Cost Orders and Test Cases? - Sas Ansari

Author : admin

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Mariano v The Queen, 2016 TCC 161

Sas Ansari

The Crown was completely successful against taxpayers' appeals of the CRA's reassessment involving a charitable donation scheme. Justice Pizzitelli for the Tax Court of Canada awarded costs against the taxpayers, *pro rata* to the total Charitable Tax Credits claimed by each. The Court felt that the circumstances justified a claim for costs well in excess of the Tariff costs claimed by the Crown.

The taxpayers argued alternatively that (i) as a test case, each party should bear their own costs, (ii) that the promoter of the scheme be held liable for costs, (iii) costs be allocated amongst all taxpayers (whether appellants or not) who were involved in the Scheme, (iv) the costs do not reflect the appellants' reasonable expectation of liability, and (v) the quantum of the fee should be reduced irrespective of the reasonable expectation of the appellants.

Analysis

The Court referred to Rule 147 of the *Tax Court of Canada Rules (General Procedure)*, that governs cost awards and grants the TCC complete discretion in determining the quantum and allocation of costs as well as the factors to consider. In this case, the Court found that the following factors were pertinent:

- the complete success of the Respondent;
- a high level of complexity and a large volume of work;
- the Appellants' refusal to admit various facts;
- the reasonableness of the expert witness;
- the case being a lead case;
- the Appellants' declining written settlement offers; and
- the complexity of the donation program which made the case lengthy.

As with the decision in *Otterson v The Queen*, 2014 TCC 362, the Court felt it inappropriate to draw a 'straight line between the amount in issue and the actual amount of a cost award' (para 23).

Specifically, in regards to lead or test cases, the Court referred to the decision in *Velcro Canada Inc. v The Queen*, 2012 TCC 273, and rule 147(3)(j) which allows the Court to consider any other matter relevant to the question of costs (paras 25-26). Generally, the successful party is entitled to costs at Tariff absent special circumstances dictating otherwise. Cost awards are not to be extravagant, but rather compensatory and contributory - *Martin v The Queen*, 2014 TCC 50. This is not an exact science, but rather the court's determination of an appropriate contribution toward the winner's solicitor-client costs - *Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc.,* 2002 FCA 417 (see also *R v Ciarniello*, 81 OR (3d) 561 (Ont.C.A.); *Cherubini Metal Works Ltd. v Nova Scotia (A.G.)*, 2011 NSCA 43).

In this case, the Appellants were chosen among 16,000 taxpayers involved in the donation scheme in the years in question, and more in other years. The taxpayer's felt that theirs was a test case that would potentially dispose of thousands of other appeals - lead appellants would be unwilling to bring such cases if they are held liable for the full cost of test cases (para 31).

The court disagreed. This cases did not involve a "serious statutory interpretation issues [or] large public policy elements; but dealt with factual issues in the context of what I would consider well-established law on both donative intent and trust law" (para 33) - *Law Society of British Columbia v Mangat,* [1997] BCJ No. 2694. Even if a decision does not bind others, it may still be of public interest, including because they involve public recognition of past wrongs - *Vennell v Barnado's*, 73 OR (3d) 13. *Vennell* defined a test case in these terms (para 25):

> …A test case, as I understand it, ordinarily refers to a proceeding that will determine the issues that will arise in other cases that are pending or, at least, contemplated. Most commonly, I think, a party to a test case will also be involved in the other cases and will have agreed to accept the decision in the test case for the purposes of them. That has, for example, happened where, instead of proceeding to a trial of common issues under the CPA, an individual action has been commenced as a test case that will bind the defendant for the purposes of the claims of other members of a class in which the individual plaintiff is included.

Under Rule 146.1, lead appellants success or failure does not bind other taxpayers unless they agree to be bound nor does it bind the Minister against other taxpayers (para 36). Although a decision may be of precedential value, it is no reason to have the Crown bear the costs of an appeal that ends up saving it costs (para 38) - *Brown v The Queen*, [2002] TCJ No. 204. A case with precedential value entitles the successful party an award beyond, but nor much beyond, Tariff (para 39) - *Teelucksingh v The Queen*, 2011 TCC 253. Additionally, in *Brown*, at para 20, the TCC stated:

> …I cannot agree. This was not a test case. Simply because a provision of the Act is considered by a Court for the first time and may affect other taxpayers does not colour that appeal with the character of a test case. The normal income tax appeal-which this appeal was-is not a matter of public policy (as in Lachine General Hospital Corp. v. A.G. of Quebec) or touch on constitutional principles and in the public interest (as in Singh v. the Queen). It is simply a dispute between a taxpayer and the Crown as to whether the taxpayer was properly assessed tax. The principle purpose of these appeals was to settle a dispute between the parties, not necessarily to settle a point of law….

Finally, with respect to the reasonable expectation of liability of the Appellants, the Court agreed that where the costs are unreasonable or not within the unsuccessful party's reasonable expectation they may be reduced by the Court (parar 45) - *Balasundaram v Alex Irvine Motors Ltd.* [2012] OJ No. 6323. However, no attack was made by the Appellants on the quantum of legal fees claimed by the Respondent making an analysis of reasonableness not feasible.

[The court went on to analyze the reasonableness of the costs and discursements]

Sas Ansari, BSc BEd PC JD LLM PhD (exp) CPA In-Depth Tax 1, 2 &3

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