Docket: 2016-1697(IT)G

BETWEEN:

MICHAEL DUFFY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2016-1703(IT)G

BETWEEN:

PAMELA DUFFY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2016-1705(IT)G

BETWEEN:

1218769 ONTARIO INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Before: The Honourable Justice Don R. Sommerfeldt

ORDER ON COSTS

The Appellants collectively are awarded one set of costs in the amount of $25,000, to be shared among them, as per the attached Reasons for Order on Costs.

Signed at Ottawa, Canada, this 11th day of December 2020.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2020 TCC 135
Date: December 11, 2020
Docket: 2016-1697(IT)G

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BETWEEN:

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Respondent.

REASONS FOR ORDER ON COSTS

Sommerfeldt J.

I. INTRODUCTION

[1] I previously issued a judgment, with attached reasons, allowing the appeals (the "Appeals") of the Appellants from various reassessments (the "Reassessments") issued against them by the Canada Revenue Agency (the "CRA"), on behalf of the Minister of National Revenue (the "Minister"), after the CRA had conducted a net worth analysis. At issue in the Appeals were various items of allegedly unreported income, allegedly mischaracterized income and disallowed expenses, as well as questions as to whether the CRA was entitled to reassess certain taxation years that were statute-barred and whether the CRA was justified in assessing penalties under subsection 163(2) of the *Income Tax Act* (the "ITA").[1] The Appeals related to the 2010, 2011 and 2012 taxation years of the Appellants, as well as the 2009 taxation year of 1218769 Ontario Inc. ("121ON"), which has a September 30 year-end.

[2] The Appeals were allowed with costs, and I invited submissions from the Appellants and the Respondent (collectively, the "Parties") in respect of costs, as they had not reached an agreement on costs. These Reasons pertain to the Order on Costs that I am issuing concurrently with these Reasons.

[3] As indicated, the Appeals related to three taxation years for the two individual Appellants and four taxation years for the corporate Appellant. Based on my reading of the pleadings, the total amount of income in issue in respect of the ten Appeals was approximately $541,000 (i.e., approximately $311,000 reassessed to 121ON, $172,000 to Mr. Duffy, and $58,000 to Mrs. Duffy).

[4] The Appeals were scheduled for a four-day hearing in Hamilton. A few days before the hearing was scheduled to commence, counsel for the Parties contacted the Court and requested a one-day delay in the commencement of the hearing, in order that the two counsel could meet with one another face to face in an effort to resolve or narrow some or all of the issues. The negotiations conducted on that day were very fruitful. At the commencement of the hearing the next day, both counsel advised the Court of a number of concessions that their respective clients had

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1 *Income Tax Act*, RSC 1985, c. 1 (5th Supplement), as amended.

made. Most notably, the Respondent conceded that the Appeals of 121ON for the 2009, 2010 and 2011 taxation years, the Appeal of Mr. Duffy for the 2010 taxation year and the Appeal of Mrs. Duffy for the 2010 taxation year should be allowed in their entirety.[2] After the concessions made by the Parties, the only issues that remained to be considered were:

a) Did 121ON have unreported income in the amount of $27,237.90 in the taxation year ending September 30, 2012?

b) In computing its income for 2012, was 121ON entitled to deduct vehicle expenses in excess of the $900 conceded by the Respondent?

c) In 2012, did Mr. Duffy have unreported income, derived from shareholder benefits, in the amount of $13,618.90?

d) In 2012, did Mrs. Duffy have unreported income, derived from shareholder benefits, in the amount of $13,618.90?

e) Were the penalties assessed against the Appellants under subsection 163(2) of the *ITA* for 2012 justified?

Of the above issues, the main issues addressed during the hearing were the alleged unreported income of 121ON in the amount of $27,237.90 and the alleged shareholder benefits received by Mr. and Mrs. Duffy, each in the amount of $13,618.90 (i.e., approximately one-half of $27,237.90).

[5] Thus, by reason of the partial settlement that had been negotiated, the aggregate magnitude of the amounts in dispute in the Appeals was reduced from approximately $541,000 to approximately $54,475.70 (i.e., $27,237.90 + $13,618.90 + $13,618.90), plus modest vehicle expenses and penalties; and a four-day hearing was shortened to a one-day hearing.

[6] The net worth analysis conducted by the CRA was far-reaching, and touched on a number of aspects of the Appellants' financial affairs. At the hearing, the Appellants challenged the methodology of the net worth assessments, as pertaining to ten items, enumerated as follows:

a) Q-Trade account – currency conversion;

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[2] The hearing did not focus on the 2011 taxation year of Mr. Duffy and Mrs. Duffy.

b) Visa account and bank account;

c) Pelham property taxes;

d) Q-Trade account – interest expense;

e) income tax liability;

f) Mexican expenditures;

g) reimbursed employment expenses;

h) Q-Trade account – return of capital;

i) potential rental rebate; and

j) motor vehicle expenses;

The Appellants were successful in challenging the net worth analysis in respect of five of those items.

II. **COMMENTS**

[7] I have a few observations in respect of the positions or conduct of the Parties in respect of some of the above items.

A. Q-Trade Account – Currency Conversion

[8] In conducting its net worth analysis, the CRA converted the liability amounts in Mr. Duffy's US margin account from US currency to Canadian currency, but did not make a currency conversion in respect of the asset values in that account. In the particular circumstances, the failure to perform a currency conversion in respect of the asset values worked to the disadvantage of Mr. Duffy. At the hearing, during her direct examination, the CRA auditor acknowledged that the asset values, as well as the liability amounts, should have been converted from US currency to Canadian currency. It is my understanding that the CRA's failure to perform a currency conversion in respect of the asset values in the US margin account was an inadvertent oversight. Nevertheless, it would seem that the need to apply symmetrical currency conversions for both asset values and liability amounts is axiomatic; therefore, the failure to perform the currency conversion was an obvious error on the part of the CRA. Given that the auditor acknowledged during her direct examination that there had been an error, it is peculiar that such acknowledgment was not made on the previous day, when the Parties were conducting their settlement negotiations. Had the acknowledgment been made then, it would not have been necessary to deal with this issue at the hearing.

B. Visa Account and Bank Account

[9] The major issue here related to a payment, in the amount of $1,700, by means of an online banking transfer, from Mr. Duffy's bank account to his Visa credit card account. The transfer was made by Mr. Duffy on December 31, 2012, but was not posted to his Visa account or his bank account until January 2, 2013. The CRA treated the $1,700 payment as having reduced Mr. Duffy's liabilities as of December 31, 2012, but also included the same $1,700 in his assets as of December 31, 2012. Mr. Duffy was successful in persuading me that the CRA could not have it both ways. Again, it is peculiar that, during the settlement negotiations the day before the hearing, the CRA and the Respondent persisted in adhering to asymmetrical accounting treatment.

C. Pelham Property Taxes

[10] While Mr. and Mrs. Duffy were successful in proving that the CRA had failed to give recognition for an outstanding property tax liability in the amount of $3,952.32, it is my understanding that Mr. and Mrs. Duffy may not have provided the requisite property tax documentation to the CRA on a timely basis during the course of the audit. Accordingly, I am not inclined to take this item into consideration in making the costs award.

D. Q-Trade Account – Interest Expense

[11] The Appellants were unsuccessful in respect of this item.

E. Income Tax Liability

[12] The Appellants were unsuccessful in respect of this item.

F. Mexican Expenditures

[13] The Appellants were unsuccessful in respect of this item.

G. Reimbursed Employment Expenses

[14] The Appellants were unsuccessful in respect of this item.

H. Q-Trade Account – Return of Capital

[15] Mr. Duffy was successful in showing that the CRA had misunderstood or misread a T3 slip issued by a mutual fund trust. The CRA auditor stated that it was her view that an amount shown on a T3 slip indicated a taxable source of income, even if the amount was shown in Box 42. Simply by looking at the reverse side of a T3 slip, one may see that Box 42 is used to describe an amount that represents a distribution or return of capital. This is an item that should have been conceded by the Respondent during the negotiations that preceded the hearing.

I. Potential Rental Rebate

[16] At the hearing the Appellants conceded this point.

J. Motor Vehicle Expenses

[17] The Appellants were successful in respect of this item, in part because the auditor failed to bring her audit file with her to the hearing and in part because counsel for the Respondent did not cross-examine Mr. Duffy. Those factors (i.e., not bringing the audit file to the hearing and not cross-examining Mr. Duffy) suggest that the Respondent's position in respect of the motor vehicle expenses was not strong. At the hearing, I was left wondering why this item was not conceded by the Respondent during the settlement negotiations.

III. **LEGAL PRINCIPLES**

A. Rule 147

[18] Pursuant to subsection 147(1) of the *Tax Court of Canada Rules* (*General Procedure*) (the "Rules"), the Court has an implied discretion in determining the amount of costs to be awarded. The discretion under subsection 147(1) is broad.[3]

[19] Subsection 147(3) of the Rules states that, in exercising its discretionary power under subsection 147(1), the Court may consider:

> (a) the result of the proceeding,
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> (b) the amounts in issue,
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> (c) the importance of the issues,
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> (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 [of,] 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) [n/a]; and
>
> (j) any other matter relevant to the question of costs.

B. Tariff B

[20] It has been indicated that Tariff B, which is set out in Schedule II to the Rules, exists as the default standard for an award of costs.[4] If, in exercising its

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[3] *British Columbia* (*Minister of Forests*) *v. Okanagan Indian Band*, [2003] 3 SCR 371, 2003 SCC 71, ¶19 & 22; *The Queen v. Lau*, 2004 FCA 10, ¶5; and *Velcro Canada Inc. v. The Queen*, 2012 TCC 273, ¶8.

discretion, the Court decides to depart from the Tariff, the Court must exercise its discretion on a principled basis, without caprice, and having regard to the relevant factors set out in section 147 of the Rules.[5] Where the Court is inclined to depart from the Tariff in awarding costs, the ultimate goal should be to make an award that is fair and reasonable to the parties, while recognizing the success of the successful party.[6]

[21] In recent years, a number of decisions of this Court have established that, even in a situation where there are no unusual or exceptional circumstances of misconduct or malfeasance, the Court is not bound to defer to the Tariff.[7] In other words, increased costs beyond the Tariff are not tied to exceptional circumstances, such as misconduct, malfeasance or undue delay.[8] While earlier decisions of this Court suggested that there should not be a departure from Tariff costs unless justified by special circumstances,[9] the jurisprudence has evolved since that time, particularly so as to give greater recognition to the work involved in tax litigation, as a factor in awarding costs.[10]

C. Pre-Appeal Costs

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4 *CIBC World Markets Inc. v. The Queen*, 2019 TCC 201, ¶9.

5 *Lau*, *supra* note 3, ¶5; *The Queen v. Landry*, 2010 FCA 135, ¶22 & 54; and *CIBC World Markets*, *ibid*, ¶10.

6 *Boucher v. Public Accountants Council for the Province of Ontario*, (2004) 71 OR (3d) 291 (ONCA), ¶24; *Velcro Canada*, *supra* note 3, ¶6 & 8-10; and *CIBC World Markets*, *supra* note 4, ¶11.

7 *Ford Motor Company of Canada, Ltd. v. The Queen*, 2015 TCC 185, ¶7(4) & 25. See the cases cited in footnote 7 of the *Ford Motor* case.

8 *Velcro Canada*, *supra* note 3, ¶3-21; *Spruce Credit Union v. The Queen*, 2014 TCC 42, ¶6, 24-27 & 56; and *Repsol Canada Ltd. v. The Queen*, 2015 TCC 154, ¶12.

9 For instance, see *Continental Bank of Canada et al. v. The Queen*, [1994] TCJ No. 863; 94 DTC 1858, at 1876 (TCC).

10 *Blackburn Radio Inc. v. The Queen*, 2013 TCC 98, ¶14-15. See also *Teelucksing v. The Queen*, 2011 TCC 253, ¶2; and *Daishowa-Marubeni International Ltd. v. The Queen*, 2013 TCC 275, ¶4.

[22] In his written submissions in respect of costs, counsel for the Appellants itemized his annual billings to his clients over a five-year period.[11] It appears that the billings for the first two years of that period related to services provided before these Appeals were commenced.

[23] As subsection 147(1) of the Rules states that the Court may determine the amount of costs involved in any proceeding, and as section 2 of the Rules defines "proceeding" as meaning an appeal or a reference, it has been held that, unless there are exceptional circumstances, costs should not be awarded in respect of expenditures incurred prior to the drafting of the particular notice of appeal.[12]

D. Partial Indemnity Costs

[24] As stated by Justice Campbell in *Zeller Estate*, "Traditionally, the degree of indemnification represented by partial indemnity costs has varied between 50% and 75% of solicitor-and-client or substantial indemnity costs…."[13]

[25] Subsection 147(3.5) of the Rules provides that, for the purposes of section 147 of the Rules, "substantial indemnity costs" means 80% of solicitor-and-client costs.

IV. **SUBMISSIONS BY THE APPELLANTS**

[26] Counsel for the Appellants has submitted that, by reason of the many items that were settled in the days immediately preceding the hearing, the Appellants had substantially won the Appeals before the hearing commenced. As the Minister conceded items representing almost 90% of the aggregate amount in issue, counsel

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11 Appellants' Costs Submissions, May 31, 2019, p. 4.

12 *The Queen v. Landry*, 2010 FCA 135, ¶24 & 34; *The Queen v. Martin*, 2015 FCA 95, ¶18-22; *Aon Inc. v. The Queen*, 2018 TCC 111, ¶30; and *Jayco, Inc. v. The Queen*, 2018 TCC 239, ¶57.

13 *Zeller Estate v. The Queen*, 2009 TCC 135, ¶9; citing Mark Orkin, *The Law of Costs*, 2nd ed. (Aurora: Canada Law Book, 2008), vol. 1, p. 2-3. See also *Dickie v. The Queen*, 2012 TCC 327, ¶27; *affirmed*, 2014 FCA 40, ¶6; *Spruce Credit Union, supra* note 8, ¶29-30; and *Ford Motor Company, supra* note 7, ¶7(7) & 23.

for the Appellants has suggested that the Appellants should receive "a very substantial indemnification" for the costs that they incurred.[14]

[27] Counsel for the Appellants has submitted that there was no basis for the CRA to have reassessed the statute-barred years. The Appellants have noted that the CRA had completed its audit and reached its conclusions, all within the normal reassessment period, but then declined to actually reassess until the normal reassessment period had expired. Counsel for the Appellants has suggested that the appropriate course of action would have been to have requested waivers, rather than alleging that there was wilful default, neglect or fraud on the part of the Appellants. Ultimately, a week before the hearing was scheduled to commence, the Respondent conceded that the Appeals should be allowed in respect of the statute-barred years. By that time, the Appellants had largely completed their preparation to address the statute-barred years at the hearing.

[28] In his submissions, counsel for the Appellants also advised that detailed materials outlining the CRA's accounting errors had been provided to the Respondent in January 2017. While settlement offers were exchanged in 2017, no settlement ensued at that time. Counsel for the Appellants noted that, in addition to the Respondent's concession concerning the statute-barred years a week before the hearing, other concessions followed and continued until the morning of the hearing. Counsel for the Appellants submitted that the CRA had performed shoddy work and that the Respondent declined to consider a possible settlement seriously until shortly before the hearing, in the hope that the Appellants would capitulate.

V. **SUBMISSIONS BY THE RESPONDENT**

[29] Counsel for the Respondent has submitted that, while the Appellants made an offer in January 2017 to settle these Appeals, the basis of the offer was that the Respondent was expected to concede all issues except the capital gains issues and that, for the capital gains issues, capital gains treatment would be allowed on real property sales, and income treatment would apply to the investment accounts. The Respondent has submitted that this was not an offer that was within the bounds of the Minister's jurisdiction to accept. The Respondent has also noted that the Respondent subsequently made a settlement offer which was within appropriate jurisdictional parameters, but which the Appellants did not accept.

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[14] Appellants' Submissions, *supra* note 11, p. 1.

[30] The Respondent has acknowledged that the CRA auditor made some mistakes, but those mistakes were innocent and inadvertent, and did not show incomplete, less-than-rigorous, sloppy or unfounded accounting practices or auditing work.

VI. **ANALYSIS AND APPLICATION OF PRINCIPLES**

A. Quantum

[31] Counsel for the Appellants has advised that his billings (net of HST) to his clients in respect of his legal services disputing the Reassessments were as follows:[15]

December 29, 2014	$4,453.04
December 8, 2015	2,467.90
December 30, 2016	5,476.60
December 22, 2017	10,492.52
December 27, 2018	18,832.31
Total:	$41,722.37

Hence, the solicitor-and-client costs for the audit, objection and appeal stages were $41,722.37. The Appellants have not requested solicitor-and-client costs.

B. Application of Rule 147(3.1)

[32] Neither Party has suggested that the settlement offer made by the Appellants on January 27, 2017 was an offer that satisfied the requirements of subsection 147(3.1) of the Rules. Accordingly, there is no basis for awarding substantial indemnity costs in accordance with subsection 147(3.1).

C. Appellants' Concerns about CRA's Work and Strategy

[33] As noted above, some of the errors made by the CRA in its audit were obvious, particularly those which failed to apply symmetrical treatment (such as making a foreign currency conversion in respect of liability amounts but not asset values, or treating a year-end Visa payment as reducing Mr. Duffy's liabilities but not the value of his assets). I do not view those inadvertent errors as indicative of

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[15] Appellants' Submissions, *supra* note 11, p. 4.

shoddy or sloppy work, but, given the obvious nature of those errors, they should have been conceded during the settlement negotiations.

[34] My comments in these Reasons should not be construed as me being harshly critical of the CRA or of counsel for the Respondent.[16] As noted above, the CRA's failure to recognize the Pelham property tax liability was likely due to the failure of Mr. and Mrs. Duffy to provide the requisite documentation to the CRA on a timely basis. Of the ten items in issue at the hearing, the CRA's position was upheld in respect of five of those items. I did not see any indication of the CRA or the Respondent having adopted a strategy of resisting the Appellants' Appeals in the hope that the Appellants would capitulate.[17]

D. Application of Rule 147(3)

[35] As noted above, subsection 147(3) of the Rules sets out various factors to be considered in exercising the Court's discretionary power to award costs. Those factors are considered below.

(1) Result of the Proceeding

[36] The Appellants succeeded in challenging sufficient aspects of the CRA's net worth analysis to such an extent that the Appellants demonstrated that there was no unreported income. However, as indicated above, the Appellants were not successful in substantiating every criticism that they had made in respect of the net worth analysis. In particular, the Appellants were not successful in respect of the issues identified above as Q-Trade Account – interest expense, income tax liability, Mexican expenditures, reimbursed employment expenses and potential rental

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16 In the Appellants' Submissions, *supra* note 11, p. 3, ¶(g), counsel for the Appellants, after expressing frustration concerning the Minister's reluctance to acknowledge the accounting errors or to make any concessions until the eve of the hearing, stated, "I should note that I do not blame [counsel for the Respondent], who has always been courteous and collegial in our dealings. I understand that he must act on the instructions he received from his client…. I felt that it was incumbent on his client to pay closer attention to their accounting errors."

17 Hoped-for capitulation by the Appellants may well have been part of the Respondent's strategy. However, if such was the case, the strategy was not readily apparent to me.

rebate. Nevertheless, one should not lose sight of the fact that the Appellants did succeed in overturning sufficient aspects of the net worth assessments so as to establish that they had not failed to fully report their income for 2012, which was the only year in issue during the actual hearing (the other years having been resolved by the Parties).

(2) Amounts in Issue

[37] Based on the pleadings, the aggregate amount of unreported income and disallowed expenses was approximately $541,000. As well, penalties were assessed in respect of the unreported income. By reason of the partial settlement prior to the hearing, when the hearing commenced, the aggregate amount challenged by 121ON was $27,237.90, and the aggregate amount challenged by each of Mr. and Mrs. Duffy was $13,618.90.

(3) Importance of the Issues

[38] While the issues in these Appeals were important to the Parties, particularly the Appellants, the resolution of those issues required a fact-intensive analysis of net worth assessments. The resolution of the issues in these Appeals will likely be of limited interest to the tax or business community or to the broader public as a whole. In other words, while the issues were personally important to the Parties, the issues were not necessarily publicly important.

(4) Written Settlement Offers

[39] In 2017, there was a written settlement offer and a written counteroffer, neither of which was accepted. In particular, by letter dated January 27, 2017, counsel for the Appellants sent a written settlement offer to counsel for the Respondent. The letter did not specifically identify itself as a settlement offer, but the letter was accompanied by a voluminous organized set of documents, which, according to counsel for the Appellants, refuted the Reassessments in all respects except "the issues relating to capital gains versus income."[18] With respect to that latter point, counsel for the Appellants proposed that capital gains treatment be allowed by the Respondent in respect of the real property sales, while the Appellants would accept income treatment in respect of the investment accounts.

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[18] Letter dated January 27, 2017, attached to the Appellants' Submissions, *supra* note 11, p. 2, fifth paragraph.

[40] By letter dated July 4, 2017, counsel for the Respondent made a counteroffer, the details of which need not be set out here (as they were quite lengthy). In his written submissions in respect of costs, counsel for the Respondent submitted that the Respondent was not in a position in 2017 "to accept the Appellants' settlement offer because it was not entirely supported by facts and law."[19]

[41] As noted above, a week before the hearing, the Respondent conceded that the statute-barred years should not have been reassessed. In negotiations that took place the day before the hearing commenced, most of the remaining issues were settled. The Respondent's final concession was made minutes before the hearing commenced.[20]

[42] This was not a situation where the Appellants had made an "all or nothing" settlement offer, although the offer set out in the letter dated January 27, 2017, from counsel for the Appellants, could be viewed as coming close to an "all or nothing" offer. I accept the comment by counsel for the Respondent that the Respondent was not free to accept that offer, but perhaps the CRA should have taken that offer as an impetus to review the details of the net worth assessment, which may have led to earlier concessions in respect of the statute-barred years and a discovery of the asymmetrical accounting treatment.[21]

[43] A week before the hearing commenced, the aggregate amount of income in dispute was approximately $541,000, but at the commencement of the hearing, the outstanding amounts still in issue had been reduced to $27,237.90 for 121ON and $13,618.90 for each of Mr. and Mrs. Duffy, with the corporate tax liability overlapping with the individual tax liabilities. Against that backdrop, more than once during the hearing, I found myself wondering why the Parties had not gone a little further in their negotiations and resolved all of the issues in their entirety, particularly when I saw that some of the issues in dispute related to asymmetrical accounting practices and other errors which the Respondent's witness admitted during her testimony were indeed erroneous, when I noted that counsel for the Respondent did not cross-examine Mr. Duffy whatsoever, and when I observed

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19 Written Submissions of the Respondent, June 19, 2019, p. 12, ¶21.

20 Appellant's Submissions, *supra* note 11, p. 3, ¶(f).

21 See *O'Dwyer v. The Queen*, 2014 TCC 90, ¶19.

that the Appellants, during the hearing, conceded the issue in respect of the potential rental rebate.

[44] I think that the following comment from the *Fellowes, McNeil* case is apropos:

> … I have proceeded on the basis that the award of party-and-party costs is a matter of the court's discretion….
>
> This discretion is exercised having regard to the following principles. First, the principle of indemnity is a paramount consideration. Secondly, *the courts must approach the matter on the basis that encourages settlement of all actions from the outset.* Thirdly, the court must discourage actions and defences which are frivolous. Fourthly, the court must discourage unnecessary steps in the litigation.[22] [*Emphasis added.*]

In a similar vein, and referencing *Fellowes, McNeil*, the Ontario Court of Appeal has stated the following:

> Traditionally the purpose of an award of costs within our "loser pay" system was to partially or, in some limited circumstances, wholly indemnify the winning party for the legal costs it incurred. However, costs have more recently come to be recognized as an important tool in the hands of the court to influence the way the parties conduct themselves and to prevent abuse of the court's process. Specifically, the three other recognized purposes of costs awards are *to encourage settlement*, to deter frivolous actions and defences[,] and to discourage unnecessary steps that unduly prolong the litigation.[23] [*Emphasis added.*]

(5) Volume of Work

[45] I do not consider the amount of work performed by counsel for either the Appellants or the Respondent as being greater than that which would be required in litigating any reassessment based on a net worth analysis. However, I note that counsel for the Appellants spent a considerable amount of time preparing to challenge the statute-barred taxation years at the hearing, although such

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22 *Fellowes, McNeil v. Kansa General International Insurance Co. Ltd.* (1997), 37 OR (3d) 464, at 467 (Ont. Ct. Gen. Div.). See also p. 472 of that decision.

23 *1465778 Ontario Inc. et al. v. 1122077 Ontario Ltd. et al.*, (2006) 82 OR (3d) 757, ¶26 (ONCA), as quoted in *ACSIS EHR (Electronic Health Record) Inc. v. The Queen*, 2016 TCC 50, ¶6.

preparation ultimately was not needed, as the Respondent conceded those taxation years a week before the hearing.

[46] I also take into consideration the expense, in the amount of $13,500, incurred by the Appellants in retaining an expert, even though, by reason of the concessions that were made and the issues that were settled before the hearing began, it was not necessary to call the expert to testify. It has been recognized that, in determining an award of costs, one of the factors that the Court may consider is the necessity of consulting with an expert, even though the expert is not ultimately called as a witness.[24]

(6) Complexity of the Issues

[47] These Appeals arose out of a net worth analysis. The issues were factual and not particularly complex.

(7) Conduct of the Parties Affecting the Duration of the Proceeding

[48] Both Parties are to be commended for the negotiations that occurred the day before the hearing and for the resolution of most of the issues before the hearing began. However, a nagging question that I have had since the opening of the hearing is why, if the Parties were able to resolve almost all of the issues in dispute, they could not have gone the last short distance and settled the Appeals in their entirety. I have not been given any specific indication as to whether one Party or the other was primarily responsible for the inability to settle all of the issues. However, given that some of the CRA's auditing errors resulted from asymmetrical accounting treatment and given that there was no cross-examination of Mr. Duffy to challenge the Appellants' position, it seems to me that the Respondent might possibly bear the greater responsibility for the inability to negotiate a complete settlement.

(8) Failure to Make Admissions

[49] I am not aware of any denial, neglect or refusal by either Party to admit anything that should have been admitted in the pleadings. As noted above, each Party made significant concessions, although I think that, in the settlement negotiations, the Respondent should have made additional concessions (as

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[24] *Repsol*, *supra* note 8, ¶13(e).

indicated above), and the Appellants should have conceded the issue relating to the potential rental rebate (which they conceded during the hearing).

(9) Improper, Vexatious, Unnecessary or Overly Cautious Steps

[50] I was not given any evidence or information to cause me to think that either Party engaged in improper, vexatious or unnecessary steps in the proceedings or took any step in the proceedings through negligence, mistake or excessive caution.

(10) Other Relevant Matters

[51] I am not aware of any other relevant matters or factors.

E. Tariff B

[52] As explained above, the jurisprudence has evolved to the point where it is no longer necessary for a successful litigant to show misconduct, malfeasance or undue delay on the part of the other litigant in order to receive an award of costs greater than that calculated in accordance with the Tariff. After considering the factors listed in subsection 147(3) of the Rules, particularly the result of the proceeding (i.e., the Appellants established that there was no unreported income) and the desirability of encouraging settlement at an early stage of the proceeding, I am of the view that this is not a situation where costs should be limited by the Tariff, although in making that statement, it should be noted that neither Party has given me any indication as to what the amount of costs would be if they were to be calculated in accordance with the Tariff.

F. Pre-Appeal Costs

[53] As noted in the table set out in paragraph 31 above, counsel for the Appellants billed his clients annually, over a five-year period, on December 29, 2014, December 8, 2015, December 30, 2016, December 22, 2017 and December 27, 2018 respectively. The Notices of Appeal were filed on May 2, 2016. Therefore, I assume that the invoices dated December 29, 2014 and December 8, 2015 related to services provided by counsel at the audit and objection stages and that the invoices dated December 30, 2016, December 22, 2017 and December 27, 2018 related to the drafting of the Notices of Appeal and the conduct of the Appeals.

[54] As noted above, absent exceptional circumstances, costs are generally not awarded in respect of expenditures incurred before the legal proceedings are commenced (which includes the drafting of the requisite notice or notices of appeal).[25] I am not aware of any exceptional circumstances with respect to these Appeals that would justify an award of costs in respect of legal services provided before the drafting of the Notices of Appeal and the commencement of the Appeals. Therefore, the legal fees and disbursements that I have considered are those which were billed in December 2016, 2017 and 2018, which totalled $34,801.43.

G. Partial Indemnity Costs

[55] Given that:

a) the Appellants succeeded in demonstrating that there was no unreported income,

b) the outcome of the Appeals was almost comparable to what would have been the outcome if the settlement offer in the letter of January 27, 2017 had been accepted,

c) the Respondent conceded the statute-barred years only a week before the hearing, and adhered, during the settlement negotiations the day before the hearing, to positions in respect of some issues that were based on asymmetrical accounting treatment and that were, during the hearing, acknowledged to be erroneous, with the result that the Appellants and their counsel spent additional time preparing for the hearing and addressing those positions during the hearing, and

d) significant expenses were incurred in retaining an expert (who, due to the settlement of many issues, ultimately was not required to testify),

it is my view that partial indemnity costs should be awarded. However, the factors listed above do not call for an award of substantial indemnity costs.

[56] As stated in subsection 147(3.5) of the Rules, substantial indemnity costs are 80% of the actual solicitor-client costs. In this case, the actual solicitor-client costs for legal services rendered in respect of the Appeals (but not the audits or

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[25] See paragraph 23 above and the cases cited in footnote 12 above.

objections) were $34,801.43. Therefore, substantial indemnity costs would be $27,841.14 (i.e., 80% of $34,801.43). As section 147(3.1) of the Rules does not apply, and as recognition should be given to the Respondent's willingness to concede the statute-barred years (albeit only a week before the hearing) and to negotiate and settle many (but not all) of the other issues shortly before the commencement of the hearing, I have decided to award partial indemnity costs in the amount of $18,000, which is equivalent to approximately 52% of solicitor-client costs or 65% of substantial indemnity costs. This is within the range stipulated in the *Zeller Estate* case.[26]

[57] In addition, I have decided to award costs in the amount of $7,000 in respect of the $13,500 expenditure (net of HST) paid by the Appellants for the preparation of an expert report.

VII. **CONCLUSION**

[58] For the reasons expressed above, costs in the aggregate amount of $25,000 (i.e., $18,000 + $7,000) are awarded in favour of the Appellants.

Signed at Ottawa, Canada, this 11th day of December 2020.

"Don R. Sommerfeldt"

Sommerfeldt J.

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[26] *Zeller Estate*, *supra* note 13, ¶9.

CITATION:	2020 TCC 135
COURT FILE NO.:	2016-1697(IT)G, 2016-1703(IT)G, 2016-1705(IT)G
STYLE OF CAUSE:	MICHAEL DUFFY, PAMELA DUFFY and 1218769 ONTARIO INC. AND HER MAJESTY THE QUEEN
REASONS FOR ORDER ON COSTS BY:	The Honourable Justice Don R. Sommerfeldt
DATE OF ORDER:	December 11, 2020

COUNSEL OF RECORD:

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