

Docket: 2009-215(IT)G

BETWEEN:

NEIL MACCALLUM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Counsel for the Appellant: D. Andrew Rouse  
Counsel for the Respondent: Stan W. McDonald

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**ORDER**

In accordance with the attached Reasons, it is ordered that the Appellant is entitled to costs in excess of the tariff for the period after the offer to settle was made. The Appellant is awarded normal tariff costs for the period up to July 30, 2010 and a lump sum amount of \$16,500 for the time period from July 30, 2010. This amount includes an award of costs for this motion.

Signed at Ottawa, Canada, this 22<sup>nd</sup> day of September 2011.

“V.A. Miller”

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V.A. Miller J.

Citation: 2011TCC446  
Date: 20110922  
Docket: 2009-215(IT)G

BETWEEN:

NEIL MACCALLUM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR ORDER**

V.A. Miller J.

[1] The Appellant has brought a motion for an order pursuant to section 147 of the *Tax Court of Canada Rules (General Procedure)*, (the “*Rules*”), for costs in excess of the tariff from the date that he made an offer of settlement to the Respondent. The Appellant has relied on Practice Note 18 and the proposed amendments to section 147 of the *Rules*.

[2] This appeal was heard June 13, 2011. On June 22, 2011, Reasons for Judgment were issued which allowed the appeal with costs. At that time, I was not aware that the Appellant had sent an offer to settle to the Respondent and that he had also sent a copy of this offer to the Registrar of the Court in a sealed envelope. The Appellant filed the present motion with the Court on July 21, 2011.

#### **Background**

[3] The Appellant appealed the reassessment of his 2003, 2004 and 2005 taxation years. In his Notice of Appeal, he raised four issues. They were:

- a) Whether the reassessments were made beyond the normal reassessment period;

- b) Whether the Appellant was entitled to a business investment loss in the 2003 taxation year;
- c) Whether the Minister of National Revenue (the “Minister”) correctly calculated the Appellant’s personal use and standby charges with respect to a vehicle owned by the corporation;
- d) Whether the Appellant was entitled to a reduction in the shareholder benefit calculated by the Minister.

[4] By letter dated June 2, 2010, the Appellant offered to settle this appeal on the basis that the Respondent would allow the business investment loss and the Appellant would discontinue his appeal of the remaining three issues. The Appellant also presented a fact scenario in his letter which he felt supported the offer to settle. This offer was refused, with reasons, on July 7, 2010.

[5] By letter dated July 30, 2010, the Appellant again made an offer to settle to the Respondent. He also sent a sealed copy of that offer to the Registrar of this Court. By letter dated August 10, 2010, the Respondent again refused the Appellant’s offer to settle.

[6] In the offer to settle dated July 30, 2010, the Appellant again asked that the business investment loss be allowed and that the other issues be dismissed.

[7] By letter dated November 12, 2010, the Appellant withdrew three of the issues raised in his appeal so that the only issue litigated at the hearing of this appeal was whether the Appellant was entitled to an allowable business investment loss of \$56,016 in his 2003 taxation year.

[8] The Respondent has opposed this motion on the basis that the Appellant’s success at Court was as a result of an argument not made by the Appellant at the time of the offer of settlement and not reasonably anticipated by the Respondent at the time the offer to settle was rejected.

[9] I note that the second offer to settle from the Appellant did not give any argument or facts in an attempt to persuade the Respondent to settle. The offer was succinct; it reads:

The Appellant offers to settle his appeal as follows:

- 1) The Appellant is entitled to an allowable business investments loss of \$56,016.00 for the 2003 taxation year;

- 2) The interest expenses of \$7,220.00 for the 2004 taxation year and \$6,028.00 for the 2005 taxation year be allowed in full;
- 3) The Appellant is entitled to no further relief.

The interest expenses referred to in the offer to settle were assessed amounts which related to the ABIL for the Appellant's 2004 and 2005 taxation.

[10] Although the Respondent rejected this last offer to settle on August 10, 2010, the Appellant's last offer to settle did not have an expiry date and it was never withdrawn. The Appellant's success at Court was primarily based on facts known by the Minister and admitted by the Respondent in the Joint Statement of Facts.

[11] The Appellant has relied on sections of the *Rules* which are still at the proposal stage. However, section 147 of the *Rules* gives the Court a broad discretionary power in determining an award of costs. The Court can consider an offer of settlement made in writing; and, any other matter relevant to the question of costs. In accordance with subsection 147(4), the Court may award a lump sum with respect to costs.

[12] In this case, the Appellant received a judgment that was as favourable as the terms of the offer to settle. Actually, it was identical to the offer to settle. It is clear that if the Respondent had accepted the offer, both parties' costs would have been greatly reduced.

[13] In the circumstances, I conclude that the Appellant is entitled to costs in excess of the tariff for the period after the offer to settle was made. The Appellant is awarded normal tariff costs for the period up to July 30, 2010. I award a lump sum amount of \$16,500 for the time period from July 30, 2010. This amount includes an award of costs for this motion.

Signed at Ottawa, Canada, this 22<sup>nd</sup> day of September 2011.

“V.A. Miller”

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V.A. Miller J.

CITATION: 2011TCC446

COURT FILE NO.: 2009-215(IT)G

STYLE OF CAUSE: NEIL MACCALLUM  
AND THE QUEEN

PLACE OF HEARING: Motion by written submissions

DATE OF FILING: July 21, 2011

REASONS FOR ORDER BY: The Honourable Justice Valerie Miller

DATE OF ORDER: September 22, 2011

APPEARANCES:

Counsel for the Appellant: D. Andrew Rouse  
Counsel for the Respondent: Stan W. McDonald

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