Docket: 2018-1216(GST)G

BETWEEN:

DAVILLE TRANSPORT INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion disposed of by written representations without hearing

Before: The Honourable Justice B. Russell

Appearances:

Counsel for the Appellant: Osborne G. Barnwell

Counsel for the Respondent: Sebastien Budd

ORDER

In accordance with the accompanying written reasons, it is ordered that:

a) the Appellant's motion for reconsideration of costs is granted, with total costs including disbursements of the underlying appeal hereby fixed at $8,110 (rather than the fixed amount of $4,000 awarded July 29, 2021);

b) the Appellant also will have its costs of this motion, fixed at $840; and

c) the Respondent is to promptly tender these two amounts of fixed costs.

Signed at Halifax, Canada, this 10th day of February 2022.

"B. Russell"

Russell J.

Citation: 2022 TCC 5
Date: 20220210
Docket: 2018-1216(GST)G

BETWEEN:

DAVILLE TRANSPORT INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Russell J.

[1] The Appellant, Daville Transport Inc. (DTI) has filed a motion, to be disposed of by written representations, for reconsideration of costs awarded per my July 29, 2021 judgment in the underlying appeal (2021 TCC 47). That judgment allowed DTI's appeal, with costs to DTI fixed at $4,000.

[2] The motion is brought per subsection 147(7) of the *Tax Court of Canada Rules (General Procedure)* (Rule(s)). Rule 147(7) allows a party to apply, "…to the Court to request…that the Court reconsider its award of costs."

[3] Primarily DTI contends that it should receive the benefit of Rule 147(3.1), which reads:

> 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. (underlining added)

[4] In other words, where an appellant made a settlement offer that was not accepted, and the appeal proceeds and ultimately the appellant obtains judgment on terms as or more favourable to the appellant than were the settlement offer terms, then the appellant is entitled to enhanced costs, called, "substantial indemnity costs".

[5] The term "substantial indemnity costs" in Rule 147(3.1) above is defined by Rule 147(3.5) which defines "substantial indemnity costs" as meaning 80% of solicitor and client costs. Solicitor and client costs are amounts charged a client by counsel for all essential services rendered in the course of counsel's litigation retainer.

[6] Such costs are substantially greater than "party and party costs", being the usual type of costs awarded, based on an established tariff of fees, typically provided in a court's rules of procedure. Party and party costs cover only a small percentage of costs on a solicitor and client basis.

[7] In its written representations DTI references the settlement offer it relies upon in claiming Rule 147(3.1) substantial indemnity costs. DTI counsel made the offer October 4, 2020 by email to respondent's counsel. DTI's "offer to settle" was that DTI would "consent to judgment to allow the amount of $15,000 of HST as exigible for the period 2014 – 2016". Nothing was said as to any legal theory underlying this offer.

[8] In an October 23, 2018 email, DTI counsel wrote to respondent's counsel, that:

> I will be in touch re the principled basis for the offer sent. Truth be told, I believe I took a percentage of what was seen as the HST on the Canadian amount of the HST for the period. However, I will take a look.

[9] The following day DTI counsel further emailed respondent's counsel, stating:

> I write further to my promise that I would communicate the rationale/principle underlying the offer to settle.
>
> The HST at issue is $118,300. Of this amount, approximately 70% relates to the USA purchases of gasoline by these unregistered truckers. As noted in the pleadings, there is no sales tax etc. on the US purchases. The remainder relates to gas purchases in Canada in which the gas card was used by these non-registrants.
>
> <u>The offer then is approximately 50% of the Canadian portion of the HST, which is about $15,000. The idea is to provide something substantive to CRA so that the case can be closed and if rejected to be in a position to secure higher costs for the litigation going forward.</u> (underlining added)

[10] The respondent Crown sees this offer as DTI having proposed:

> … that the HST assessed for fuel supplies made in Canada be reduced by an estimated 50% or $15,000 in order to resolve the appeal, but did not provide a legal or principled basis for the 50% estimate or the proposed $15,000 amount.[1]

[11] I too see it that way. The offer is a proposal that the parties arbitrarily split a round figure amount DTI identifies as the quantum of HST assessed respecting fuel supplies made in Canada. This is not, nor was there any suggestion that it was compatible with or otherwise reflective of provisions of the *Excise Tax Act*.

[12] As cited by the respondent Crown, in *CIBC World Markets Inc. v. R.*, 2012 FCA 3, the Federal Court of Appeal affirmed that the Minister of National Revenue can only assess tax consistent with his/her view of the underlying facts and law. At paragraphs 20 - 22 the Court stated:

> 20. …Can the Minister accept an offer of settlement that requires him to issue a reassessment that cannot be supported on the facts and the law? Put another way, does the Minister have the power to issue reassessments on the basis of compromise, regardless of the facts and the law before him?
>
> 21. I answer these questions in the negative.
>
> 22. …The Minister has a statutory duty to assess the amount of tax payable on the [facts] as he finds them in accordance with the law as he understands it…The Minister is obligated to assess - on the facts in accordance with the law and not to implement a compromise settlement. (underlining added)

[13] Here, DTI's settlement offer terms were arbitrary, lacking the required basis of facts in accordance with the law. This was simply a "let's split it down the middle" settlement offer.

[14] As DTI's arbitrary settlement offer was not based on facts in accordance with the law, consequently it could not be entertained by the respondent Crown. As such, this settlement offer was not within the scope of Rule 147(3.1).

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[1] Respondent's written representations, para. 19

[15] Accordingly, DTI's claim for entitlement to substantial indemnity costs per Rule 147(3.1) fails.

[16] Is there anything further to be contemplated in this motion for reconsideration of costs? Respondent Crown's counsel submits there is not, stating:

> The court's existing award $4,000 in costs is reasonable given the Appellant's mixed success at trial, the amount of tax at issue and the lack of valid settlement offers…and ought not to be disturbed.[2]

[17] However, upon my reconsideration of the costs awarded in the underlying appeal, I have come to the view that the $4,000 amount of costs awarded is somewhat on the lean side. I am prompted to this conclusion by DTI's bill of costs, filed in its motion record. The bill is based on this Court's "Tariff B – Amounts to be Allowed on Taxation of Party and Party Costs", at Schedule II of the Rules. The bill totals $4,720 (which I have confirmed is rightly calculated in reference to Tariff B's fee for service provisions), plus disbursements of $558 (in my view reasonable) for an overall total of $5,278.

[18] My judicial discretion as to costs does not require that I award costs on a tariff basis. Tariff B has not been updated in recent years. While DTI's success was mixed in this appeal, it did succeed with respect to a substantial portion of the total amount at issue.

[19] Consequently I think it appropriate in applying my discretion on reconsideration to start with the said $4,720 shown on the bill of costs, but increased by a factor of 1.6 as the tariff is not at all current, equaling $7,552. Adding the $558 for disbursements leaves $8,110 for costs.

[20] Finally, there also is the matter of costs for the motion itself. DTI's primary argument, seeking substantial indemnity costs per Rule 147(3.1), failed. DTI's bill of costs shows the substantial indemnity costs that it unsuccessfully sought totalled $17,775.

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[2] Ibid., para. 34

[21] Still, DTI has won a $4,110 increase in costs over the $4,000 granted July 29, 2021. Thus I will grant DTI costs of this motion.

[22] The Tariff B fee for services of counsel for a motion is $525. I will, as above, gross up that amount by a factor of 1.6, yielding the amount of $840 as costs to DTI on this motion.

[23] Accordingly an Order will go:

a) allowing the appellant's motion for reconsideration of costs of the underlying appeal, and consequently awarding total costs including disbursements fixed at $8,110 (rather than the $4,000 previously awarded); and

b) granting the appellant costs of this motion in the fixed amount of $840.

Signed at Halifax, Canada, this 10th day of February 2022.

"B. Russell"

Russell J.

CITATION:	2022 TCC 5
COURT FILE NO.:	2018-1216(GST)G
STYLE OF CAUSE:	DAVILLE TRANSPORT INC. AND THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 3 and 4, 2021
REASONS FOR ORDER BY:	The Honourable Justice B. Russell
DATE OF ORDER:	February 10, 2022

APPEARANCES:

Counsel for the Appellant:	Osborne G. Barnwell
Counsel for the Respondent:	Sebastien Budd

COUNSEL OF RECORD:

For the Appellant:

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Firm:	Barrister and Solicitor

For the Respondent:	François Daigle Deputy Attorney General of Canada Ottawa, Canada