Docket: 2008-714(IT)G

BETWEEN:

ALBERTA PRINTED CIRCUITS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Order as to Costs

By: The Honourable Justice F.J. Pizzitelli

Counsel for the Appellant:	R. Paul Jacobson, Q.C., Shaun T. MacIsaac and Elsy D. Gagné
Counsel for the Respondent:	William L. Softley and Margaret A. Irving

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ORDER

Upon reading the written submissions of the Appellant and the Respondent as to the award of costs in the above appeal, filed on May 27, 2011;

THIS COURT ORDERS that:

1. The Appellant shall be entitled to party and party costs throughout this appeal except as set out below.

2. With respect to the Appellant's expert witness costs, the Appellant shall be entitled to 77.99% of the expert witness fees including to prepare its report,

save and except that the Appellant shall not be entitled to any costs for the Appellant's expert witness attendance at the Settlement Conference for which Rip C.J. already awarded $1,000 nor shall the Appellant be entitled to any further fees for attendance at such Settlement Conference.

3. The Appellant shall not be entitled to any costs in respect of the attendance of R. Paul Jacobson at trial. Any fees and disbursements of R. Paul Jacobson or his firm prior to trial shall be subject to review by the taxation officer to ensure no unnecessary duplication of fees.

Signed at Ottawa, Canada, this 16th day of June 2011.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2011 TCC 305
Date: 20110616
Docket: 2008-714(IT)G

BETWEEN:

ALBERTA PRINTED CIRCUITS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Pizzitelli J.

Position of the Parties

[1] The Appellant has submitted that it should be entitled to costs on a solicitor and its client basis for all counsel who appeared before the Court and that the Court should exercise its discretion to award a lump sum for costs totalling $911,798.09 inclusive of $500,000 for fees, $169,422.11 in expert witness fees and the balance for disbursements and GST, all based on the Appellant having three counsel throughout the process.

[2] The Respondent's position is basically that the Appellant should only be entitled to party and party costs in accordance with the Tariff for two counsel on all matters prior to trial, save and except with respect to the Settlement Conference on June 10, 2010, held before Rip C.J. at which Rip C.J. awarded the Appellant $1,000 which should stand. For trial time, the Respondent submits that the Appellant should only be allowed party and party costs for two counsel for the approximate four days and one hour of the trial dealing with the transfer pricing issue, and that all other time at trial dealing with other issues and argument should be treated so that each party bears its own costs, due to the divided success of the

Appellant. In addition, the Respondent submits the Appellant should only be allowed 77.99% of the costs of preparation of its expert witness report and his attendance at trial to reflect the percentage of the Appellant's monetary win in the matter.

The Law

[3] As both parties have alluded to in their representations, Rule 147 of the *Tax Court of Canada Rules (General Procedure)* grants the Court discretion in determining costs having regard to a number of factors that may be considered in exercising such discretion found in subsection 147(3) and allows the Court to award a lump sum in lieu of or in addition to any taxed costs as set out in subsection 147(4) as well as gives the Court wide power pursuant to subsection 147(5) to award or refuse costs in respect to a particular issue or part of a proceeding or to award a percentage of costs or costs on a solicitor and client basis. Section 147 is reproduced below.

> 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.
>
> (2) Costs may be awarded to or against the Crown.
>
> (3) In exercising its discretionary power pursuant to subsection (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,
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> (*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 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,

(*j*) any other matter relevant to the question of costs.

(4) The Court may fix all or part of the costs with or without reference to Schedule II, Tariff B and, further, it may award a lump sum in lieu of or in addition to any taxed costs.

(5) Notwithstanding any other provision in these rules, the Court has the discretionary power,

(*a*) to award or refuse costs in respect of a particular issue or part of a proceeding,

(*b*) to award a percentage of taxed costs or award taxed costs up to and for a particular stage of a proceeding, or

(*c*) to award all or part of the costs on a solicitor and client basis.

(6) The Court may give directions to the taxing officer and, without limiting the generality of the foregoing, the Court in any particular proceeding may give directions,

(*a*) respecting increases over the amounts specified for the items in Schedule II, Tariff B,

(*b*) respecting services rendered or disbursements incurred that are not included in Schedule II, Tariff B, and

(*c*) to permit the taxing officer to consider factors other than those specified in section 154 when the costs are taxed.

(7) Any party may,

(*a*) within thirty days after the party has knowledge of the judgment, or

(*b*) after the Court has reached a conclusion as to the judgment to be pronounced, at the time of the return of the motion for judgment,

whether or not the judgment included any direction concerning costs, apply to the Court to request that directions be given to the taxing officer respecting any

> matter referred to in this section or in sections 148 to 152 or that the Court reconsider its award of costs.

[4] Notwithstanding the highly discretionary power to award costs under Rule 147, Létourneau J.A. in *Canada v. Landry*, 2010 FCA 135, [2010] F.C.J. No. 662 (QL) in paragraph 22 confirmed the principle that such "discretion must be exercised on a principled basis."

[5] In order to exercise such discretion on a principled basis, I propose to deal with the factors set out in subsection (3) of Rule 147:

(a) Result of the Proceeding

[6] There were four issues before the Court, namely:

1. Whether the Appellant and APCI, Inc. ("APCI") were dealing at arm's length;

2. Whether the reassessments in question were statute barred by the application of Articles IX(3) and XXVII(3) of the *Agreement Between Canada and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and on Capital*, CTS 1980/29 (the "*Treaty*");

3. Whether the Minister of National Revenue (the "Minister") was correct in including transfer pricing adjustments of $894,263, $1,065,727 and $1,422,775 in the Appellant's income for the 1999, 2000 and 2001 taxation years respectively pursuant to subsection 247(2) of the *Income Tax Act* (the "*Act*"); and

4. Whether subsection 247(3) penalties were properly assessed with respect to the transfer pricing adjustments above.

[7] With respect to issue 4 above, there was no dispute that such penalties would apply against any transfer pricing adjustments finally decided upon. With respect to the other three items, the Respondent was successful with respect to both issues in 1 and 2 above and the Appellant was successful with respect to 77.99% of the monetary transfer pricing adjustments in issue 3 above. This is a split decision in that the Respondent was successful on two of the three main issues in dispute while the Appellant was successful on one of the issues that dealt with 77.99% of

the assessment amount in dispute. I will comment more on these issues and the results in the context of the volume of work and conduct of the parties.

(b) Amounts in Issue

[8] Both parties are of the view that having regard to the three years involved, the amount involved, resulting in $1,033,210 in potential taxes owing and $248,850 in penalties thereon, were not extraordinarily large. The Appellant takes the position that the amounts were relatively small. With respect to the Appellant, such amounts are significant no matter how one perceives them, although not so significant when compared to the amounts involved in the other transfer pricing cases referred to by the Appellant and discussed in my reasons, like the *General Electric Capital Canada Inc. v. Canada*, 2010 TCC 490, 2010 DTC 1353 [*General Electric*] and *GlaxoSmithKline Inc. v. Pharmascience Inc.*, 2008 FC 849, [2008] F.C.J. No. 1070 (QL) cases. Nonetheless, both parties were, as a result required to expend much time in preparation for their cases, some of which could have been avoided as I will comment on later.

(c) Importance of the Issues

[9] While I agree with the Respondent that this was not the first transfer pricing case to be decided, I do not agree with the Respondent that this was a normal tax appeal decided on its facts. At play in this decision was the applicability of the hierarchy of methods used to determine transfer pricing adjustments and the issues of bundling and unbundling products or services which played a large role in my decision. In my view, these issues may be of assistance in resolving future disputes as they dealt with the points of law dealing with the applicability of the hierarchy of methods enunciated in the Information Circular of Canada Revenue Agency ("CRA") and the OECD Commentary transfer pricing guidelines.

(d) Offers of Settlement

[10] There were no offers to settlement at play here to consider.

(e) Volume of Work

[11] The parties had agreed to a Partial Statement of Facts and as well as to Joint Books of Documents consisting of 13 volumes of documents. There is no doubt that notwithstanding the not so extraordinary amount in dispute for this type of case, the volume of work and materials involved was great by both sides.

Regrettably, in my view, the volume of work could have been cut in half had the parties admitted or conceded certain issues which I will discuss in greater detail when evaluating the conduct of the parties. Like other factors herein, this particular factor is a double-edged sword.

(f) Complexity of the Issues

[12] This factor is also a double-edged sword for the parties. On the one hand, the issue of whether the parties were at arm's length involved an analyses of a complex set of facts and actions on the part of the Appellant, APCI and its principles with much documentation scanning several tax jurisdictions. The transfer pricing issue was in my view not a complicated one on its facts, but complicated in analysing the applicability of the appropriate transfer pricing methodology and obligations of the parties in following the hierarchy set out in the CRA's Informal Circular and OECD guidelines which was ignored by the Respondent, involving analyses of competing and contrary expert opinion reports. The applicability of the limitation period in the *Treaty* on the other hand was a question of pure law in my view with little assistance given by the Appellant who basically argued the matter was already before the Federal Court of Appeal in *Sundog Distributing Inc. v. Her Majesty the Queen*, Federal Court of Appeal, Court File No. A-327-10, which I understand has been withdrawn. The number of issues involved in this case and the interrelation between the issues of arm's length and the applicability of both the *Treaty* and transfer pricing rules added substantially to the complexity of the case, but in my opinion unnecessarily so. If the parties had acted differently, the length of this trial could have been cut in half in my opinion and at least one if not two of the issues could have been avoided altogether.

(g), (h) and (i) Generally the Conduct of the Parties

[13] As is evident from the above, the conduct of the parties particularly in unnecessarily lengthening the trial and in refusing to admit facts or issues caused this trial to go at least four days longer than necessary. I do not suggest that either party acted improperly, vexatiously or negligently nor through mistake or excessive caution within the meaning of paragraph *(i)* of Rule 147(3). Both sets of counsel presented their cases admirably and professionally and in fact agreed as to the applicability of the fourth issue dealing with penalties up front to whatever transfer adjustments were finally decided upon by this Court. This, of course, saved no doubt much Court time.

[14] On the other hand, however, the Appellant in particular could and should have admitted it had *de facto* control over APCI and hence was not at arm's length to it having regard to the overwhelming evidence in favour of such finding. Likewise, the Appellant in my view had a very weak case in arguing the applicability of the limitation period in the *Treaty*, and in fact made little argument on the issue, instead suggesting the Court wait out the decision of the *Sundog* appeal, involving the same counsel, which was ultimately withdrawn. Four days of the Court's time was taken on these issues, excluding the time it took to address these in a day of argument, which meant another four days, plus one hour was spent on the transfer pricing issue.

[15] As for the transfer pricing issue, while I agree with the Appellant that the Respondent failed to follow the preferred transfer pricing methodologies recommended in CRA's Information Circular and hence "dropped the ball," I cannot say the Respondent on the evidence should have admitted to the Appellant's comparables without question. On the other hand, if the Respondent had practiced what it preached and followed the external and internal cup methods, it may well have come to the conclusion I did in finding the prices charged for the set up function was an arm's length price or submitted other comparables to rebut it or adjust it. Since the Respondent failed to take such approach, we will never know what time may have been saved, although I would think that at least the Court's time could have been spend properly addressing the issue. With respect to the square-inch fee, neither side followed the suggested path on this issue, and accordingly, the Appellant, on whom the onus lies, was not very successful on that part of the argument. In this regard, even the Appellant's expert report did not follow the method it championed when addressing the square-inch fee, and accordingly, its report was valuable only to the extent of the unbundled set up fee. I might also add that while I found in favour of the Appellant in deciding the set up function did not include the other work undertaken by APCI for which the square-inch fee was applied, I do not find that the Respondent was wrong in refusing to admit that fact as there was evidence to support its argument, notwithstanding that I ultimately disagreed and found in the Appellant's favour on such assumption.

(j) Other Issues

[16] At the beginning of the trial counsel for the Appellant notified the Court that Mr. Jacobson was not well and might have to get up and leave the Court from time to time, due to his recent illness. During the trial, Mr. Jacobson never addressed the Court, leaving the conduct of the trial to his colleague, Mr. MacIsaac and his assistant, Elsy D. Gagné. Under the circumstances, I do not think it fair that, since

Mr. Jacobson's presence appears to have been more in the nature of an observer, the Respondent should be paying his fees for attendance at trial. While I mean no disrespect to Mr. Jacobson, a review of his accounts attached to the written submissions of the Appellant also show many meetings and discussions with Mr. MacIsaac as well as a review of the same pleadings and documents Mr. MacIsaac charged in his accounts to review prior to the time of the trial. No submissions were made as to his respective role or contribution to the Appellant's case or the presentation of it. Accordingly, this is a circumstance where, there being the possibility of unnecessary duplication of legal services, then in fairness to the Respondent and the Appellant, that the parties be given the opportunity to plead their arguments for his fees claimed prior to the trial to the taxation officer for consideration by him or her.

Claim for Solicitor and Client Costs and Lump-sum Costs

[17] Having regard to my above analyses of the factors to be considered under Rule 147(3), I cannot agree with the Appellant that this is a case in which solicitor and client costs should be awarded. As the Respondent pointed out, former Chief Justice Bowman in both *Continental Bank of Canada v. Canada*, 94 DTC 1858 and in *Alemu v. R.* [1999] 3 C.T.C. 2024 (*sub nom. McGorman v. R.*) applied the principle that the general rule is that costs and disbursements are awarded on a party and party basis in accordance with the Tariff, unless there are circumstances which warrant a departure. I find "no misconduct by the Respondent nor undue delay, inappropriate prolongation of the proceedings, or unnecessary procedural wrangling" on its part that would justify the award of costs on a solicitor and client basis as requested by the Appellant within the criteria of the *Continental Bank* decision above. In fact, the conduct of the Appellant in not admitting to its non-arms length relationship to APCI in particular, in light of the overwhelming evidence is reason as well not to award such higher costs.

[18] As for the Appellant's request for lump-sum costs, while I appreciate its reference to paragraph 10 of Rothstein J.'s decision in *Consorzio Del Prosciutto Di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417, relied upon by Hogan J. in the *General Electric* case, confirming the Court has "discretion to depart from the Tariff, especially when it considers an award of costs according to the Tariff to be unsatisfactory," I do not agree the use of the Tariff would be unsatisfactory here. In fact, I believe this is a case where the Respondent in particular should have the ability to question the claim for costs in regards to Mr. Jacobson to ensure no duplication of time.

Conclusion

[19] In my view, the Appellant was successful to the extent of reducing its assessed transfer price adjustment by 77.99% and has made a *prima facie* case for costs on a party and party basis in accordance with the Tariff. The fact that it lost on two of the three issues fought over, does not lessen the extent of its win. While I find its conduct above should further deny its claim for solicitor and client costs, I do not find that on the whole, seen in conjunction with the Respondent's conduct in ignoring its own rules, that the Appellant should be denied less than full party and party costs in accordance with the Tariff, save and except that it shall be entitled to no more than the $1,000 awarded by Rip C.J. in connection with costs on the Settlement Conference and save further that, having regard to the limited value of its expert witness report, it should only be given an award for expert witness fees based on 77.99% of the whole fees.

[20] Accordingly, the Appellant shall be entitled to party and party costs in accordance with the Tariff throughout this matter, save and except as set out below:

1. With respect to the Appellant's expert witness costs, the Appellant shall be entitled to 77.99% of the expert witness fees including to prepare its report, save and except that the Appellant shall not be entitled to any costs for the Appellant's expert witness attendance at the Settlement Conference for which Rip C.J. already awarded $1,000 nor shall the Appellant be entitled to any further fees for attendance at such Settlement Conference.

2. The Appellant shall not be entitled to any costs in respect of the attendance of R. Paul Jacobson at trial. Any fees and disbursements of R. Paul Jacobson or his firm prior to trial shall be subject to review by the taxation officer to ensure no unnecessary duplication of fees.

Signed at Ottawa, Canada, this 16th day of June 2011.

"F.J. Pizzitelli"

Pizzitelli J.

CITATION:	2011 TCC 305
COURT FILE NO.:	2008-714(IT)G
STYLE OF CAUSE:	ALBERTA PRINTED CIRCUITS LTD. and HER MAJESTY THE QUEEN
REASONS FOR ORDER BY:	The Honourable Justice F.J. Pizzitelli
DATE OF ORDER:	June 16, 2011

APPEARANCES:

Counsel for the Appellant:	R. Paul Jacobson, Q.C., Shaun T. MacIsaac and Elsy D. Gagné
Counsel for the Respondent:	William L. Softley and Margaret A. Irving

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