

Citation: 2010TCC522
Date: 20101006
Docket: 2007-761(IT)G
2007-762(GST)G

BETWEEN:

FADI BITAR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Additional submissions on applicable taxes with respect to
disbursements heard by telephone conference call on April 7, 2010
By: The Honourable E.P. Rossiter, Associate Chief Justice

Participants:

Counsel for the Appellant:

Gerard Tompkins, Q.C.

Counsel for the Respondent:

Peter Leslie and Krista Clark

ORDER AND REASONS FOR ORDER

[1] In this matter, the Respondent had, mid-trial, consented to allowing the appeals and both parties spoke to the issue of costs. On December 2, 2009 a decision was rendered by the Court on the issue of costs which was followed by an Amended Judgment of January 21, 2010, which Judgment provided that “costs are awarded to the Appellant in the sum of \$20,000 plus applicable taxes and reasonable disbursements, which shall include non-legal professional fees, expert witnesses, travel, photocopy, witness fees and other ancillary disbursements.” Subsequent to the issuance of the Amended Judgment, there was a dispute between the Appellant’s counsel and the Respondent’s counsel as to what are the reasonable disbursements of the Appellant.

[2] The Court, by Order of March 11, 2010, after submissions of counsel on February 26, 2010 ordered:

It is further ordered that the said disbursements shall be comprised of the following sums in respect of disbursements incurred:

1. Scott D. Campbell Inc. - \$31,103.00;
2. Carolyn MacGregor - \$75.00 per day or part thereof;
3. Stephen Shaw, C.A. - \$678.00;
4. Tax Court of Canada filing fees - \$800;
5. Drake Recording Services Ltd. - \$1,042.20; and
6. Other legal disbursements - \$1,530.00

together with applicable taxes, if any, with interest thereon from December 2, 2009 through to the date of payment at the prime lending rate of the Bank of Nova Scotia plus two percent, payable not later than March 19, 2010.

[3] Notwithstanding the Orders of January 21, 2010 and March 11, 2010, the Appellant and the Respondent still could not come to an agreement with respect to what was to be paid in terms of costs by the Respondent to the Appellant. Counsel appeared again before me on April 7, 2010. At that time, the Respondent took the position that the Respondent does not pay HST on lump sum awards because it does not fall under the definition of “taxable supply” and it is a Court awarded sum, not a payment of legal fees and further, that the “other legal disbursements - \$1,530.00 was not specific enough for HST to be applicable.

[4] It is my view that the Order as granted by the Court was specific and clear but for some reason the Respondent refused to pay HST on the \$20,000 costs awarded to the Appellant plus HST on the \$1,500 awarded to the Appellant as costs of the taxation. Rule 147 of the *Tax Court of Canada Rules (General Procedure)* gives the authority to the Court to determine the amount of costs of all parties involved in any proceeding, the allocation of those costs and the person required to pay them. Costs may be awarded to or against the Crown. Also, the Court may fix all or part of the costs with or without reference to Schedule II, Tariff B and further, may award a lump sum in lieu of or in addition to any taxed costs.

[5] The Respondent argues that the Appellant had been awarded a lump sum. I know that in many cases in the past, the Tax Court of Canada has awarded lump sum costs as one final figure inclusive of all taxes and fees. In *Hunter v. The Queen*, 2003 D.T.C. 51 Justice Bell awarded one set of costs inclusive of fees and disbursements of \$22,000. Similarly, Chief Justice Bowman in *Scavuzzo v. The Queen*, 2006 TCC

90, awarded the Appellants costs in the amount of \$275,000 which represented approximately 50 percent of the Appellants' total costs inclusive of GST. Also, in *Zeller Estate v. The Queen*, 2009 TCC 135, Justice Campbell chose to award a lump sum of \$226,189.51 comprised \$44,350. for service of counsel based on Tariff B, \$2,217.50 in GST payable on that amount and \$179,622.01 in disbursements. All of these cases demonstrate that a lump sum award of costs can be inclusive of all taxes and fees. However, there is nothing that precludes the Court from awarding a sum but also requiring taxes to be paid on that sum. Costs are awarded to a party who is generally successful in the litigation in an attempt for them to recover some of the legal fees which they had incurred in the course of carrying out the litigation, HST and is payable on legal fees. Section 147(4) of the *Tax Court of Canada Rules (General Procedure)* gives the court significant discretion as it states:

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.

[6] I do not know how the Court could be more specific in its award of costs when stating it the Order of January 21, 2010:

Costs are awarded to the Appellant in the sum of \$20,000 plus applicable taxes and reasonable disbursements, which shall include non-legal professional fees, expert witnesses, travel, photocopy, witness fees and other ancillary disbursements.

[7] This Order is clearly within the jurisdiction of the Tax Court of Canada and is clear, specific and unequivocal with respect to the intent of the Court in its award to the Appellant. The Appellant was awarded costs in the amount of \$20,000 plus applicable taxes and reasonable disbursements. The Court did not award \$20,000 inclusive of taxes nor did the Court award \$20,000 without reference to any taxes. It awarded \$20,000 plus applicable taxes. A lump sum award was not made in this particular case in terms of costs. A specific award of costs was made, plus applicable taxes and these costs were awarded to the Appellant for legal counsel.

[8] It is nonsensical to the Court for the Appellant to be deprived of any HST costs because the award was, according to the Respondent, a "lump sum" rather than a tariff rate given that the Order specifically included the words "plus applicable taxes". The Court specifically turned its mind to the issue of taxes when the original Order was granted. The amount awarded in terms of \$20,000 plus the \$1,500 costs awarded for the taxation of costs relates to the legal fees incurred by the Appellant in

prosecuting this appeal. On both of these amounts there will be HST payable and as such, the Respondent is liable to pay the amounts awarded plus applicable taxes.

[9] With respect to the sum of \$1,530 awarded for “other legal disbursements”, the argument by the Respondent was that the disbursements were not specific enough. I believe the Respondent’s position on this point is correct and I do not believe HST would be payable on this amount despite the wording of the Order which included the phrase applicable taxes because taxes are not applicable unless the expenditures in the cost award are specified and these disbursements were not specified. This is consistent with 157(4) of the *Rules* as it allows sales taxes to be included in costs awarded by the Court if it is established that “such taxes have been paid”. In this case, the \$1,530 was requested by the Appellant in its submissions. The amount was not broken down into specifics; it was not established that any sales taxes have been paid or are payable. The amount may comprise fees or charges that are either non-taxable or are taxed on the final amount.

[10] Based on the review of the submissions of the Appellant and the Respondent, the Court concludes that taxes are payable on the \$20,000 and the \$1,500 for the reasons stated and HST should not be payable on the \$1,530 disbursements without further specifics on what the disbursements are, because the Appellant must establish if sales taxes have been paid or are payable on those disbursements.

Signed at Ottawa, Canada this 6th day of October, 2010.

“E.P. Rossiter”

Rossiter A.C.J.

CITATION: 2010TCC522

COURT FILE NO.: 2007-761(IT)G and 2007-762(GST)G

STYLE OF CAUSE: FADI BITAR v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: April 7, 2010

REASONS FOR ORDER BY: The Honourable Associate Chief Justice E.P. Rossiter

DATE OF REASONS FOR ORDER: October 6, 2010

APPEARANCES:

Counsel for the Appellant: Gerard M. Tompkins, Q.C.
Counsel for the Respondent: Peter Leslie and Krista Clark

COUNSEL OF RECORD:

For the :

Name: Gerard M. Tompkins, Q.C.

Firm: Patterson Law
Halifax, Nova Scotia

For the Respondent: Myles J. Kirvan
Deputy Attorney General of Canada
Ottawa, Canada