Docket: 2009-3904(GST)G

BETWEEN:

SURREY CITY CENTRE MALL LTD.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on April 8, 2013 at Vancouver, British Columbia

Before: The Honourable Justice Valerie Miller

Appearances:

Counsel for the Appellant:	Joel Nitikman
Counsel for the Respondent:	Bruce Senkpiel

ORDER

Applicant's motion for an extension of time to seek increased costs with respect to its appeal is dismissed and costs of this motion is awarded to the Respondent.

The Applicant is entitled to its costs in the appeal in accordance with the tariff.

Signed at Toronto, Ontario, this 7th day of May 2013.

"V.A. Miller"

V.A. Miller J.

Citation: 2013TCC148
Date: 201305XX
Docket: 2009-3904(GST)G

BETWEEN:

SURREY CITY CENTRE MALL LTD.,

Applicant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

V.A. Miller J.

[1] This is a motion by the Applicant for an extension of time to seek increased costs in the amount of $75,000 with respect to a judgment which allowed its appeal. The Applicant also requests costs of this motion. The ground relied on is that counsel for the Applicant did not learn that no appeal would be filed in this matter until after the 30 day period allowed for an application for increased costs.

[2] The appeal in this matter involved an assessment against the Applicant for $2,688,785 of GST plus interest and late-filing penalties. The issues in the appeal were (i) whether the amount of $41.1 million paid by the Technical University of British Columbia ("Tech BC") to The Insurance Corporation of British Columbia ("ICBC") was constructively paid to the Applicant (Appellant), or whether the Applicant's debt was reduced within the meaning of subsection 182(1) of the *Excise Tax Act ("ETA")*; and, (ii) whether Tech BC made the payment as agent for the Province and therefore Crown immunity applied to it.

[3] The trial was heard by Justice Hershfield over a period of three days. He decided that the Applicant's debt was reduced within the meaning of subsection 182(1); but, that the Applicant enjoyed the same immunity from taxation as the Province. He allowed the appeal with costs to the Applicant and issued judgment on October 2, 2012. The judgment was emailed to counsel for the Applicant on October 2, 2012.

[4] The time within which a taxpayer may apply to the Court to request increased cost is 30 days after he has knowledge of the judgment: Subsection 147(7) of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*"). Likewise, an appeal from a judgment of the Tax Court must be made to the Federal Court of Appeal within 30 days of the judgment. In the circumstances of this motion, both appeal periods expired on November 1, 2012. The Applicant filed this motion on November 28, 2012 – 27 days late.

[5] The factors to consider in granting an extension of time are: a continuing intention to take proceedings within the prescribed time limits, the existence of an arguable case, the cause and actual length of the delay and whether there was prejudice caused by the delay: *Rosen v. R.*, [2000] 2 C.T.C. 422 (FCA); *Tomas v. R.*, 2007 FCA 86.

[6] The Applicant's reason for its delay was that its counsel was waiting to see if the Respondent was going to appeal this matter to the Federal Court of Appeal. In the affidavit filed in support of this motion, the affiant states that counsel "did not want to apply for costs before the matter was finally resolved. So far as he is aware, there would be no prejudice to the Respondent if the Court granted an extension of time to file this Motion".

[7] It is my view that the reason given for the delay is an irrelevant consideration and an insufficient reason to merit an extension of time: *Maytag Corp. v. Whirlpool Corp.*, 2001 FCA 250. The time limit given in subsection 147(7) of the *Rules* applies without regard to whether an appeal has been made from the judgment. The matter before the Tax Court was finalized by the judgment on October 2, 2012.

[8] Because there was nothing in the materials submitted to the Court which spoke to the Applicant's intention to make an application for increased costs within the 30 day time limit, I asked counsel about this factor. His response was as follows:

> JUSTICE: Don't I also have to look at whether or not during the 30-day period, the applicant can show me evidence that it was intending to file a motion with respect to the costs beyond the tariff?
>
> MR. NIKITMAN: Well, the rules don't specifically say that. I mean, that's certainly a factor.
>
> JUSTICE: Hmm, but the case law says that.
>
> MR. NIKITMAN: No, and I was going to say, that's certainly a factor to take into account. I can tell Your Honour the common practice among counsel is not to file for an extended time until after you find out if there's going to be an appeal filed.

> And if there is an appeal filed, you don't argue about costs until after that appeal is over. And sometimes it goes to the Supreme Court of Canada and then you don't file your motion of costs until after the Supreme Court of Canada decides it. So often there is a long, long delay until counsel -- until you actually know the ultimate result of the case. I mean, that is the common practice among counsel.

[9] It may be a common practice among some counsel; but, it is not a practice condoned by this Court. Such a practice is totally disrespectful to the Court and its *Rules*.

[10] In *Maytag*, counsel also made the argument that the time for a motion for increased costs is after all appeal routes have been exhausted. This is the time that the final liability for costs has been determined. I adopt the comments made by Sharlow J.A. in response to this argument:

> I am unpersuaded by this argument. The drafters of Rule 403 would have been well aware of the exigencies of litigation, and particularly of the possibility that in any case an appeal might result in a reversal of an order for costs. Yet that knowledge did not deter them from imposing the 30 day limit in Rule 403(1)(a), and did not lead them to substitute a rule that would permit a motion for directions as to costs after the determination of any and all appeals. From this I infer that more weight was placed on the value of timely and certain determination of matters of costs than on the possibility of wasted effort due to appeals.

[11] Later in his submissions, counsel for the Applicant stated that the Applicant did not intend to bring a motion for costs until after it learned whether there was going to be an appeal of the judgment in this matter. According to the affidavit filed on behalf of the Applicant, Mr. Nitikman did not telephone counsel for the Respondent to inquire about an appeal until after the 30 day time limit had expired. I conclude that the Applicant did not have a continuing intention to make an application pursuant to subsection 147(7) of the *Rules*.

[12] Counsel for the Respondent stated that it would not be prejudiced if the extension were granted. However, this is only one factor which I must consider.

[13] In support of its position for increased costs, counsel for the Applicant argued that the amount at issue was large; the tax, interest and penalty were $4.7 million. The issue was important and the decision is a "leading judgment" that has been noted in Australia and commented on by the GST scholar David Sherman.

[14] It is my view that the Applicant has not established that it has an arguable case. Its arguments in support of increased costs were not convincing. That the amount in issue was large is not enough to justify an award of costs in excess of the tariff. The

issue involved the interpretation of subsection 182(1) of the *ETA*. This provision of the *ETA* had been dealt with in two prior decisions of this Court. One of those decisions was from an appeal under the informal procedure. The hearing of the appeal before Justice Hershfield lasted three days with only one witness being examined. The exhibits consisted of 74 documents. That David Sherman commented on the judgment does not make it a "test case". Mr. Sherman writes a review on all GST cases. The case analysis written by the Australian barrister noted that there was "no ready comparison" to subsection 182 in the Australian GST Act. I infer he found the decision interesting.

[15] I have concluded that in the circumstances of this matter, the Applicant would not have been entitled to increased costs even if the application had been filed in time.

[16] Although this motion was filed only 27 days beyond the 30 day time limit, the Applicant has not shown that there were extenuating circumstances that would justify an extension of time for filing an application for increased costs in the appeal.

[17] The motion is dismissed with cost to the Respondent. The Applicant is entitled to its costs in the appeal in accordance with the tariff.

Signed at Toronto, Ontario, this 7th day of May 2013.

"V.A. Miller"

V.A. Miller J.

CITATION:	2013TCC148
COURT FILE NO.:	2009-3904(GST)G
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PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	April 8, 2013
REASONS FOR ORDER BY:	The Honourable Justice Valerie Miller
DATE OF ORDER:	May 7, 2013

APPEARANCES:

Counsel for the Appellant:	Joel Nitikman
Counsel for the Respondent:	Bruce Senkpiel

COUNSEL OF RECORD:

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