Written Settlement Offer Before Hearing

The TCC continues to encourage parties to settle before trial. In *ACSIS EHR (Electronic Health Record) Inc. v. The Queen* (**2015 TCC 263**), the taxpayer was awarded costs after a successful appeal heard over three days. Then, in *ACSIS* (2016 **TCC 50**), the taxpayer successfully moved for increased costs of up to 95 percent of all invoiced fees and disbursements from May 2, 2014 onward. Costs before that time were calculated according to the tariff (TCC rule 147(7)).

The taxpayer had made two settlement offers: the first on May 2, 2014, and the second on March 11, 2015. The Crown had rejected both offers. The TCC emphasized that although "a settlement offer is only one of the factors to be considered under Rule 147(3), it has gained significant importance where the Court is considering an award of solicitor/client costs." The court cited *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (**2006 CanLII 35819** (ONCA)):

> Traditionally the purpose of an award of costs within our "loser pay" system was to partially or, in some limited circumstances, wholly indemnify the winning party for the legal costs it incurred. However, costs have more recently come to be recognized as an important tool in the hands of the court to influence the way the parties conduct themselves and to prevent abuse of the court's process. Specifically, the three other recognized purposes of costs awards are to encourage settlement, to deter frivolous actions and defences and to discourage unnecessary steps that unduly prolong the litigation.

(See also *Langille* (**2009 TCC 540**) and *Donato* (**2010 TCC 16**).) Rule 147(3.1) also provides that an appellant who makes an offer and obtains a judgment more favourable than the offer's terms is entitled to "substantial indemnity costs" after the offer's date, defined as 80 percent of solicitor and client costs (rule 147(3.5)).

The Crown argued unsuccessfully that it was unable to accept either offer because "the [taxpayer could not] provide substantial enough documentation to support [its] claims that the work [it was] conducting met the criteria for SR&ED [and thus] put the [Crown] at a legal disability." The court said that this presumption was rebutted because the minister had had the opportunity to weigh the taxpayer's evidence, which was not limited to documentary evidence.

In the initial appeal, the TCC said the following:

> While it will always be preferable that an appellant maintain contemporaneous documents to support its systematic investigative procedures and methods, . . . the *Act* contains no legislative requirement to file those documents in order to qualify for the deduction of expenditures. . . . *Les Abeilles Service de Conditionnement Inc. v The Queen*, **2014 CCI 313**, 2014 DTC 1219, made a similar observation and [the court in] *116736 Canada Inc. v The Queen*, 98 DTC 1816 . . . [said] . . .
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> > However, the Act and the Regulations do not require that such written reports be produced in order for a taxpayer to qualify for the deduction of such expenditures: it is possible to adduce evidence by way of oral testimony. Whether the Minister or a judge could conclude that the activities purported to have been carried out by the taxpayer were actually carried out then becomes a question of credibility.
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> The documentary evidence, that I do have, coupled with the oral testimonies of these three individuals, supports my finding that the Appellant engaged in systematic investigation and undertook tests to resolve the technological uncertainties. This is not to say that taxpayers should ignore detailed record keeping. Such documentary evidence is always to be preferred and each case will vary in respect to how the evidence will be viewed. Taxpayers who come to court without proper documentation will always remain in the unenviable position of persuading a court that systematic investigation did occur.

The Crown had the same opportunity as the TCC to evaluate the taxpayer's oral evidence that SR & ED was conducted, but the Crown rejected the taxpayer's claim for SR & ED on the grounds of insufficient documentary evidence.

A taxpayer who wants to bring a written settlement offer must serve it no earlier than 30 days after the closing of pleadings and at least 90 days before the commencement of the hearing (rule 147(3.3)). Pleadings are defined as closed when an appellant has filed and served an answer to the reply or when the time for filing and serving an answer has expired.

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