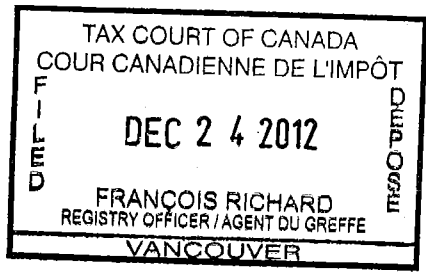


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2012-3401(GST)G

**TAX COURT OF CANADA**



BETWEEN:

**CLUB INTRAWEST,**

Appellant,

and

**HER MAJESTY THE QUEEN,**

Respondent.

**REPLY**

In reply to the Appellant's Notice of Appeal with respect to the periods ending October 31, 2002, October 31, 2003, October 31, 2004, October 31, 2005, October 31, 2006, October 31, 2007 and October 31, 2008 (the "Periods"), the Deputy Attorney General of Canada says:

**A. STATEMENT OF FACTS**

1. All facts alleged in the Notice of Appeal not expressly admitted herein are denied.
2. He admits the facts stated in paragraphs 2, 3, 12, 16, 17, 23, 24 and 25 of the Notice of Appeal.

3. He denies that the appellant is a non-resident of Canada as is alleged in paragraph A of the Notice of Appeal. He also denies the facts alleged in paragraphs 1, 4, 6, 11, 13, 15, 18, 19 and 21 of the Notice of Appeal.
4. He has no knowledge of the facts stated in paragraph 10 of the Notice of Appeal.
5. He states that paragraphs 5, 7, 8, 9, 14 and 20 of the Notice of Appeal, are in the manner of evidence and that the documents cited there speak for themselves.
6. With respect to paragraph 22 of the Notice of Appeal, he admits that the appellant proposed an allocation method as an alternative to the method utilized by the Minister of National Revenue (the "Minister") and says further that the proposed method was unreasonable.
7. In determining the Appellant's liability for net GST, the Minister made the following assumptions of fact:
  - a) the appellant is a non-profit, non-stock corporation incorporated by Intrawest Resort Ownership Corporation ("IROC") on November 9, 1993 under the laws of the state of Delaware, USA,;
  - b) the appellant is also registered under the laws of British Columbia, Ontario and Quebec;
  - c) at all material times, the appellant was a resident of Canada with a mailing and business address of 326 -375 Water Street, Vancouver, British Columbia;
  - d) at all material times, the appellant was a GST registrant;
  - e) at all material times, the appellant was required to file GST returns on a monthly basis;
  - f) IROC created a vacation accommodation ownership plan;

- g) the creation of the appellant was in furtherance of the vacation accommodation ownership plan;
- h) the purposes for which the appellant was formed includes to purchase, acquire, own, construct, maintain, equip, operate and generally deal in real property and to pay the expenses incurred in exercising its powers and performing its functions;
- i) under the vacation accommodation ownership plan, IROC builds resort accommodations situated in Canada and transfers beneficial ownership of those properties to the appellant in exchange for rights to occupy the resort accommodations beneficially owned by the appellant;
- j) the appellant operates as a private resort club, managing a total of 17 resorts worldwide: 14 mountain resorts in North America and Europe, two warm weather resorts in the United States and a resort in Mexico;
- k) more specifically, the appellant beneficially owns resort accommodations in British Columbia, Ontario, Quebec (the "Canadian Resorts"), California, Florida, Hawaii and Mexico (collectively, the "Resorts");
- l) the appellant acquires beneficial ownership of the real properties acquired by IROC and IROC US in exchange for timeshare resort points ("Points");
- m) the right to occupy the Resorts is designated and marketed as Points;
- n) the appellant supplies Points to at retail value to purchasers indirectly through IROC and IROC US, (the US arm of IROC operating outside of Canada);
- o) purchasers do not hold fee-simple title to their interest in the Resorts, but only hold Points;
- p) purchasers acquire Points for the purpose of using the Resorts as personal recreational accommodation, subject to certain terms and conditions;

- q) purchasers of Points are entitled to reserve and occupy, on an annual basis, residential accommodations at any one of the Resorts owned beneficially by the appellant, from time to time;
- r) Goods and Services Tax ("GST") is collected and remitted in respect of the supply of Points;
- s) upon purchasing Points purchasers ("Members") automatically become members of the appellant ("Membership") at no additional cost at that time;
- t) in addition to the cost of the initial purchase, Members must pay the appellant an annual resort fee for each Membership they own ("Resort Fees");
- u) Resort Fees are levied by the appellant, through its Board of Directors;
- v) Resort Fees are payable by Members to the appellant;
- w) Resort Fees are charged to Members based on costs payable by the appellant to various suppliers ("Operating Costs");
- x) the Operating Costs are comprised of: maintenance, repairs, insurance, utilities, security, front desk and concierge staffing, an annual contribution for a reserve fund for capital expenditures, domestic services (including cleaning and maid services:, property taxes and other expenses such as management and reservation system fees paid to the third party manager;
- y) Resort Fees are charged to Members based on the Operating Costs;
- z) Members are billed a proportionate share of the Operating Costs based on the number of Points they own or hold;
- aa) Operating Costs are budgeted for in each calendar year as determined by the appellant's Board of Directors;

- bb) the determination of the amount of the Resort Fees is solely within the discretion of the Board of Directors;
- cc) Operating Costs are debts of the appellant and not debts of the Members;
- dd) the Members bear no personal liability for the payment of the Operating Costs;
- ee) the Resort Fees are consideration for supplies of Memberships in the appellant and are taxable to the extent they are supplied in Canada;
- ff) Members must pay the Resort Fees if they wish to maintain their Membership in the appellant;
- gg) unless Members pay their Resort Fees on a current basis, they cannot:
  - i) make any reservations using their Points at any Resort;
  - ii) bank, borrow or transfer any Points;
  - iii) use any of the Resorts or enjoy any other rights or privileges of Membership; or,
  - iv) transfer their Membership;
- hh) any unpaid Resort Fees are a lien as security for the payment of all such amounts and are attached to the Membership of the delinquent Member and is effective from the date upon which the Resort Fees became payable and continues until paid in full;
- ii) failure to pay the Resort Fees by the stipulated due date renders a Member in default;
- jj) in the event of default, the appellant may choose to exercise its right to forfeit the defaulting Member's Membership;

- kk) the appellant has the power of sale as to each and every Membership for the purpose of collecting delinquent Resort Fees;
- ll) the Resort Fees are additional payment for Membership in the appellant;
- mm) the appellant is not an agent of the Members;
- nn) Members do not consent to the appellant acting as their agent;
- oo) the appellant does not have the authority to affect the legal position of Members;
- pp) Members do not control the actions of the appellant;
- qq) the appellant is not accountable to the Members for the Operating Costs;
- rr) Members are not at risk respecting the Operating Costs which are incurred by the appellant with third party suppliers;
- ss) the Operating Costs are the costs of the appellant;
- tt) the appellant bears no risk respecting the Resort Fees;
- uu) the Resort Fees are additional consideration for intangible personal property of the right of Members to use the Resorts;
- vv) the consideration for the right of Members to use the resort accommodations is comprised of the Resort Fees and the Points;
- ww) the appellant did not collect or remit GST on the supply of Resort Fees;
- xx) from January 1, 2002 to June 30, 2006 supplies and services by the appellant were taxable at the rate of 7 per cent, from July 1, 2006 to December 31, 2007, supplies and services by the appellant were taxable at the rate of 6 per cent and from January 1, 2008 to December 31, 2008 supplies and services by the appellant were taxable at the rate of 5 per cent;

**The respondent's allocation method of calculating GST collectible is fair and reasonable:**

- yy) Membership in the appellant through the purchase of Points relates to real property that is resort accommodations situated both in and outside Canada;
- zz) the Resort Fees are consideration for supplies of Memberships in the appellant;
- aaa) GST is payable on the Resort Fees paid by Members in respect of the resort accommodations situated in Canada;
- bbb) a fair and reasonable method of allocating the GST/HST payable by the appellant is to utilize the ratio of total number of Points issued in respect of properties located in Canada to the total number of Points issued in respect of all the resort accommodations, in and outside Canada;
- ccc) total Resort Fees for all Resorts paid in the Periods is as follows:
  - i) \$12,711,759 at October 31, 2002
  - ii) \$15,235,160 at October 31, 2003
  - iii) \$17,209,623 at October 31, 2004
  - iv) \$19,385,592 at October 31, 2005
  - v) \$21,367,474 at October 31, 2006
  - vi) \$23,141,836 at October 31, 2007
- ddd) the ratio of Canadian Points to worldwide Resort Points in the Periods is:
  - i) 76.69% at October 31, 2002
  - ii) 68.88% at October 31, 2003
  - iii) 63.40% at October 31, 2004
  - iv) 63.61% at October 31, 2005

- v) 60.52% at October 31, 2006
- vi) 57.85% at October 31, 2007
- eee) the Minister's allocation is based on the information summarized in the schedule attached hereto as Schedule "A" which information was provided by the appellant;
- fff) Input Tax Credits ("ITCs") were allowed in respect of the Resort Fees;
- ggg) Resort Fees are not levied on Members on a location by location basis, but on an aggregate basis, regardless of the Resort's location;
- hhh) the amount of Resort Fees paid by a Member is based only on the number of Points held by that Member;
- iii) the appellant's proposed allocation method does not use the total amount of consideration received from Members as Resort Fees in its calculation of GST payable;
- jjj) embedded in those Operating Costs incurred at Canadian Resorts are certain wages and supplies that have no intrinsic relationship, and that are unrelated to, real property in Canada; and,
- kkk) the appellant's proposal that it should only report GST on Operating Costs incurred in Canada and not on the consideration of the supply of Resort Fees is not fair or reasonable.

**B. ISSUES TO BE DECIDED**

- 8. The issues are whether the:
  - a) the Resort Fees are part of the consideration paid by Members for Membership in the appellant;



- b) the respondent's allocation method for calculating the GST on the Resort Fees is fair and reasonable.

**C. STATUTORY PROVISIONS RELIED ON**

- 9. He relies on sections 142, 165, 169, 225, 296, 298, 306, 307 and 308 of the *Excise Tax Act*, R.S.C. 1985, c.E-15, as amended (the "Act").


**D. GROUNDS RELIED ON AND RELIEF SOUGHT**

- 10. He submits that the Resort Fees are part of the consideration paid by Members for Membership in the appellant and that the appellant was obliged to collect and remit GST on them.
- 11. Although a plain reading of subsections 142(1) and (2) would have authorized the Minister to have assessed the appellant for GST on Resort Fees paid in relation to the Resorts, the Minister has assessed GST only with respect to Resort Fees paid in relation to the Canadian Resorts.
- 12. He further submits that the Minister's allocation method for calculating the GST on the Resort Fees is both fair and reasonable
- 13. He requests that the appeals be dismissed, with costs.

**DATED** at the City of Vancouver, the Province of British Columbia, this 24<sup>th</sup> day of December, 2012.

William F. Pentney  
Deputy Attorney General of Canada  
Solicitor for the Respondent

Per:

  
\_\_\_\_\_  
Lynn M. Burch  
Counsel for the Respondent

Department of Justice  
B.C. Regional Office  
900 - 840 Howe Street  
Vancouver, British Columbia  
V6Z 2S9

Telephone: (604) 775-6016  
Facsimile: (604) 666-2214

**TO:** The Registrar  
Tax Court of Canada  
200 Kent Street  
Ottawa, Ontario  
K1A 0M1

**AND TO:** Jeffrey T. Love  
McCarthy Tetrault LLP  
Suite 5300, Toronto Dominion Bank Tower  
Toronto, Ontario  
M5K: 1E6

# SCHEDULE "A"

SUMMARY OF GST COLLECTIBLE FOR ANNUAL RESORT FEES FOR THE PERIOD FEB.1,2002 TO DEC.31,2008

	wp Ref	2001	wp Ref	2002	wp Ref	2003	wp Ref	2004	wp Ref	2005	wp Ref	2006	wp Ref	2007
<b>GST Collected on Resort Fee Revenues</b>														
Resort Fees Paid by Members	0205-4.1	6,180,421	0205-5.1	8,142,716	0205-6.1	10,205,323	0205-7.1	12,344,146	0205-8.1	14,022,381	0205-9.1	15,974,922	0205-10.1	17,525,481
Resort Fees Paid by members to Capital Reserve	0205-4.2	1,090,662	0205-5.2	1,449,289	0205-6.2	1,674,488	0205-7.1	2,016,741	0205-8.1	2,282,714	0205-9.1	2,601,569	0205-10.1	2,843,664
Resort Fees Paid by Developer	0205-4.1	530,445	0205-5.1	726,953	0205-6.1	714,683	0205-7.1	751,875	0205-8.1	777,894	0205-9.1	695,827	0205-10.1	858,563
Resort Fees Paid by Developer to Capital Reserve	0205-4.2	93,608	0205-5.2	129,388	0205-6.2	117,265	0205-7.1	122,398	0205-8.1	126,634	0205-9.1	113,274	0205-10.1	139,766
<b>Resort Fees Paid (Total)</b>		<b>7,895,136</b>		<b>10,448,346</b>		<b>12,711,759</b>		<b>15,235,160</b>		<b>17,209,623</b>		<b>19,385,592</b>		<b>21,367,474</b>
%Cdn - rolling balance				77%		69%		63%		64%		61%		58%
GST rate				7/107		7/107		7/107		7/107		7/107		0.05660 6/106
<b>GST Collected</b>														
\$ 3,385,394.37						\$ 570,033.77		\$ 631,933.65		\$ 716,159.35		\$ 767,576.77		\$ 699,690.83
GST Audit Assessment date (Note 1)						2002-10-31		2003-10-31		2004-10-31		2005-10-31		2006-10-31
<b>Note 1 For GST audit purposes, the assessment for each year will be made to the period ended Oct.31 as the membership is invoiced for next year's Resort fees on or about Oct.15.</b>														

CLUB INTRAWEST - CALCULATION OF GST COLLECTIBLE FOR ANNUAL RESORT FEES FOR THE PERIOD FEB.1,2002 TO DEC.31,2008

CLUB INTRAWEST	Data	2002-03-20 Mar 20 2002	2002-03-22 Mar 22 2002	2002-04-16 Apr 16 2002	2002-06-28 Jun 28 2002	2002-07-29 Jul 29 2002	2002-09-01 Sep 16 2002	2002-10-26 Oct 26 2002	2002-10-26 Feb 14 2003
<b>Canadian Points</b>									
Whistler	891663					49369	59875		
Tremblant	316143		39627		70172				
Panorama	127359		18296						
Vancouver	168858								
Blue Mountain	0								
Points (Cdn) Contributed	1504023	0	55923	0	70172	49369	59875	0	0
Points (Cdn) - rolling balance	1504023	1504023	1559946	1559946	1630118	1679487	1739362	1739362	1739362
<b>nonCanadian Points</b>									
Sandestin	0	55175						55175	
Kauai	100394								
Mexico	0								
Palm Desert	265035			53007					53007
Points (nonCdn) Contributed	365429	55175	0	53007	0	0	0	55175	53007
Points (nonCdn) - rolling balance	365429	420604	420604	473611	473611	473611	473611	528786	581793
<b>Calculations</b>									
Points %Canadian rolling balance									
Points (Cdn) - rolling balance	1504023	1504023	1559946	1559946	1630118	1679487	1739362	1739362	1739362
Points (nonCdn) - rolling balance	365429	420604	420604	473611	473611	473611	473611	528786	581793
Total - rolling balance	1869452	1924627	1980550	2033557	2103729	2153098	2212973	2268148	2321155
%Cdn - rolling balance	80%	78%	79%	77%	77%	78%	79%	77%	75%
%Cdn - rolling balance								77%	
<p>Note : This table is compiled from data received from Club Intrawest by email on Jan.16, 2009. The information has been reorganized to correct the sequence by date as discussed with Sandra Ruff.</p>									

CLUB INTRAWEST - CALCULATION OF GST COLLECTIBLE FOR ANNUAL RESORT FEES FOR THE PERIOD FEB.1,2002 TO DEC.31,2008

	Mar 21 2003	May 7 2003	Sept 9 2003	Dec 30 2003	Mar 12 2004	Apr 26 2004	July 30 2004	Oct 1 2004	Dec 31 2004	Feb 15 2005
<b>CLUB INTRAWEST</b>										
<b>Data</b>										
<b>Canadian Points</b>										
Whistler										
Tremblant										
Panorama										
Vancouver										
Blue Mountain							111831			57253
Points (Cdn) Contributed	0	0	0	0	0	0	111831	0		57253
Points (Cdn) - rolling balance	1739362	1739362	1739362	1739362	1739362	1739362	1851193	1851193		1908446
<b>nonCanadian Points</b>										
Sandestin	55175		55175	55175	55175	55486		51529		
Kauai										
Mexico										
Palm Desert		53007	53007		53007					
Points (nonCdn) Contributed	55175	53007	108182	55175	108182	55486	0	51529		0
Points (nonCdn) - rolling balance	636968	689975	798157	853332	961514	1017000	1017000	1068529		1068529
<b>Calculations</b>										
Points %Canadian rolling balance										
Points (Cdn) - rolling balance	1739362	1739362	1739362	1739362	1739362	1739362	1851193	1851193		1908446
Points (nonCdn) - rolling balance	636968	689975	798157	853332	961514	1017000	1017000	1068529		1068529
Total - rolling balance	2376330	2429337	2537519	2592694	2700876	2756362	2868193	2919722		2976975
%Cdn - rolling balance	73%	72%	69%	67%	64%	63%	65%	63%		64%
%Cdn - rolling balance				69%				63%		

CLUB INTRAWEST - CALCULATION OF GST COLLECTIBLE FOR ANNUAL RESORT FEES FOR THE PERIOD FEB.1,2002 TO DEC.31,2008

CLUB INTRAWEST	Mar 15 2005	April 28 2005	July 29 2005	Aug 29 2005	Dec 22 2005	Dec 31 2005	April 24 2006	Oct 24 2006	Dec 31 2006	Mar 2 2007
<b>Data</b>										
<b>Canadian Points</b>										
Whistler					8119					
Tremblant	10254				3418					
Panorama	15078				2154					
Vancouver					2834					
Blue Mountain		57253	50934		2297					
Points (Cdn) Contributed	25332	57253	50934	0	1822					
Points (Cdn) - rolling balance	1933778	1991031	2041965	2041965	2060787		2060787	2060787	2060787	2060787
<b>nonCanadian Points</b>										
Sandestin					4714					
Kauai					1610					
Mexico				99648	1652		102018	59374		71872
Palm Desert					6570					
Points (nonCdn) Contributed	0	0	0	99648	14546		102018	59374		71872
Points (nonCdn) - rolling balance	1068529	1068529	1068529	1168177	1182723		1284741	1344115		1415987
<b>Calculations</b>										
<b>Points %Canadian rolling balance</b>										
Points (Cdn) - rolling balance	1933778	1991031	2041965	2041965	2060787		2060787	2060787		2060787
Points (nonCdn) - rolling balance	1068529	1068529	1068529	1168177	1182723		1284741	1344115		1415987
Total - rolling balance	3002307	3059560	3110494	3210142	3243510		3345523	3404902		3476774
%Cdn - rolling balance	64%	65%	66%	64%	64%		62%	61%		59%
%Cdn - rolling balance						64%			61%	

CLUB INTRAWEST - CALCULATION OF GST COLLECTIBLE FOR ANNUAL RESORT FEES FOR THE PERIOD FEB.1,2002 TO DEC.31,2008

CLUB INTRAWEST	Data	Kauai	Jun 1 2007	Jun 6 2007	Oct 4 2007	Dec 21 2007	Dec 31 2007	Jan 1 2008	Oct 2 2008	Dec 31, 2008	Total
<b>Canadian Points</b>											
Whistler											1009026
Tremblant											439614
Panorama											160887
Vancouver									35770		207462
Blue Mountain											279568
Points (Cdn) Contributed			0	0	0	0	0	0	35770		
Points (Cdn) - rolling balance			2060787	2060787	2060787	2060787	2060787	2060787	2096557		2096557
<b>nonCanadian Points</b>											
Sandestih			69086								522282
Kauai			-102004					10417			0
Mexico			32918	49140	36345	149160					602127
Palm Desert						11243					547883
Points (nonCdn) Contributed			0	49140	36345	160403		10417	0		
Points (nonCdn) - rolling balance			1415987	1465127	1501472	1661875		1672292	1672292		1672292
<b>Calculations</b>											
Points %Canadian rolling balance											
Points (Cdn) - rolling balance			2060787	2060787	2060787	2060787		2060787	2096557		
Points (nonCdn) - rolling balance			1415987	1465127	1501472	1661875		1672292	1672292		
Total - rolling balance			3476774	3525914	3562259	3722662		3733079	3768849		
%Cdn - rolling balance			59%	58%	58%	55%		55%	56%		
%Cdn - rolling balance							58%			56%	