Docket: 2005-1566(IT)G

BETWEEN:

RICHARD BIBBY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Applications determined pursuant to *Rule* 69 of the
Tax Court of Canada Rules (General Procedure)

By: The Honourable Justice E.A.Bowie

Participants:

Counsel for the Appellant:	Howard J. Alpert
Counsel for the Respondent:	H. Annette Evans

ORDER

UPON applications brought by the appellant and by the respondent for reconsideration of the award of costs herein;

AND UPON having read the material filed by both parties;

IT IS HEREBY ORDERED that both applications are dismissed, and that the parties each bear their own costs of these applications.

Signed at Ottawa, Canada, this 3rd day of March 2010.

"E.A.Bowie"

Bowie J.

Citation: 2010 TCC 111
Date: 20100303
Docket: 2005-1566(IT)G

BETWEEN:

RICHARD BIBBY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Bowie J.

[1] I gave judgment in this matter on November 13, 2009[1] allowing the appeal, with costs. The appeal was from a reassessment of the appellant's income tax for the 2002 taxation year. By that reassessment the Minister of National Revenue had added three amounts to the income declared by the appellant:

Unreported benefit under subsection 15(1)	$224,000
Unreported benefit under subsection 15(2)	29,767
Unreported benefit under subsection 80.4(2)	4,783
Total	$258,550

[2] The appellant did not contest the latter two items at trial, although he did not formally concede them. The evidence and argument at trial was all directed to whether the appellant was required to include $224,000 in his income for the year as a benefit conferred on him by Rabco Marketing Ltd., a family owned and operated company, or only the $27,000 that he had in fact declared. The appellant was successful, and by the judgment $224,000 was deleted from his income for the 2002 taxation year, and he was awarded his costs to be taxed.

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[1] 2009 TCC 588.

[3] On December 14, 2009, counsel for the respondent filed a document styled APPLICATION FOR RECONSIDERATION OF COSTS AWARD, together with an affidavit exhibiting the appellant's pre-hearing conference brief. The application is brought to invoke *Rule* 147(7) of the *Tax Court of Canada Rules (General Procedure)*:

> 147(7) Any party may,
>
> (*a*) within thirty days after the party has knowledge of the judgment, or
>
> (*b*) after the Court has reached a conclusion as to the judgment to be pronounced, at the time of the return of the motion for judgment,
>
> whether or not the judgment included any direction concerning costs, apply to the Court to request that directions be given to the taxing officer respecting any matter referred to in this section or in sections 148 to 152 or that the Court reconsider its award of costs.

The respondent argues that the appellant ought not to be awarded costs, because his success at trial did not result from the evidence and the arguments that he advanced during the trial, but from an argument that was first raised in a written submission made, at my invitation, after the conclusion of the trial. Briefly, the appellant's position at trial was that the company and the appellant could agree, more than a year after the 2002 yearend, to reduce the amount of Mr. Bibby's compensation for that year, although it had been recorded in the company's books and reflected in its financial statements at the 2002 yearend. The appellant's success in the appeal resulted entirely from the fact that the Minister of National Revenue had assessed him under subsection 15(1) of the *Income Tax Act*, although the amount in question was clearly not paid to him as a shareholder benefit, but as compensation, and therefore was taxable under section 6 rather than section 15. Section 6 was not pleaded by the respondent.

[4] The appellant responded to this submission on January 21, 2010 by a document styled APPELLANT'S REPLY TO APPLICATION FOR RECONSIDERATION OF COSTS AWARD AND APPLICATION FOR RECONSIDERATION OF COSTS AWARD. By this document, the appellant sought to have the costs award varied to provide for a counsel fee for the three-day hearing in the amount of $24,000. This amount is arrived at on the basis of $4,800 per day for the three-day hearing and $9,600 for the preparation of written submissions after the trial, rather than the $6,000 that the

tariff would allow. This submission is grounded in the fact that the appellant made an offer to settle prior to the trial on the basis that the appellant's 2002 income would be reassessed on the basis of shareholder benefits totaling $14,240 and the penalties deleted, which was not accepted by the respondent, and that the result was more favourable to the appellant than the offer. The appellant submits that this was a reasonable settlement offer and that its rejection, together with the appellant's substantial success in the result, militate in favour of the increased costs he seeks.

[5] The respondent takes issue with the appellant's right to apply under *Rule* 147(7) after the expiry of the 30-day period that the *Rule* permits. She also opposes the application on the merits, arguing that it was not unreasonable for the respondent to reject the settlement offer made two days before trial, because no rationale was offered by which the proposed settlement could be justified.

[6] I am not persuaded by either party that I should vary the judgment by which the appellant is entitled to recover costs taxed in accordance with the tariff. It is true that the appellant was late in fixing upon the winning argument, and that as a result a good deal of time was wasted at trial on evidence and argument that had little merit, and no influence on the result. Nevertheless, the appellant did succeed in the end, and after considering all the factors referred to in *Rule* 147(1) I see no reason to deprive him of the costs that normally follow the event.

[7] Nor do I see any reason to fix costs on a basis more generous than the tariff. The appellant's application is brought outside the time permitted by *Rule* 147(7). There has been no application to extend the time, although *Rule* 12 does provide for it. Nor does the material filed assert any facts that would justify an extension. I can only assume that the appellant had no intention to apply under *Rule* 147(7) until he received the respondent's application on the 30th day following the judgment, and that he then followed the adage the best defence is a good offence.

[8] Leaving aside the question of the time limit, I do not see any merit in the appellant's application. There was nothing complex about the case, nor did it require the length of time that it took. There being no rationale for the proposed settlement, I do not consider that the respondent acted unreasonably in rejecting it.

[9] Both applications will be dismissed, and the parties will each bear their own costs of the applications. It is evident from the material filed that counsel disagree as to whether this is a Class B or C proceeding. That is a matter that, if necessary, will be dealt with by the taxing officer.

[10] Before leaving this matter, however, I should point out that the *Rules* are quite specific as to the way in which applications, including applications under *Rule* 147(7) should be brought. *Rule* 65 provides:

> 65 All interlocutory or other applications shall be made by a notice of motion. (Form 65)

Rule 69 provides a procedure by which a party can request that a motion be disposed of on the basis of written representations, without appearance by the parties. In the present case, neither party seems to have been aware of these *Rule*s.

Signed at Ottawa, Canada, this 3rd day of March, 2010.

"E.A. Bowie"

Bowie J.

CITATION:	2010 TCC 111
COURT FILE NO.:	2005-1566(IT)G
STYLE OF CAUSE:	RICHARD BIBBY and HER MAJESTY THE QUEEN
REASONS FOR ORDER BY:	The Honourable Justice E.A.Bowie
DATE OF ORDER:	March 3, 2010

PARTICIPANTS:

Counsel for the Appellant:	Howard J. Alpert
Counsel for the Respondent:	H. Annette Evans

COUNSEL OF RECORD:

For the Appellant:

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For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada