Docket: 2006-3312(IT)G

BETWEEN:

ROY WALSH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Before: The Honourable Justice G. A. Sheridan
(At the direction of the Court, the Appellant's motion was dealt with by written submissions.)

Counsel for the Appellant:	D. Andrew Rouse
Counsel for the Respondent:	David Besler

ORDER AS TO COSTS

Upon a Motion by the Appellant for an Order pursuant to section 147 of the *Tax Court of Canada Rules (General Procedure)* ("*Rules*") for directions increasing the costs payable to the Appellant to an amount in excess of the tariff provided in the *Rules*;

And having read the submissions of the parties, including the affidavit of D. Andrew Rouse;

In accordance with the attached Reasons for Order, the Appellant's motion is granted and costs are awarded to the Appellant in a lump sum amount equal to 80 per cent of the fees charged to him after the March 30, 2007 offer of settlement, together with disbursements.

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

"G. A. Sheridan"

Sheridan J.

Citation: 2010TCC125
Date: 20100303
Docket: 2006-3312(IT)G

BETWEEN:

ROY WALSH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER AS TO COSTS

Sheridan, J.

[1] The Appellant, Roy Walsh, is seeking an order pursuant to section 147 of the *Tax Court of Canada Rules (General Procedure)* for costs payable to the Appellant to an amount in excess of the tariff provided in the *Rules*; specifically, an order for costs equal to 80 per cent of the fees charged to him after the offer of settlement was made, together with disbursements.

Background

[2] The Minister of National Revenue assessed the Appellant for source deductions not remitted by Jardine Security Ltd. on the basis that he was a director of that corporation within the two-year period prior to the assessment against him. The Appellant filed an appeal of the assessment on November 16, 2006. The Appellant sent two letters to the Respondent, dated March 30, 2007[1] and June 11, 2007[2], respectively, the first asking the Respondent to allow the appeal; the latter, proposing a formal offer of settlement. Both were rejected by the Respondent[3]. At no time did

[1] Exhibit "C" to the Affidavit of D. Andrew Rouse.

[2] Exhibit "E" to the Affidavit of D. Andrew Rouse.

[3] Exhibits "D" and "F" to the Affidavit of D. Andrew Rouse.

the Respondent make an offer of settlement to the Appellant. The appeal was heard on May 1, 2009. By Judgment dated November 4, 2009, I allowed the appeal and vacated the assessment on the basis that:

1. the Minister has not proven that the execution of the Writ of Seizure and Sale was returned unsatisfied as required by paragraph 227.1(2)(*a*); and

2. the Appellant ceased to be a director of Jardine Security Ltd. on May 31, 2002 and is, therefore, relieved of liability under subsection 227.1(4) of the *Act*.

Criteria for the Awarding of Costs in Excess of the tariff

[3] Rule 147(3) sets out the criteria for determining whether the Court ought to exercise its discretionary powers under Rule 147(1):

> 147. (3) In exercising its discretionary power pursuant to subsection (1) 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.

[4] In the absence of special circumstances, costs are to be awarded in accordance with the tariff[4]. In the present case, I am satisfied that an award of costs in excess of the tariff is fully justified.

Paragraphs 147(3)(a) and (e): the result of the proceeding; and the volume of work.

[4] *McGorman v. The Queen*, [1999] 3 C.T.C. 2024 at paragraph 13. (T.C.C.).

[5] In my view, these two factors are neutral. The fact that the Appellant was wholly successful in his appeal does not, in itself, justify awarding additional costs. Similarly, the amount of work involved in this appeal was not more than would have been required in one involving similar issues.

Paragraphs 147(3)(b), (c) and (f): the amounts in issue; the importance of the issues; and the complexity of the issues.

[6] The Respondent argued that the Appellant ought not to be granted costs in excess of the tariff as the amount in issue was not large in comparison to many other assessments issued by the Minister. Nor was there anything novel or complex in the issues raised: the principles for determining a director's liability for tax payable by a defaulting corporation are well-established; the disposition of the appeal will depend on the facts of each case.

[7] While I agree with the Respondent's characterization of these factors, I do not accept that it justifies refusing the Appellant's request for additional costs. I agree with counsel for the Appellant that, in all the circumstances of this case, the relatively small amount involved and straight-forward nature of the appeal ought to have motivated the Minister to give at least some consideration to the Appellant's offer to settle. With the exception of the Minister's having failed to prove the fact of his compliance with paragraph 227.1(2)(*a*) of the *Income Tax Act*, the essential facts upon which the assessment was based and the Judgment ultimately turned were known to, or capable of being confirmed by the Minister long before the matter went to trial. Had the Canada Revenue Agency officials paid more attention to their own policy directives on directors' liability, the information gathered during their inquiries and the corroborative materials furnished, at their request, by the Appellant, litigation might well have proven unnecessary.

[8] I also accept the submission of counsel for the Appellant that this case falls in the same category as *Langille v. R.*[5], a decision of Boyle, J. in which he awarded costs in excess of the tariff where the Minister had rejected an offer of settlement:

> 47. …
>
> > "The taxpayer's settlement offer was rejected by the Respondent on April 30th. The Respondent's rejection letter does not set out any reasons for

[5] 2009TCC540 at paragraph 9. (T.C.C.).

> not accepting the offer beyond restating its position on the facts and law concerning the dairy farm winding up issue. For example, the Respondent does not say that it needs the complete facts to come out under oath and be tested in cross-examination, etc., nor that there are any facts that remain uncertain. The Crown had already examined the taxpayer for discovery under oath and the taxpayer was the only witness who testified to the facts of his dairy farming operation. **Similarly, there has been no suggestion that the CRA was concerned that a significant legal principle was involved that would affect other taxpayers' appeals of the CRA's administrative practices.**" (Emphasis added)

Paragraph 147(3)(d): any offer of settlement made in writing.

[9] The Respondent's position is that the Appellant's letters of March 30, 2007 and June 11, 2007 were not "offers of settlement in writing or otherwise"; rather, according to paragraph 7 of the Statement of Facts of the Written Submissions of the Respondent, they were "two letters asking the Respondent to concede the appeal and pay costs to the Appellant". As such, they contained no "element of compromise", a prerequisite to a valid offer of settlement. In support of this proposition, counsel for the Respondent cited paragraph 10 of *Canadian Olympic Association v. Olymel, Société en commandite*[6].

[10] In my respectful view, that is an overstatement of the principles arising from *Canadian Olympic Association.* It is readily apparent from the opening words of paragraph 10 that Lemieux, J. went to some pains to limit the scope of his decision:

> 10 At least for the purposes of the cost award before me which does not arise in an action but in the context of an appeal from the Registrar of Trade-marks awarding Olymel two trade-mark registrations, I am of the view that the ingredient of compromise (or incentive to accept) is an essential element of an offer to settle. Other considerations may apply when considering an offer to settle liquidated or unliquidated damages in an action. [Emphasis added.]

[11] Further, in the preceding paragraphs, the Court considered two Ontario Court of Appeal decisions in which the "ingredient of compromise" was, according to the Ontario Rules, merely a factor to be considered rather than an essential element of a legitimate offer to settle. Given the Respondent's reliance on *Canadian Olympic Association*, it is perhaps instructive to set out in full the relevant passages qualifying the decision ultimately reached by Lemieux, J.:

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[6] [2000] F.C.J. No. 1725 (QL). (F.C.T.D.).

4 On September 29, 1997, Olymel's solicitor wrote to the solicitors to COA the following letter:

> On behalf of our client, Olymel, Société en Commandite, we hereby confirm our client's offer to settle both these Appeals on condition that the Appellant discontinue these two Appeals on the basis that the two decisions of the Opposition Tribunal be sustained whereby the Appellant [sic] two oppositions are rejected with costs payable to the Respondent/Applicant. This offer is open until the Hearing of this matter or unless revoked earlier by Olymel, Société en Commandite.
>
> We reserve the Respondent's right to refer to their Offer to Settle when dealing with costs.

5 Counsel for COA says Olymel's September 29, 1997 offer is not an offer to settle within the meaning of the Rules because that offer contains no element of compromise or alternatively it is vague and uncertain and not capable of acceptance. Moreover, in the further alternative, COA says that the words "unless otherwise ordered by the Court" in Rule 420 empower the Court to order something less than double costs.

6 The question whether an offer to settle must contain an element of compromise was considered by the Ontario Court of Appeal dealing with a somewhat analogous provision under the Ontario Rules of Civil Procedure in the cases of *Data General (Canada) Ltd. v. Molnar Systems Group Inc. et al*. (1991), 6 O.R. (3d) 409 and recently in *Walker Estate et al. v. York Finch General Hospital et al.*, 169 D.L.R. (4th) 689. Those two cases stand for the proposition that, under the Ontario Rules, an element of compromise is not an essential feature of an offer to settle but its absence can be a relevant factor to be taken into account in ordering otherwise under the words "unless the Court orders otherwise" under Ontario Rule 49.

7 Madam Justice Reed, in *Apotex Inc. v. Syntex Pharmaceuticals International Ltd. et al.*, [1999] 2 C.P.R.(4th) 368, did not specifically deal with the issue of whether an element of compromise was an integral part of an offer to settle but seems to assume that it was.

8 In *Apotex, supra,* Apotex, as plaintiff, had offered to settle an action for a declaration of non-infringement and patent invalidity on the basis it would discontinue the action on a without costs basis, and the defendants would acknowledge that Apotex's formulation of the tablets was non-infringing and would consent to the Minister issuing Apotex its notice of compliance.

9 At page 376 of the reported case, Madam Justice Reed said this at paragraph 17:

> Also, a compromise is present in the offer. The plaintiff's formulation would have been acknowledged as non-infringing, but the attack on the patent's validity would have been discontinued. A disallowance of the action would have left the defendants' patent unchallenged. As counsel for the plaintiff notes, there was also room for a counter offer, the defendants could have offered to licence the plaintiff.
> [Emphasis added.]

[12] It was against this backdrop that Lemieux, J. then considered the merits of the Canadian Olympic Association's request for costs in excess of the tariff. As can be seen from the passage below, in reaching its ultimate decision, the Court was influenced by more than the lack of an "element of compromise":

> 11 The purpose of the offer to settle rule, as pointed out by Morden A.C.J.O. in *Data General*, *supra*, is to encourage the termination of litigation by agreement of the parties -- more speedily and less expensively than by judgment of the Court at the end of a trial. He added the impetus to settle is a mechanism which enables a plaintiff to make a serious offer respecting his or her estimate of the value of the claim which will require the defendant to give early and careful consideration to the merits of the case.
>
> 12 As argued by counsel for COA, Olymel's offer contained no element of compromise although it was made after Olymel had filed its respondent's memorandum of fact and law which, in my view, was not so persuasive and convincing as to render COA's continuation of the appeal without merit. In the circumstances, it was a request that COA capitulate an arguable appeal. Olymel's offer did not, in my view, advance the purposes of the offer to settle provision of the Rules.
>
> 13 Without an element of compromise in analogous situations, an offer to settle could simply become a very easy mechanism for a respondent to obtain double costs and clearly, such a device is not within the intent of the Rules. [Emphasis added.]

[13] In my view, the present case is not analogous to the circumstances in *Canadian Olympic Association*. Firstly, given the Appellant's background and the financial and personal hardships he faced prior to his offers to settle, it is unlikely his offers were part of a sophisticated maneuver for increased costs. His case is also distinguishable from *Canadian Olympic Association* in other important ways. There, the primary parties were on an equal footing, an element clearly lacking in the present matter. Further, the matter in dispute, trademark registration, was by its very nature more amenable to a certain degree of give-and-take between the parties, more conducive to the notion of compromise. In the context of the present appeal, it cannot be said that the Appellant's offers to settle were merely "… a request … to capitulate

an arguable appeal". I agree with counsel for the Appellant that because the appeal hinged on whether, as a question of fact, the Appellant was a director at the relevant time, there was significantly less room for compromise in an offer of settlement. By rejecting the Appellant's offers without a counter-proposal (a possibility mentioned by Reed, J. in *Apotex*, *supra*) or, at the very least, further discussion, the Respondent seems to have been of the same view. Notwithstanding the kind of information available to him at that point, the Minister opted to take his chances. Finally, unlike the offer in *Canadian Olympic Association*, the Appellant's offers to settle were made well before trial. While brief, the Appellant's letters of March 30, 2007 and June 11, 2007, in their wording and the supporting documents attached, clearly signalled the Appellant's intention to seek an extra-judicial resolution of the matter. Whether through indifference or by design, the Respondent chose instead, to risk riding out the (relatively small) storm of the Appellant's appeal. Having done so, he must now accept the consequences.

Paragraphs 147(3)(g), (h) and (i): the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; the denial or the neglect or refusal of any party to admit anything that should have been admitted; and whether any stage of the proceedings was improper, vexatious or unnecessary; or taken through negligence, mistake or excessive caution.

[14] Subject to the general concerns set out above, the Respondent's conduct does not come within the ambit of these criteria. The Respondent's conduct did not otherwise unnecessarily lengthen the proceeding; nor was it on par with the behaviour of officials criticized by Bowman, C.J. in *Scavuzzo v. R.*, [2006] 2 C.T.C. 2429, (T.C.C.).

Paragraph 147(3)(j): any other matter relevant to the question of costs.

[15] In respect of this criterion, I can do no better than to quote a passage from *Jolly Farmer Products Inc. v. The Queen*[7] in which Boyle, J. provides an eloquent reminder of the unique context of tax appeals, the inherent imbalance of power between the parties, and the role of costs in ensuring that, in administering its statutory duties, the Crown does not overstep its bounds:

> 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

[7] [2009] 3 C.T.C. 2148. (T.C.C.).

> 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.

[16] While the proceedings in the present case were not as complicated as in *Jolly Farmer Products Inc.*, the above principles are nonetheless applicable. The Appellant made his position clear from the outset, providing supporting documentation and the corroborative evidence of his accountant. The same material was offered in support of the Appellant's offers to settle. Availing himself of his not insignificant statutory powers, the Minister made his own investigations during the audit and objection stage. Discoveries were conducted. At trial, no challenge was made to the Appellant's or the accountant's credibility; no surprising new facts were unearthed; no novel arguments unveiled. In these circumstances, had the Minister been even a little more attentive to the Appellant's file, in general, and to his appeal, in particular, much of the proceeding could well have been avoided.

Conclusion

[17] For the reasons set out above, the Appellant's motion is granted; costs are awarded to the Appellant in a lump sum amount equal to 80 per cent of the fees charged to him after the March 30, 2007 offer of settlement, together with disbursements.

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

"G. A. Sheridan"

Sheridan J.

CITATION:	2010TCC125
COURT FILE NO.:	2006-3312(IT)G
STYLE OF CAUSE:	ROY WALSH AND HER MAJESTY THE QUEEN
REASONS FOR ORDER AS TO COSTS BY:	The Honourable Justice G. A. Sheridan
DATE OF ORDER:	March 3, 2010

Counsel for the Appellant:	D. Andrew Rouse
Counsel for the Respondent:	David Besler

COUNSEL OF RECORD:

For the Appellant:

Name:	D. Andrew Rouse
Firm:	Mockler Peters Oley Rouse Fredericton, New Brunswick

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