Docket: 2005-1804(IT)G

BETWEEN:

JOLLY FARMER PRODUCTS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard by way of a telephone conference on November 5, 2008 from Ottawa, Ontario.

Before: The Honourable Justice Patrick Boyle

Participants:

Counsel for the Appellant: John D. Townsend

Counsel for the Respondent: Cecil S. Woon

ORDER

WHEREAS a motion made by counsel for the Appellant for an order fixing costs was heard on November 5, 2008;

AND UPON hearing submissions of the parties and receiving the parties' further written submissions;

The Appellant's motion is granted in part in accordance with the reasons herein.

Signed at Ottawa, Canada, this 23rd day of December 2008.

"Patrick Boyle"

Boyle, J.

Citation: 2008 TCC 693
Date: 20081223
Docket: 2005-1804(IT)G

BETWEEN:

JOLLY FARMER PRODUCTS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Boyle, J.

[1] The taxpayer has brought a motion requesting an order for costs in excess of the amount provided for in the tariff to the Tax Court Rules.

[2] The trial and its preliminary motion were heard and decided by the former Chief Justice of our Court. Chief Justice Bowman allowed the taxpayer's appeal (2008 DTC 4396) and awarded costs in favour of the taxpayer. The taxpayer had been entirely successful at trial. The trial lasted five days. The taxpayer called two experts and the Crown called one expert. Both the taxpayer and the Crown were represented by two counsel throughout the hearing.

[3] Chief Justice Bowman is a person with what even Voltaire would agree is an uncommon amount of common sense. It is clear from his reasons that he did not consider this a close case and was of the view that the issue involved did not warrant such a long trial – perhaps no trial at all. I believe it is also fair to say that his reasons fixed the blame for this squarely on the Respondent. Three paragraphs out of his reasons are of particular import:

> 13 . . . Here, I think the CRA has become fixated (counsel for the appellant used the word "mesmerized") on two things — the fact the employees are shareholders, and the fact that they profess and adhere to certain basic Christian beliefs reminiscent of the early Church. These facts are, in my view, of no significance.

> Once we get rid of these two red herrings and focus on the fact that the appellant provides its employees with living and other facilities, the provision of those facilities becomes a perfectly normal and ordinary cost of carrying on the appellant's business.
>
> 14 I think the Minister's approach to this problem results from a confusion between (or perhaps a melding of) two or more concepts. An individual cannot deduct in computing his or her income "personal or living expenses". The Minister seems to think, I gather, that the cost to an employer of providing to its employees living amenities (or the capital cost of property used for that purpose) falls equally within that prohibition. Moving on from this fallacious inarticulate premise the Minister then seeks to require the employer to show that its business decision to provide accommodation to its employees is commercially justifiable and is a better way of doing business than some other method. In this way the fallacy of the original premise is compounded and is exacerbated by the fact that the Minister, in some way that I cannot fathom, throws into the mix the fact that the employees are also shareholders and also have strong religious beliefs. Then, even after the employer, Jolly Farmer Products Inc., overwhelmingly demonstrates (unnecessarily in my view) that its business organization results in a resounding commercial success, the Minister still hangs on with the tenacity of grim death to his original error and argues that the appellant should have adopted a way of doing business that the Minister finds more palatable, even though it is less economic. *Mit der Dummheit kämpfen Götter selbst vergebens*.[1]
>
> . . .
>
> 24 This case is an excellent example of the CRA seeking to substitute its business judgment for that of the taxpayer. The alternatives suggested by the respondent would have made the operation far less profitable. The way in which the appellant chooses to carry on its highly successful commercial operation is a business decision and the Minister of National Revenue has no right to substitute his business judgment and advance other alternatives that are more palatable to him. (See for example *Gabco Limited v. M.N.R.*, 68 DTC 5210.)

[4] The taxpayer is asking for a fixed counsel fee in the amount of $97,750 along with the fees actually paid to its experts, as well as the photocopying disbursements paid to its counsel. The taxpayer's actual legal fees for the litigation were approximately $400,000. The counsel fee under the tariff for one senior counsel and one junior counsel is approximately $20,000.

[5] The Respondent takes the position that:

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[1] This brief German quote is from Friedrich von Schiller's *Maid of Orleans* and translates to: Against stupidity the very gods themselves struggle in vain.

(i) no amount beyond tariff is warranted;
(ii) the taxpayer should only get a fee for one counsel since the junior counsel did not lead any evidence or argue any part of the case;
(iii) the expert's fees should not be reimbursed by way of costs because they were unnecessary;
(iv) costs should be awarded for only three of the five days of trial because the evidence of the taxpayer's main witness included too much detail about the business history and operations of the corporate taxpayer, because the experts were unnecessary, and because a half-day was lost due to the taxpayer's witness scheduling problems; and
(v) the photocopying charges were excessive.

[6] It should be noted that the taxpayer is not making a request for costs on a solicitor/client basis. There was no suggestion that there has been any conduct on the part of the Respondent in the course of the trial which would warrant even considering such an exceptional order.

[7] The Court has full discretionary power over the awarding of costs. Rule 147(3) provides that in exercising its discretionary power, 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,
>
> (*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.

[8] The Court need not slavishly adhere to the tariff. However, the Court must exercise its discretion on proper principles, such as the considerations enumerated in Rule 147(3), and not capriciously. The mere fact that a case is novel, unique, complex, difficult, or involves a large sum of money is not reason for departing from the tariff: see *McGorman et al. v. HMQ*, 99 DTC 591, at paragraph 13 per Bowman J. as he then was. Nor is the mere fact that the party's actual legal fees greatly exceed the tariff amount reason to award costs in excess of tariff. In *Continental Bank of Canada et al. v. HMQ*, 94 DTC 1858, Bowman ACJ wrote:

> It is obvious that the amounts provided in the tariff were never intended to compensate a litigant fully for the legal expenses incurred in prosecuting an appeal. The fact that the amounts set out in the tariff appear to be inordinately low in relation to a party's actual costs is not a reason for increasing the costs awarded beyond those provided in the tariff. I do not think it is appropriate that every time a large and complex tax case comes before this court we should exercise our discretion to increase the costs awarded to an amount that is more commensurate with what the taxpayers' lawyers are likely to charge. It must have been obvious to the members of the Rules Committee who prepared the tariff that the party and party costs recoverable are small in relation to a litigant's actual costs. Many cases that come before this court are large and complex. Tax litigation is a complex and specialized area of the law and the drafters of our Rules must be taken to have known that.

Similarly, as stated by Justice Layden-Stevenson in *Aird v. Country Park Village Property (Mainland) Ltd.*, [2004] F.C.J. No. 1153 (QL):

> Costs should be neither punitive nor extravagant. It is a fundamental principle that an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party. . .

[9] With this summary of principles in mind, I will turn to the considerations relevant in this case.

I. <u>Settlement Offers</u>

[10] The taxpayer's first settlement offer in 2006 included a detailed twenty plus page statement of the legal position and analysis consistently taken by the taxpayer. The Respondent was from this point on fully aware of the taxpayer's case in a much more extensive manner than simply from a Notice of Appeal. At the time of this settlement offer, there were also about 70 shareholder/employee reassessments under appeal and this settlement offer only proposed to settle the taxpayer's appeal in this

case at the same time as settling the shareholder/employee appeals. For this reason, I do not think it is the type of settlement offer that would justify an increased costs award. It was not on terms at least as favourable to the Respondent as the trial outcome as this offer required the Crown to compromise its reassessments of the shareholder/employees.

[11] On the day of the Court ordered pre-hearing and settlement conference in 2007, the taxpayer's counsel delivered to the Crown a further settlement offer. By this time the shareholder/employees' appeals had already been resolved. Based upon my review of the settlement offer interpreted in a reasonable manner, it was at least as favourable to the Crown as its complete loss at trial. While the offer does refer to the shareholder/employee benefit aspects of the case, that issue continued to be relevant to the taxpayer/employer on a going forward basis even though the shareholder/employee tax appeals had been resolved. I do not see how that can be interpreted as making the settlement offer in this case contingent on the resolution of other matters. Indeed, it would appear from the reasons of Chief Justice Bowman that, as a practical matter, his findings similarly impact those issues for the taxpayer/employer. While the Crown's interest in upholding the integrity and principles of the *Income Tax Act* requires it to consider settlement offers differently than private parties, and requires it to think beyond the dollars directly involved, there does not appear to be any policy or consistency issue raised in this case. Chief Justice Bowman did not identify any in his reasons, nor did the Crown identify any on this motion.

[12] One troubling aspect of this 2007 settlement offer is the affidavit of a Department of Justice paralegal who states that the Crown appears to have no record of having received that written offer. I make the observation, without need for any finding, that the affidavit of the paralegal refers only to there being no record. It does not say that she informed herself of whether anyone recalled the offer. I am satisfied on a balance of probabilities that this offer was in fact delivered. The reason for this is that in his email several days later when counsel were trying to narrow the issues for trial, the taxpayer's counsel expressly referred to this settlement offer by date to the effect that it is unfortunate the Crown did not refer to it. In any event, if the settlement had not been received by the Crown, certainly this email put it on notice that such an offer had been made and the Crown should have searched to locate its copy or asked for a copy if none had been received or it had been misplaced. Parties should take seriously their obligations to consider settlement offers carefully or run the risk of costs if they are not more successful at trial.

[13] The Tax Court's Rule 147, unlike the rules in several other courts, does not say that if an unsuccessful party has not accepted a more favourable settlement offer, that party is responsible for substantial indemnity or solicitor/client costs from the date of the offer through to the end of the trial. However, in this case I am satisfied that some increase from tariff is warranted as a result of the Crown having not accepted the offer, either because they found its terms unacceptable or because they did not pursue obtaining a copy of it to review.

II. Was the trial unduly lengthened?

[14] It is clear from his reasons that the trial judge thought that the Respondent's position was unfounded. Indeed he uses the word fallacious on two occasions, stupid in his German exclamatory, and describes the Minister being fixated on an unfathomable position.

[15] Further, the Respondent's position on what are called the Religious Assumptions in the preliminary motion kept changing significantly throughout. Even though the trial judge found the taxpayer's evidence in defence of its shareholders' religious motivations for the business model adopted by it was unnecessary, it was clearly entirely reasonable for the taxpayer to have to address the issue in clear and detailed fashion in the appeal.

[16] The Religious Assumptions issue was not raised by the Respondent as part of the reassessment process. The Religious Assumptions were raised for the first time by the Crown in its Reply. The taxpayer's motion was to strike them on the ground they were irrelevant. The motion was hotly contested by the Crown. The motion's judge, Chief Justice Bowman, was not prepared to strike assumptions that were in fact made whether they were irrelevant or not, nor was he prepared to decide they were not relevant although he expressed considerable doubt: see *Jolly Farmer Products Inc. v. HMQ*, 2008 DTC 4396. Thereafter, on discovery of the Respondent's representative, the Respondent significantly downplayed, if not denied, that the Religious Assumptions influenced its position or were relevant to it. However, the Appeals Officer in his evidence at trial said that a reason, if not the reason, for the reassessments was the choice of the taxpayer's shareholders to live separate and apart from the community.

[17] It was the Respondent's shifting position on the Religions Assumptions from relevant to unimportant and back to decisive, especially when considered in light of the fact that they were ultimately irrelevant, together with their relevance having been strongly questioned by the Court in the motion to strike, that unnecessarily

lengthened the proceedings. The Respondent's approach clearly increased the burden on the taxpayer to meet the case against it and left the taxpayer with little choice but to put in the case it did. This included dealing with the Religious Assumptions aspects as well as the economic benefits aspects. This undoubtedly lengthened the trial and, in my opinion, also warrants some increase from tariff in setting costs.

III. Experts

[18] I do not accept that the evidence of the taxpayer's two experts was an unnecessary frill. The taxpayer had the onus to fully meet the case of the Respondent regardless of how weak the taxpayer thought it or the judge in the end found it to be. It should be noted the Respondent similarly called an expert to testify to the economic benefits of the taxpayer's chosen business model.

[19] The reassessments appealed from involved a significant amount of money relating to a core issue to the taxpayer's business. The outcome of the appealed reassessments would carry forward into its tax liability for future years as a practical matter and would apply to other expenses of the business.

[20] The evidence of the economic benefits of having the employees live on site was clearly put forward to reasonably respond to the Minister's position that the expenses of providing on-site accommodation to its employees were not laid out by the taxpayer to earn income.

[21] No reason was advanced on this motion as to why experts' fees, if they were to be the subject of the costs award, should not be fully reimbursed. The Crown retained its own expert and I will assume it was on relatively similar terms or I would have heard otherwise. Accordingly, the experts' fees of the taxpayer are to be fully reimbursed by the Respondent.

IV. Should a multiplier be applied to the tariff rates?

[22] The taxpayer's position on the motion was to ask for a fixed counsel fee equal to five times the tariff amount. There does not appear to be any precedent for taking this approach to the fixing of costs. Nor do I find it an attractive approach. I do not accept a multiple of five, nor any lesser multiple, as an appropriate exercise of my discretion in this case.

V. Junior Counsel Fee

[23] I see no basis for the Crown's position that a junior counsel fee should not be awarded because the junior counsel did not lead evidence or argue. He was present, gowned and assisting throughout. The Crown had two counsel. The Court routinely awards multiple counsel fees and our tariff contemplates it, even though it is always the case that only one counsel per party will be on their feet or talking at a time. The presence and contribution of both of the taxpayer's counsel are being considered in my fixing of costs in this matter.

VI. Witness Scheduling

[24] The scheduling of the taxpayer's witnesses meant that a half-day was lost when the Court adjourned for the afternoon. Under the tariff, this would not be an issue because it provides for an amount per day or part day. I agree with the Crown that, in fixing costs in excess of tariff, I need be mindful of this delay and the resulting undue lengthening by the successful party entitled to costs.

VII. Photocopying

[25] The Crown's position is that $11,000 for photocopying disbursements is excessive. Approximately 35,000 pages were copied. To those uninitiated in lengthy complex litigation this will sound like a lot. However, a week-long hearing with six witnesses, half of whom were experts, preceded by at least one contested motion, lengthy discoveries, productions and undertakings, a court ordered pre-hearing conference, and ending with written outlines of argument and books of authorities, in which copies are made for two counsel, the witness, the other side, the Court and the judge, is not a process that was designed to save the trees. Indeed, as I pointed out at the hearing, there was 18 inches of paper in front of me just on this motion. I am allowing the taxpayer its actual outsourced copying disbursements and $0.25 per page for all of its counsel's in-house photocopying except for that related to the motion in which the Respondent was awarded costs.

VIII. Conclusion

[26] There are perhaps some arguments and some cases that the Canada Revenue Agency just should not pursue. The Crown is not a private party. By reassessing a taxpayer and failing to resolve its objection, the Crown is forcing its citizen/taxpayers to take it to Court. If the Crown's position does not have a reasonable degree of sustainability, and is in fact entirely rejected, it is entirely appropriate that the Crown should be aware it is proceeding subject to the risk of a possibly increased award of costs against it if it is unsuccessful. The Crown is not a private party and tax litigation

is not a dispute like others between two Canadians. This is the government effectively pursuing one of its citizens. There will be many times when the Crown will lose cases in circumstances where prior to the hearing the Crown was not fully aware of the taxpayer's evidence or could not test its credibility, or could not fully understand the taxpayer's position. There will be times when the Crown unsuccessfully pursues new or novel arguments. None of those appear to have been the case here. The essential facts do not appear to have been in dispute and there had been lengthy discovery of the taxpayer. As mentioned, the taxpayer's first settlement letter included a detailed analysis of the taxpayer's legal position.

[27] I am mindful of the fact that one of the reasons advanced for this Court's relatively modest tariff is the prospect that individual Canadians pursuing their tax appeal who find themselves unsuccessful should not in the ordinary course find themselves subject to large costs awards as well at the same time. There is concern that if I fix costs in excess of tariff in this case, symmetry may require that in other cases where the Crown is successful, losing taxpayers should be similarly exposed to risks of increased costs awards beyond the tariff. I am confident that our Court's judges can exercise their discretion appropriately and their discretion will not be fettered by my decision in this case. Indeed, it may be that any risk that the threat of costs deters individual Canadians from pursuing tax appeals where they perceive injustice can be addressed by judges taking a separate approach to awards of costs in excess of tariff in appropriate circumstances where the parties are all well represented.

[28] In these circumstances, I am fixing counsel fee at $42,500, plus the full amount of experts' fees of the taxpayer, plus $9,328.69 in respect of photocopying disbursements.

[29] This fixed counsel fee is inclusive of the taxpayer's entitlement to costs on this motion.

Signed at Ottawa, Canada, this 23rd day of December 2008.

"Patrick Boyle"

Boyle, J.

CITATION:	2008 TCC 693
COURT FILE NO.:	2005-1804(IT)G
STYLE OF CAUSE:	JOLLY FARMER PRODUCTS INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 5, 2008
REASONS FOR ORDER BY:	The Honourable Justice Patrick Boyle
DATE OF ORDER:	December 23, 2008

PARTICIPANTS:

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