Federal Court of Appeal | Cour d'appel fédérale

Date: 20120110

Docket: A-370-10

Citation: 2012 FCA 3

CORAM: **SHARLOW J.A.**
LAYDEN-STEVENSON J.A.
STRATAS J.A.

BETWEEN:

CIBC WORLD MARKETS INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 10, 2012.

REASONS FOR ORDER BY: STRATAS J.A.

CONCURRED IN BY: SHARLOW J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR ORDER

STRATAS J.A.

A. Introduction

[1] The appellant, CIBC World Markets, has moved for an order under Rule 403 directing the assessment officer to award it a higher-than-normal level of costs for its successful appeal in this Court (2011 FCA 270) and for the proceedings in the Tax Court of Canada (2010 TCC 460).

[2] CIBC World Markets relies upon an offer of settlement it sent to the respondent Minister on June 30, 2009, a time well before the proceedings in the Tax Court and this Court. Under the offer, the Minister would issue a reassessment allowing CIBC World Markets to receive 90 per cent of the input tax credits it claimed in its GST return. The Minister did not accept the offer.

[3] CIBC World Markets' offer had no expiry date. It left its offer on the table, ready for acceptance, right through to the judgment of this Court.

[4] CIBC World Markets says that because of this Court's judgment, CIBC World Markets will receive 100% of the input tax credits it claimed in its GST return. As a result, CIBC World Markets asks us to issue a direction to the assessment officer to award it costs on the following basis:

- For the period up to and including the date of the offer of settlement, costs at a normal level, *i.e.*, costs in accordance with Tariff B to the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, plus disbursements and GST/HST.

- For the period after the date of the offer of settlement through to the date of judgment in this Court, costs equal to 80 per cent of solicitor-and-client costs, plus disbursements and GST/HST. That level of costs is specified by the Tax Court's Practice Notes 17 and 18.

[5] I would dismiss CIBC World Markets' motion, for the reasons set out below.

B. Analysis

(1) The need to reassert the offer of settlement after the Tax Court rendered its decision

[6] At the outset, a fatal objection exists against CIBC World Markets' request for higher-than-normal costs in this Court. An offer of settlement made before the decision at first instance does not affect the award of costs on appeal, unless the offer is reasserted while the appeal is pending: *WIC TV Amalco Inc. v. ITV Technologies Inc.*, 2005 FCA 253, citing *Century Services Inc. v. ZI Corp.*, 1998 ABCA 403 and *Douglas Hamilton Design Inc. v. Mark* (1993), 20 C.P.C. (3d) 224 (Ont. C.A.)). CIBC World Markets made its offer before the Tax Court's judgment but did not reassert it after the Tax Court's judgment. Therefore, its offer could not trigger any costs consequences in this Court.

[7] Therefore, the only issue before us is whether a higher-than-normal award of costs should be made concerning the proceedings in the Tax Court.

(2) An evidentiary issue

[8] CIBC World Markets' motion record included an unexpurgated version of a letter setting out an offer of settlement. This letter also sets out some of the comments made and opinions offered

by the Tax Court judge who presided at the pre-hearing conference in this matter. The Minister asks us to disregard these comments and opinions. It says that these are protected from disclosure.

[9] I agree. Pre-hearing conferences are *in camera* matters and statements made in them should not be used in submissions concerning costs: *Morrissey v. Canada*, 2011 TCC 373 at paragraphs 59 and 60. The rationale is well-said in *Bell Canada v. Olympia & York Developments Ltd.*, [1994] O.J. No. 343 at pages 144-145 (C.A.), cited in *Morrissey*:

> Pre-trials were designed to provide the court with an opportunity to intervene with the experience and influence of its judges to persuade litigants to reach reasonable settlements or refine the issues. None of that would be possible without assurance to the litigants that they can speak freely, negotiate openly, and consider recommendations from a judge, all without concern that their positions in the litigation will be affected.

[10] Typically, in pre-hearing conferences, parties assert positions and make proposals for compromise, and often presiding judges offer views and suggest proposals. After a pre-hearing conference, there is nothing wrong with a party communicating its own positions and proposals, for instance in an offer of settlement, and those positions and proposals can mirror the ones discussed in the pre-hearing conference. The settlement offer can be disclosed for the purposes of later costs submissions.

[11] Where, as here, a party seeks an enhanced level of costs, what is forbidden is the bare recounting of discussions, positions and proposals made by the parties in the pre-hearing conference

and not embodied in later settlement offers, or disclosure of the comments and opinions of the justice presiding at the pre-hearing conference. All of these remain protected from disclosure.

[12] It was permissible for CIBC World Markets to include in its motion record the letter setting out its settlement offer. However, the references in this letter to the Tax Court judge's comments and opinions should have been blacked out. I shall disregard those references.

(3) Whether a higher-than-normal award of costs should be made concerning the proceedings in the Tax Court

(a) General principles

[13] The parties agree that offers of settlement are relevant to the discretion to award costs. This is set out in Rule 147(1) and Rule 147(3)(d) of the *Tax Court of Canada Rules (General Procedure)*:

147. (1) The Court may determine the amount of the costs of all parties involved in any proceeding, the allocation of those costs and the persons required to pay them.	**147.** (1) La Cour peut fixer les frais et dépens, les répartir et désigner les personnes qui doivent les supporter.
…	[…]
(3) In exercising its discretionary power pursuant to subsection (1) the Court may consider,	(3) En exerçant sa discrétion conformément au paragraphe (1), la Cour peut tenir compte :
…	[…]
(*d*) any offer of settlement made	*d*) de toute offre de règlement

in writing,	présentée par écrit;
…	[…]

[14] Rule 147(3)(*d*) is aimed at encouraging parties to make offers of settlement and to treat them seriously. An unaccepted offer can trigger adverse costs consequences if, in light of the Court's decision, it turns out that the offer should have been accepted.

[15] Implicit in this is an important pre-condition: only offers that, as a matter of law, could have been accepted can trigger costs consequences. If, due to some legal disability, a party could not have accepted an offer, adverse costs consequences should not be visited upon that party.

(b) As a matter of law, could the Minister have accepted CIBC World Markets' offer of settlement?

[16] The Minister submits that it was subject to a legal disability that prevented it from accepting CIBC World Markets' offer of settlement: the Minister can only make assessments that are supportable on the facts and the law. The Minister says that accepting CIBC World Markets' offer – issuing a reassessment allowing 90% of the input tax credits CIBC World Markets claimed in its GST return – was not an option that could be supported on the facts and the law of this particular case. It would reflect a pure and arbitrary compromise on quantum, not any legally or factually sustainable result or any result which might have resulted from the proceedings in the Tax Court or this Court.

[17] The Minister notes, correctly, that the issue in the Tax Court and on appeal to this Court concerned a "yes-no" question of statutory interpretation on which the Minister's assessment denying CIBC World Markets input tax credits would have been confirmed in its entirety or rejected in its entirety.

[18] To be precise, the issue was whether the *Excise Tax Act*, R.S.C. 1985, c. E-15, properly interpreted, allowed CIBC World Markets to make multiple claims for input tax credits for the same taxation year, as long as the claims were made within the limitation period. If the answer were affirmative, then the Minister's reassessment would have been quashed and CIBC World Markets would receive 100% of the input tax credits it claimed. If the answer were negative, then the Minister's reassessment would have been confirmed and CIBC World Markets would receive none of the input tax credits it claimed.

[19] Due to the precise circumstances of this case, I agree with the Minister that under no factual or legal scenario could CIBC World Markets have been granted 90% of the input tax credits it claimed. The situation might have been different if, for example, the quantum of input tax credits were in issue and, theoretically, the Minister could defend the 90% figure on the facts and the law. But here, the issue was an all-or-nothing question of statutory interpretation.

[20] In light of this conclusion, certain legal questions fall for consideration. Can the Minister accept an offer of settlement that requires him to issue a reassessment that cannot be supported on

the facts and the law? Put another way, does the Minister have the power to issue reassessments on the basis of compromise, regardless of the facts and the law before him?

[21] I answer these questions in the negative.

[22] This Court is bound by its decision in *Galway v. Minister of National Revenue*, [1974] 1 F.C. 600 (C.A.). In that decision, Jackett C.J., writing for the unanimous Court, stated (at page 602) that "the Minister has a statutory duty to assess the amount of tax payable on the [facts] as he finds them in accordance with the law as he understands it." In his view, "it follows that he cannot assess for some amount designed to implement a compromise settlement." The Minister is obligated to assess "on the facts in accordance with the law and not to implement a compromise settlement." See also *Cohen v. The Queen*, [1980] C.T.C. 318 (F.C.A.).

[23] More recently, this Court reaffirmed *Galway* in *Harris v. Canada*, [2000] 4 F.C. 37 (C.A.). Sexton J.A., writing for the unanimous Court, stated (at paragraph 37) that "the Minister of National Revenue is limited to making decisions based solely on considerations arising from the Act itself" and cannot make "deals" divorced from those considerations. To similar effect, see *Longley v. Minister of National Revenue* (1992), 66 B.C.L.R. (2d) 238 (C.A.) at page 455.

[24] CIBC World Markets cites *1390758 Ontario Corporation v. The Queen*, 2010 TCC 572 at paragraph 36 and *Smerchanski v. Minister of National Revenue*, [1977] 2 S.C.R. 23 for the proposition that courts have enforced settlements that apply tax law to agreed facts. That is true. But

the Minister's power to agree to facts is limited by the *Galway* principle – the Minister cannot agree to an assessment that is indefensible on the facts and the law. Nothing in *1390758 Ontario* and *Smerchanski* undercuts the *Galway* principle.

[25] At present, the *Excise Tax Act* does not contain a provision allowing the Minister to make settlements solely on the basis of compromise, rather than following the facts and the law as the Minister views them or might reasonably defend them. Put another way and more succinctly, there is no legislative provision that repeals *Galway*.

[26] Finally, CIBC World Markets invokes policy considerations. Citing *1390758 Ontario*, *supra*, it submits that if every dispute had to be litigated to judgment, "unmanageable backlogs would quickly accumulate and the system would break down": see also similar concerns expressed in *Garber v. The Queen*, 2005 D.T.C. 1456 at paragraph 23 (T.C.C.), aff'd 2006 D.T.C. 6358 (F.C.A.) and *Consoltex Inc. v. The Queen*, 97 D.T.C. 724 at page 731 (T.C.C.).

[27] This may be true, but, despite *Galway*, a high proportion of cases are not litigated to judgment. Often negotiations and discussions bring to light new facts, better characterizations of the overall situation, and richer appreciations of the applicable law. These negotiations and discussions can culminate in a settlement that the Minister can implement by reassessing on the basis of defensible views of the facts and the law.

[28] Finally, I note that this policy consideration raised by CIBC World Markets is just one policy argument nestled among a forest of policy arguments, both for and against legislative reform: for some of these, see Daniel Sandler and Colin Campbell, "Catch-22: A Principled Basis for the Settlement of Tax Appeals" (2009) 57 Can. Tax J. 762. It is for Parliament to choose which of these policy arguments should prevail, not this Court.

C. Conclusion and proposed disposition

[29] It follows from the foregoing that, in this case, there was no factual or legal scenario under which the Tax Court or this Court could have granted CIBC World Markets 90% of the input tax credits it claimed. Accordingly, as a matter of law, the Minister could not have accepted CIBC World Markets' offer of settlement.

[30] As a result, no special costs consequences can follow from the offer of settlement that CIBC World Markets made.

[31] Therefore, I would dismiss CIBC World Markets' motion, with costs.

"David Stratas"

J.A.

"I agree
K. Sharlow J.A."

"I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Stratas J.A.
CONCURRED IN BY:	Sharlow and Layden-Stevenson JJ.A.
DATED:	January 10, 2012

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