sum of $6,000.00 plus HST on account of additional legal research and consultations owing to the absence of established legal authority on the issue before the Court.

2. There shall be no costs awarded on this motion.

Signed at Ottawa, Ontario, this 26th day of September 2019.

"R.S. Bocock"

Bocock J.

Citation: 2019TCC201
Date: 20190926
Docket: 2016-2606(GST)G

BETWEEN:

CIBC WORLD MARKETS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR COST ORDER

Bocock J.

I. INTRODUCTION

[1] This is a motion, brought by written submissions, wherein the Appellant seeks costs on the following basis:

a) The Federal Court of Appeal found that the decision of the Minister to deny certain input tax credits ("ITCs") claimed by CIBC World Markets Inc. ("WMI") was wrong. The Federal Court of Appeal rejected the Respondent's position that the *Excise Tax Act*, RSC 1985, c.E-15, as amended (the "ETA") deemed the relevant exported administrative services to be financial services and agreed that the federal treasury should not receive windfall of GST on exported services;

b) In the appeal before this Court, 2018 TCC 108 (the "TCC appeal") WMI was billed by counsel and paid to counsel incurred legal costs before this Court of approximately $227,763.14 and approximately $1,565.54 in disbursements, inclusive of HST; and

c) A lump sum amount of $160,000 (inclusive of legal costs, disbursements and HST) is a fair and reasonable indemnity in the circumstances of this case. Because it reflects approximately 70% of actual legal costs.

II. BACKGROUND

[2] The Minister denied certain ITCs to WMI for its reporting periods ending in 2008-2013. The amount of ITCs at issue for these reporting periods was over $1.3 million. Further, although the only reporting period ultimately decided by the Court concerned a much smaller amount for 2013, the issue was relevant to future reporting periods.

[3] In reasons dated May 29, 2018, this Court dismissed the appeal of WMI. WMI appealed that decision to the Federal Court of Appeal. In reasons dated May 15, 2019, the Federal Court of Appeal allowed WMI's appeal and granted WMI full relief: *CIBC Worlds Markets Inc. v. HMQ*, 2019 FCA 147 (the "FCA decision").

[4] The novel issue before both courts arose from a fine point of law concerning the blatant conflict between classifying financial services as zero-rated exported supplies under sub-section 132(3) and Part IX of Schedule VI or as deemed exempt supplies by virtue of an election filed by WMI under Section 150 and Part VII of Schedule V of the ETA.

[5] Starkly exposing this unusually concise issue within the TCC appeal are paragraphs 6, 7 and 8 of the Court's decision:

> [6] The overarching issue is whether these exported supplies are zero-rated supplies or exempt supplies; if zero-rated, ITCs may be claimed by WMI, if exempt supplies, they may not.
>
> [7] The more narrow sub-issues to be determined are whether the exported services are: (i) services to which the s.150 election applies and deems financial services supplied "inter-group"; and, if so, (ii) are such deemed financial services exempt supplies notwithstanding their export to and consumption by a deemed non-resident person to the extent of such activities?
>
> [8] There are no material facts in dispute. The parties handed up a statement of agreed facts at the outset of the hearing. No witnesses were called.

[6] At the inception, the Court draws notice to the following frequently present procedures, hurdles and complexities of tax litigation which were absent before this Court in the TCC appeal:

a) multiple pleadings and amendments: there was an amended notice of appeal and a reply;

b) motions: there were none;

c) extensive examinations for discovery: there were none;

d) discovery of documents: there were approximately 20 documents submitted to the Court in the TCC appeal;

e) litigation process conferences: there were none;

f) requests to admit, read ins and *voir dires*: there were none;

g) witness preparation and interviews: there were no witnesses in the TCC appeal;

h) evidentiary and procedural issues at the hearing: all exhibits were admitted under a joint book of documents accompanied by a full and complete agreed statement of facts; and

i) lengthy and continued trial process: the appeal lasted less than 3 hours.

[7] In some measure, the streamlined and efficient process reflects quite well on counsel. It also reflects the clear conflict between two provisions of the Act which Parliament failed to hypothetically address, the parties practically faced and which the Court was efficiently and neatly asked to decide. Counsel and the Court were able to submit and receive the necessary evidence and argument in one-half day, the amount of time normally reserved before the Court for an informal procedure appeal.

III. A BRIEF REVIEW OF THE COST RULE, THE BROAD JURISPRUDENCE AND THE PARTIES' SUBMISSIONS

(i) The Rule

[8] The following is an excerpt from the relevant cost provisions in the *Tax Court of Canada Rules* (General Procedure) (the "*General Rules*") relevant to the determination of this question:

> **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(3)** (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,
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> (*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,
>
> [….]
>
> (*j*) any other matter relevant to the question of costs.
>
> ***147(3.1) Settlement offers***

(a) Unless otherwise ordered by the Court and subject to paragraph (c), where an Appellant makes a written offer to settle and obtains a judgment as favourable or more favourable than the terms of the offer to settle, the Appellant is entitled to party-and-party costs to the date of service of the offer and an amount equal to solicitor-client costs after that date, plus reasonable disbursements and applicable taxes.

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.

147(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.

(ii) The Broad Jurisprudence

[9] The Tariff exists as the default standard for the award of costs in an appeal before the Tax Court under the General Rules. The Federal Court of Appeal ("FCA") is aware of that reality. On the substantive issue, the FCA substituted its judgment for that of this Court. It also awarded costs to the Appellant throughout. Importantly, the FCA did not issue a cost award before this Court which it could have. Instead, on that issue alone, it left that matter to this Court, knowing of the Tariff as default and the discretion embedded within section 147 of the Rules and reposed in the trial judge.

[10] If the Court does nothing, the Tariff applies. If the Court elects to exercise its discretion, it must do so on a principled basis having regard to the relevant section 147 factors without caprice: *R v. Lau*, 2004 FCA 10 at paragraph 5; *R v Landry*, 2010 FCA 135 at paragraphs 22 and 54.

[11] In assessing such costs, where departing from the Tariff, the ultimate goal is what is fair and reasonable within the discretion of the Court: *Boucher v. Public Accountants Council for the Province of Ontario,* (2004) 71 OR (3d) 291(CA) at

paragraph 24; *Velcro Canada Inc. v. HMQ*, 2012 TCC 273 at paragraph 6. To that end, the Court must be fair and reasonable to the parties, recognizing the success of the Appellant in the context of the appeal litigated, bringing to bear upon any such award the knowledge and background as the judge who presided.

(iii) The Parties' Submissions

[12] There is a vast disparity between the submissions of each party on costs in the TCC appeal.

[13] The Appellant states that the following factors should garner it $160,000.00 or 70% of all costs it paid to counsel. These are:

(a) the Appellant was completely successful on appeal;

(b) the amounts in issue exceed $1.3 million;

(c) the issue is important because it involved two completing statutory provisions employed interchangeably by Canadian charted banks and the overarching competing legislative principles within the ETA of exported supplies and exempt supplies;

(d) careful analysis of the issues was required because of the novelty of the issues and dearth of legal pronouncements; and

(e) the legal fees generated were quantitatively large, were reasonable and dwarf by comparison the Tariff awarded costs.

[14] In contrast, the Respondent sees little or no reason to depart from the Tariff. In asserting so, Respondent's counsel draws attention to the following facts:

(a) the very streamlined pleadings, documents, evidence at the hearing and the length of the hearing itself;

(b) the amount ultimately in issue ($174,713.00), while large in absolute terms, is relatively diminished by the size of the Appellant's undertaking and the tangential impact of the ITCs on its business as a whole;

(c) the importance of the precedential value of the dispute is not relevant beyond its application to a dozen large financial institutions, and even then, not on a significant basis;

(d) settlement offers were not made, but again, not passible;

(e) the comparative costs of the Appellant and Respondent are dramatic. Respondent's counsel, who unlike the Appellant's counsel, travelled from Ottawa to Toronto for the hearing, docketed 93 hours in total whereas Appellant's counsel recorded 323.5 hours;

(f) the complexity of the issue owes much to the depth of conflict between the provisions and very little to any complex set of factual determinations.

(g) The evidentiary record of the Appellant concerning the precise nature, extent and justification of the legal work performed is not present;

(h) There are some irregularities in the Appellant's bill of costs which add to the vague basis for enhanced costs:

i) a claim for 3 counsel to attend a 5.5 hour hearing that lasted 3.5 hours;

ii) although referenced within, no Crown Book of Documents existed to be reviewed and billed;

iii) certain costs for pre-appeal expenses were included; and

iv) a software licence fee to a third party supplier was included.

IV. PRINCIPLED ANALYSIS OF VARIOUS COST HIERACHIES

[15] The Court restates that its discretionary power to depart from the Tariff and award costs beyond that scale must be exercised on a principled basis bearing in mind it is a discretionary exercise and must have a substantive purpose relevant to its use: *R v. Landry*, *supra*. In this particular matter, the Court will conduct an analysis of the particular factors placed at its disposal in section 147 of the *General*

Rules in order to determine whether costs beyond the Tariff should be awarded and, if so, on what scale.

[16] At the outset, the Court notes that no departure from the Tariff is warranted by settlement offers, conduct of any party, intransigence to admit or concede or improper conduct or negligence. None of these factors exist for consideration in the TCC appeal. In short, any departure will be determined by analysis of the other factors.

a) Results:

[17] The Appellant was fully successful on appeal. This factor alone is already partially an ingredient within the Tariff which exists to award the successful party on the basis of its party and party costs.

b) Amounts in Issue:

[18] The amended notice of appeal established the amount in issue to be $174,713.00. There were implications for other reporting periods, but those reporting periods were not before the Court. Similarly, on a relative basis, the amounts cannot be said to equate with the entire livelihood and treasure of a taxpayer placed at stake in litigation before this Court as in some appeals: *O'Dwyer v. HMQ*, 2014 TCC 90. The relative financial impact of the litigation on the Appellant was not substantively at issue.

c) Importance of the Issues:

[19] Not unlike the amounts in issue, the importance of the issue is narrow and limited to multi-national level Chartered banks. This is not meant to minimize that precise context in a "small-by-numbers" industry, but merely recognize that interest level, applicability and relevance to the tax and, business community and broader public as a whole is comparatively limited. On the other hand, the patent conflict between the provisions and the two entirely justifiable, but differing interpretations required a decision by this Court and ultimate resolution by the FCA.

d) Volume of Work:

[20] Aside from the additional research and related client explanations and communications arising within the TCC appeal, the volume of work measures on the very low end of the scale. There were no discoveries, motions, witnesses, credibility issues, documents or evidence in dispute or litigation process conferences. There was a complete agreed statement of facts, written submissions and argument, all received and heard in less than three hours before the Court; Respondent's counsel noted that the Appellant was billed by counsel for five and one-half hours for such attendance.

[21] This landscape focuses the Court on the issue of additional research and consultation fees contrasted against a most streamlined, efficient and smooth single-issue tax appeal.

e) Complexity of the Issues:

[22] Multiple issues were not present in the TCC appeal; there was one issue. It was entirely legal and interpretive by definition. It required some additional legal research and analysis by counsel. It did not require the usual and frequent preliminary litigation plans, preliminary motions, tactical maneuverings, alternate file theories, discoveries, exhaustive fact-finding or admissions. The singular issue represented the entire fabric of the TCC appeal. Its singularity and rigidity both shortened the process, but necessitated its litigation. Nothing anyone did or could have done changed that characterization.

V. CONCLUSION

[23] Having regard to all the factors, the Court is generally not inclined to depart by much from the Tariff. Counsel behaved in an exemplary fashion. The tax dispute system optimally achieved an efficient, streamlined and definitive answer to a patent conflict between two butting sections of the same taxing statute.

[24] The Tariff exists as a default compensatory measure for just such litigation. The sole departure point in the TCC appeal, even when weighing the single issue and laudatory efforts of counsel, is the novel nature of the issue owing to the lack of jurisprudence on the point. In this area, the Court will exercise its discretion.

[25] An additional lump sum amount shall be awarded for the incremental research, analysis and consultation. However, it must again reflect the comparative

efforts of Appellant's counsel to Respondent's counsel, the reasonableness of both legal positions (which is simply to say the patent nature of the conflicting provisions) and the ultimately succinct nature of the countervailing arguments. All told, the Court awards an additional $6,000.00 in fees for this incremental effort in the TCC appeal.

[26] In light of the submissions of Respondent's counsel concerning its alternative position on this cost motion in contrast to the quantum sought by the Appellant, there shall be no award of costs on this cost motion brought by the Appellant.

Signed at Ottawa, Ontario, this 26th day of September 2019.

"R.S. Bocock"

Bocock J.

CITATION:	2019TCC201
COURT FILE NO.:	2016-2606(GST)G
STYLE OF CAUSE:	CIBC WORLD MARKETS INC. AND THE QUEEN
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DATE OF ORDER:	September 26, 2019

APPEARANCES:

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Counsel for the Respondent:	Justine Malone

COUNSEL OF RECORD:

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