

Docket: 2016-3232(GST)G

BETWEEN:

1378055 ONTARIO LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Before: The Honourable Justice Don R. Sommerfeldt

ORDER ON COSTS

The Appellant is awarded costs in the amount of \$4,000, as per the attached Reasons for Order on Costs.

Signed at Ottawa, Canada, this 9th day of December 2020.

“Don R. Sommerfeldt”

Sommerfeldt J.

Citation: 2020 TCC 133
Date: December 9, 2020
Docket: 2016-3232(GST)G

BETWEEN:

1378055 ONTARIO LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER ON COSTS

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to the award of costs in respect of these Appeals.

II. BACKGROUND

[2] On July 16, 2019, I granted a Judgment allowing these Appeals and referring the reassessments that were the subject of these Appeals back to the Minister of National Revenue (the “Minister”) for reconsideration and reassessment on the basis that 1378055 Ontario Limited (“137ON”) was entitled to a portion of the input tax credits (“ITCs”) that it had claimed for certain reporting periods in 2013, 2014 and 2015. The general factual finding underlying the Judgment was that:

- a) 25% of the services provided by Deborah Foley (“Deborah”) to 137ON pertained to 137ON’s commercial activities and 75% of her services pertained to 137ON’s residential rental activities;
- b) 75% of the services provided by Mark Foley (“Mark”) to 137ON pertained to 137ON’s commercial activities and 25% of his services pertained to 137ON’s residential rental activities;

- c) 75% of the premises and related “office package” services provided by Lanmark Management Limited (“Lanmark”) to 137ON in 2013 and 2015 pertained to 137ON’s commercial activities and 25% of those services pertained to 137ON’s residential rental activities; and
- d) 100% of the development-property search services provided by Lanmark to 137ON in 2013 and 2015 pertained to 137ON’s commercial activities.

Notably, I determined that no ITCs were available to 137ON in respect of services provided to it by Cole Foley (“Cole”) or in respect of services provided to 137ON by Lanmark in 2014, as the invoices submitted in respect of such services did not contain all of the information required by subsection 169(4) of the *Excise Tax Act* and section 3 of the *Input Tax Credit Information (GST/HST) Regulations*.

[3] In the costs submissions provided to the Court by counsel for 137ON,¹ he indicated that on April 29, 2018 he had sent a written offer of settlement to counsel for the Crown that was very similar to the result obtained in the Judgment, at least insofar as the percentage allocations were concerned. However, as the settlement offer contemplated that ITCs would be available in respect of the services provided by Cole and the services provided by Lanmark in 2014, the Judgment was slightly less favourable to 137ON than the settlement offer. Counsel for 137ON has suggested that 137ON was substantially successful in obtaining the proposed settlement amount, and has submitted that costs in an amount equal to double the Tariff amount should be awarded. Counsel for 137ON has advised the Court that costs calculated in accordance with the Tariff would be \$3,635.

[4] Counsel for the Crown has submitted that each Party should bear its own costs (which was my initial unconsidered inclination when granting the Judgment and issuing the reasons therefor), or alternatively, costs should be awarded in accordance with the Tariff (rather than double the Tariff).

III. ANALYSIS

A. Principles

¹ Costs Submissions of the Appellant, dated September 10, 2019 and filed September 12, 2019, p. 1, ¶2-3.

[5] Subsections 147(1) and (3) of the *Tax Court of Canada Rules (General Procedure)* (the “Rules”) confirm that the Court has discretion in determining the amount of costs to be awarded. Subsection 147(3.1) of the Rules states that, unless otherwise ordered by the Court, if an appellant makes a settlement offer and obtains a judgment as favourable as or more favourable than the terms of that offer, the appellant is entitled to party and party costs to the date of service of the offer and to substantial indemnity costs after that date. While the Judgment came close to the settlement offer of April 29, 2018, the Judgment was less favourable than the offer, such that subsection 147(3.1) does not apply here. Therefore, it is necessary to consider the various factors listed in subsection 147(3) of the Rules.

[6] Subsection 147(3) of the Rules states that, in exercising its discretionary power under subsection 147(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 [of,] 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,
- (i.1) [n/a, as no expert witnesses were called]; and
- (j) any other matter relevant to the question of costs.

B. Application of Rule 147(3)

[7] The factors listed in subsection 147(3) of the Rules are discussed below.

(1) Result of the Proceeding

[8] The particulars of the decision or result in this matter are stated above. As indicated in paragraph 80 of the Reasons for Judgment, success was divided. Some of the claimed ITCs were allowed. Others were not.

(2) Amounts in Issue

[9] The total ITCs claimed were in the amount of \$65,137.07. The ITCs allowed were in the amount of \$37,830, which represents approximately 58% of the amount claimed.

(3) Importance of Issues

[10] The issues were factual in nature and, while important to 137ON, were not of national importance, nor were they of importance to the tax community in general.

(4) Written Settlement Offers

[11] 137ON made three written settlement offers, each of which was rejected by the Crown. As indicated above, the offer dated April 29, 2018 (which was actually the second offer) was only slightly more favourable to 137ON than was the Judgment. According to the cost submissions provided to the Court by counsel for the Crown, this offer equated to ITCs in the amount of \$41,047.50.²

(5) Volume of Work

[12] The Appeals were heard at a one-day hearing, followed by written submissions and a post-hearing case management conference. In my view, the volume of work in respect of these Appeals was not out of the ordinary.

(6) Complexity of the Issues

[13] The issues that were the subject of these Appeals were neither simple nor complex. The resolution of the issues required an analysis of the invoices to support the claimed ITCs and a determination of the appropriate allocation of the

² Respondent's Submissions Re Costs, dated and filed October 4, 2019, p. 4, ¶14.d.ii.

services represented by those invoices between 137ON's commercial activities and its residential rental activities.

(7) Conduct of the Parties Affecting the Duration of the Proceeding

[14] I am not aware of any conduct of either Party that tended to shorten the duration of the proceeding. The inadvertent oversight by counsel for the Appellant in compiling the Appellant's book of documents, which resulted in the omission of the invoices for 2014, did lengthen the proceeding somewhat, as written submissions and a post-hearing case management conference were necessitated.

(8) Denial or Refusal to Make Admissions

[15] This factor was not relevant here.

(9) Improper, Vexatious, Unnecessary or Overly Cautious Steps

[16] This factor was not relevant here.

(10) Expert Evidence

[17] No expert witness was called by either Party.

(11) Other Relevant Matters

[18] I am troubled that none of the invoices issued by Mark, Deborah, Cole or Lanmark to 137ON in 2013, 2014 or 2015 contained any allocation of the subject services between the commercial activities and the residential rental activities of 137ON. It was only after being reassessed, and in an attempt to settle the Appeals, that 137ON acknowledged that some of those services related to residential rental activities and therefore did not qualify for ITCs.

C. Reconsideration

[19] Having considered the submissions made by both Parties, and having reconsidered my previous inclination, I have changed my mind. I am now inclined to make an award of costs. As 137ON achieved partial success, and given that it endeavored to settle these Appeals on a basis that was not unreasonable (the settlement offer most favourable to the Crown was only \$3,217.50 (i.e., \$41,047.50

– \$37,830.00) more than the amount of the ITCs upheld in the Judgment), I am of the view that costs should be awarded to 137ON. However, rather than awarding costs equal to the Tariff amount (as suggested by counsel for the Crown) or equal to double the Tariff amount (as requested by counsel for 137ON), by reason of the factors discussed above, particularly in paragraphs 8, 9, 11, 14 and 18, I am awarding costs in the amount of \$4,000.

IV. **CONCLUSION**

[20] As stated in the preceding paragraph, costs in the amount of \$4,000 are awarded to 137ON.

Signed at Ottawa, Canada, this 9th day of December 2020.

“Don R. Sommerfeldt”

Sommerfeldt J.

CITATION: 2020 TCC 133

COURT FILE NO.: 2016-3232(GST)G

STYLE OF CAUSE: 1378055 ONTARIO LIMITED AND HER
MAJESTY THE QUEEN

REASONS FOR ORDER ON COSTS BY: The Honourable Justice Don R.
Sommerfeldt

DATE OF ORDER: December 9, 2020

COUNSEL OF RECORD:

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