Federal Court of Appeal | Cour d'appel fédérale

Date: 20170711

Docket: A-249-16

Citation: 2017 FCA 151

CORAM: **NADON J.A.**
DAWSON J.A.
GAUTHIER J.A.

BETWEEN:

CLUB INTRAWEST

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on May 15, 2017.

Judgment delivered at Ottawa, Ontario, on July 11, 2017.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NADON J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] Subsection 165(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (Act) imposes the Goods and Services Tax in respect of taxable supplies "made in Canada". Subsection 142(1) of the Act deems certain supplies to be made in Canada; subsection 142(2) deems certain other supplies to be made outside of Canada. Together, these provisions are referred to as the place-of-supply rules.

[2] The appellant, Club Intrawest, "was created to facilitate the administration and operation of resort accommodations in connection with a vacation accommodation ownership plan (the Intrawest program)" (Amended Partial Agreed Statement of Facts and Issues (Agreed Statement) paragraph 4). The Intrawest program is marketed and sold in Canada and the United States. Vacation homes are located in as many as nine resorts situated in Canada, the United States and Mexico.

[3] The appellant was assessed under the Act in respect of annual resort fees paid by members of the Intrawest program to the appellant for the reporting periods ending October 31 for the 2002 to 2007 taxation years. The appellant objected to the assessment and ultimately appealed from it to the Tax Court of Canada. The appellant argued that the resort fees were paid to it as reimbursement for expenses it incurred as agent for the members of the Intrawest program. It followed, the appellant argued, that GST was not exigible on the resort fees. In the alternative, if GST applied to the resort fees, the appellant argued that because the resort accommodations administered and operated under the Intrawest program were located both inside and outside of Canada, GST should be allocated on the basis it proposed and not on the basis applied by the Minister of National Revenue in her assessment. More will be said later about the alternative approaches proposed by the parties.

[4] The Tax Court rejected the appellant's argument that it had incurred the resort fees as agent of the members of the Intrawest program. The Court went on to apply the place-of-supply rules and concluded that the entire supply was made in Canada (2016 TCC 149). This is an appeal from the judgment of the Tax Court.

I. The Issues

[5] Two issues are raised on this appeal:

i. Did the Tax Court err in failing to find that the resort fees paid to the appellant by the members represented reimbursement of expenses incurred by the appellant as agent for the members of the Intrawest program?

ii. Did the Tax Court err in its interpretation and application of the place-of-supply rules?

[6] Before I turn to consideration of these issues, it is helpful to review the facts needed to situate these issues and then to review the relevant findings of the Tax Court.

II. The Facts

[7] The facts are set out in detail in the lengthy reasons of the Tax Court. The following facts are sufficient to situate the issues raised on appeal.

[8] The Intrawest program is a timeshare program offering vacation homes in resorts located in Canada, the United States and Mexico. Members of the Intrawest program purchase points to be used to rent vacation homes based on an assigned point value. The vacation homes were originally either built or purchased by a Canadian developer and an American developer. The developers transferred the vacation homes to the appellant in exchange for the number of resort points required to acquire the right to occupy and use the vacation homes for an entire year in

perpetuity. Legal title to the vacation homes was transferred to a trust company as trustee for the appellant.

[9] Under this scheme, the developer and the vacation home timeshare purchaser enter into a Purchase and Membership Agreement. In the Purchase and Membership Agreement, the developer sells resort points acquired from the appellant to the purchaser who then uses the resort points to reserve occupancy of a vacation home for a specified period of time each year. The Tax Court found that the legal substance of resort points is the right to occupy vacation homes. As a practical matter, resort points provide a means of keeping track of the proportionate interests of the point holders in the timeshare vacation homes. The Purchase and Membership Agreement also provides that the purchaser becomes a member of the appellant, and thus a member of the Intrawest program.

[10] The members of the appellant are the Canadian and American resort point purchasers and the Canadian and American developers. Members are required to pay an annual assessment to the appellant to meet "Membership Costs".

[11] "Membership Costs" are defined to include all costs incurred by the appellant for and on behalf of the members, as more specifically provided in the Master Declaration entered into by the Canadian developer and the appellant. Article 10.3 of the Master Declaration states that membership costs "shall include, but shall not be limited to":

> (a) The maintenance, repair, modification, alteration, redecoration or replacement of any Resort Accommodation;
>
> (b) The maintenance, repair, modification, alteration, redecoration, replacement, and rental of the Equipment;

> (c) Insurance coverage;
>
> (d) A capital contribution for reserves;
>
> (e) Domestic services, including cleaning and maid service, the frequency of which shall be determined from time to time by the Board, furnished to or on behalf of Members;
>
> (f) Assessments levied against Resort Accommodations by a Project or association for a Project; and
>
> (g) Any other costs incurred by the Club in connection with the maintenance, repair, replacement, restoration, redecoration, improvement, operation, and administration of the Resort Accommodations, or in connection with the operation or administration of the Club, which are directly attributable to the commitment of one (1) or more Resort Accommodations in accordance with the provisions [of the Master Declaration].

[12] To calculate the annual resort fee, the appellant divides the budgeted membership costs for a particular year by the total number of issued resort points in order to establish the per point rate for a calendar year. The annual resort fee payable by a member to the appellant for a calendar year is the per point rate for that year, multiplied by the number of resort points owned by the member.

[13] The appellant did not collect GST on the resort fees charged annually to members of the Intrawest program.

III. The Decision of the Tax Court

[14] The Tax Court considered three issues, only two of which are relevant to this appeal. The first was described to be whether the appellant "acquired numerous goods and services as agent"

for the members of the Intrawest program. The second issue was described to be whether the taxable supply of services was made in Canada.

[15] With respect to the agency issue, the Tax Court began its analysis by noting that when an agent acts for a principal and acquires property or a service from a third party supplier, the agent does not make a supply of the property or service to the principal. Rather, the agent acts as a conduit for the supply (reasons, paragraph 71). This means that the principal acquires the underlying supply and the reimbursement from the principal to the agent represents the principal's payment to the supplier for the underlying supply.

[16] With respect to agency relationships generally, citing *Royal Securities Corporation Ltd. v. Montréal Trust Co. et al.*, [1967] 1 O.R. 137 at page 155, [1996] O.J. No. 1078 at paragraph 55; aff'd [1967] 2 O.R. 200, [1967] O.J. No. 997 (Ont. C.A.), the Tax Court correctly noted that the three generally accepted components of an agency relationship are:

i. Both the principal and the agent consent to the agency relationship.

ii. The principal grants authority to the agent allowing the agent to affect the principal's legal position.

iii. The principal controls the agent's actions (reasons, paragraph 78).

[17] The Tax Court then turned to consider each element of this test. The Tax Court dealt first with the authority of the appellant to affect the legal position of the members of the Intrawest program.

[18] In its notice of appeal the appellant asserted that it held the vacation homes in trust for the members of the Intrawest program. During oral argument in the Tax Court, counsel for the appellant argued that before one could properly characterize the resort fees, a determination had to be made about the ownership of the vacation homes. The appellant argued that it held the beneficial interests in the vacation homes in trust for the members of the Intrawest program.

[19] The Tax Court thus turned to address this issue, noting that if members of the Intrawest program were not obligated to pay the expenses required to maintain, repair, improve and operate the vacation homes, or to incur other expenses with respect to the vacation homes, there would be no legal rights that the appellant could affect on behalf of its members in respect of such expenses. It would follow that an agency relationship could not "as a question of fact" exist (reasons, paragraph 80).

[20] After reviewing the evidence before it, and applying the test to determine who held the beneficial ownership in the vacation homes, the Tax Court concluded that the appellant itself held the beneficial interest in the vacation homes, subject to the occupancy rights held by the Canadian and American developers. Moreover, the beneficial interest held by the appellant included the risk of damage to the vacation homes and the obligation to incur operating costs (reasons, paragraph 140). Members of the Intrawest program simply acquired a contractual right to occupy the vacation homes pursuant to the rules set out in the governing documents (reasons, paragraph 115).

[21] It followed that the members were not responsible for the operation, repair and maintenance of the vacation homes and were not liable to incur any expenses with respect to the vacation homes (reasons, paragraph 141). It further followed that because there were no legal rights that the appellant could affect on behalf of its members with respect to the operating expenses, an agency relationship did not exist between the appellant and the members of the Intrawest program (reasons, paragraph 142).

[22] While this was dispositive of the appellant's agency argument, the Tax Court went on to consider the remaining two components of the agency relationship.

[23] With respect to the issue of consent, the Tax Court drew a negative inference from the appellant's failure to adduce a written agreement whereby the members of the Intrawest program appointed it as their agent with respect to the vacation home operating costs. The Court had difficulty accepting that the members would have appointed the appellant as their agent without entering into an agreement that specified the expenses the appellant could incur as agent, the standard of care required of the appellant and the terms of any indemnification (reasons, paragraphs 148 and 149). The Tax Court went on to find that the only direct evidence before it with respect to the conduct of the members supported the Minister's assumption that members of the Intrawest program did not consent to the appellant acting as their agent (reasons, paragraph 172). The Court then went on to review other evidence that supported a finding that the conduct of the parties did not support a finding of agency.

[24] With respect to the issue of control, while the Tax Court accepted that the members of the Intrawest program control the appellant through their ability to elect the board of directors, such corporate control did not mean that the appellant acted as the members' agent. At the end of the day, the Tax Court concluded that the evidence fell short of establishing that the members exercised control over the appellant pursuant to an agency agreement (reasons, paragraphs 190 and 191).

[25] Having concluded that the resort fees did not represent an amount paid by the members to the appellant as reimbursement of costs incurred by the appellant as agent for the members, it followed that the resort fees constituted consideration paid for a supply. The Tax Court then turned to consider whether that supply was subject to GST, and more particularly whether the supply was made in Canada (reasons, paragraph 194).

[26] The Tax Court began its analysis by noting that the parties accepted that if the appellant did make a supply, the supply was a taxable supply. However, the parties disagreed on the application of the place-of-supply rules contained in the Act (reasons, paragraph 196).

[27] The Minister, when assessing the appellant, assumed that the members of the Intrawest program paid the resort fees as consideration for the supply of intangible personal property that related to real property situated both inside and outside of Canada. The Minister submitted that the Court ought to allocate the resort fees between taxable supplies made inside Canada and taxable supplies made outside of Canada by basing the allocation on the ratio of total resort

points issued in respect of properties located in Canada to the total resort points issued in respect of all of the vacation properties (reasons, paragraph 197).

[28] The appellant disagreed, arguing that any supply made by it was a supply of a service in relation to real property, with the resort fees being the consideration for the supply. The appellant further argued that the appellant made separate single supplies of services in respect of each vacation home. Thus, the appellant submitted that the Court ought to allocate the resort fees basing the allocation on the ratio of membership costs associated with the operation of vacation homes situated in Canada to the total cost for the operation of all vacation homes (reasons, paragraphs 199-200).

[29] The Tax Court then discussed what it viewed to be a legislative inconsistency in the place-of-supply rules: as described in detail later in these reasons, subsections 142(1) and (2) deem two mutually exclusive events to occur (reasons, paragraphs 201-212). However, before addressing the legislative inconsistency the Tax Court moved to consider whether members paid the resort fees to the appellant as consideration for the supply of a service or as consideration for the supply of intangible personal property (reasons, paragraph 224).

[30] The Tax Court rejected the Minister's argument that the resort fees were paid as consideration for the supply of membership in the Intrawest program, which constituted the supply of intangible personal property. The Tax Court found that the appellant did not provide any rights in consideration for the resort fees. It followed that it did not supply any property. What the appellant supplied was its agreement to use the resort fees to fund its operations.

Specifically, the appellant agreed to use the funds to pay the vacation home operating costs, to pay costs incurred to operate the Intrawest program, to pay its own internal expenses and to hold a portion of the funds in a reserve fund for future unexpected expenses (reasons, paragraphs 226-238).

[31] Having characterized the resort fees as being consideration for the supply of a service, it was necessary for the Court to consider whether the appellant made a single supply or multiple supplies in consideration of the resort fees. Applying the test articulated in *O.A. Brown Ltd. v. Canada*, [1995] G.S.T.C. 40 at page 40, 3 G.T.C. 2092 (T.C.C.), at page 2095, the Tax Court found as a fact that the appellant made a single supply by agreeing to use the resort fees to fund its operations. In the Court's view, the Master Declaration treated "the supply as a single supply, with the consideration being based upon the [a]ppellant's total estimated costs." The appellant "could only continue to operate the Intrawest Program if it incurred all of the costs" (reasons, paragraph 259).

[32] It followed that the Tax Court rejected the notion that the resort fees, which were used to fund four separate activities (the maintenance, operation and improvement of each vacation home; the operation of the Intrawest program; the operation of the appellant itself; and the maintenance of a reserve fund), constituted four separate groups of supplies. The Tax Court further rejected the notion that the appellant made separate supplies in respect of the Canadian vacation homes on the one hand and the American and Mexican vacation homes on the other (reasons, paragraph 258).

[33] Having found that the appellant made a single supply of a service, the Tax Court considered whether section 142 of the Act deemed the supply to have been made in Canada. The Tax Court began its analysis by setting out the relevant portions of the place-of supply rules in section 142 of the Act:

142 (1) For the purposes of this Part, subject to sections 143, 144 and 179, a supply shall be deemed to be made in Canada if	142 (1) Pour l'application de la présente partie et sous réserve des articles 143, 144 et 179, un bien ou un service est réputé fourni au Canada si :
…	…
(*d*) in the case of a supply of real property or of a service in relation to real property, the real property is situated in Canada;	*d*) s'agissant d'un immeuble ou d'un service y afférent, l'immeuble est situé au Canada;
…	…
(*f*) the supply is a supply of a prescribed service; or	*f*) il s'agit d'un service visé par règlement;
(*g*) in the case of a supply of any other service, the service is, or is to be, performed in whole or in part in Canada.	*g*) s'agissant de tout autre service, il est, ou sera, rendu en tout ou en partie au Canada.
142 (2) For the purposes of this Part, a supply shall be deemed to be made outside Canada if	142 (2) Pour l'application de la présente partie, un bien ou un service est réputé fourni à l'étranger si :
…	…
(*d*) in the case of a supply of real property or a service in relation to real property, the real property is situated outside Canada;	*d*) s'agissant d'un immeuble ou d'un service y afférent, l'immeuble est situé à l'étranger;
…	…
(*f*) the supply is a supply of a prescribed service; or	*f*) il s'agit d'un service visé par règlement;
(*g*) in the case of a supply of any other service, the service is, or is to be,	*g*) s'agissant de tout autre service, il est, ou sera, rendu entièrement à

performed wholly outside Canada.	l'étranger.
(emphasis added)	(soulignement ajouté)

[34] Noting that there were currently no prescribed services, the Tax Court observed that the internal inconsistency it had previously referred to exists as a result of the wording of paragraphs 142(1)(*d*) and 142(2)(*d*) of the Act, which apply when the supplied service is "in relation to real property". Where a single supply of a service is made in relation to real property both inside and outside of Canada, the supply will be deemed to be made both inside and outside of Canada, depending upon which paragraph of section 142 is applied (reasons, paragraph 263).

[35] In order to resolve this inconsistency, the Tax Court concluded that, while the phrase "in relation to" should be given a wide scope, "within the context of section 142, the words require a direct relationship between the service and the real property. The service must be performed directly on the real property or relate directly to the real property" (reasons, paragraph 265).

[36] This interpretation was found to be "consistent with the immediate context in which the relevant words are used in section 142." More particularly, at paragraph 320 the Tax Court reasoned that:

> … Both paragraph 142(1)(d) and paragraph 142(2)(d) deal first with the supply of real property and then with the supply of a service in relation to real property. In fact, paragraphs 142(1)(d) and 142(2)(d) contain the only reference in the place-of-supply rules to the supply of real property. This supports an interpretation that Parliament intended paragraphs 142(1)(d) and 142(2)(d) to apply to supplies that relate solely to real property, including services that relate only to such real property.

[37] It followed that notwithstanding the Tax Court's conclusion that all of the services performed by the appellant "relate directly or indirectly to real property", paragraphs 142(1)(*d*) and 142(2)(*d*) of the Act were inapplicable – they applied only to services performed by the appellant that related directly and solely to real property (reasons, paragraphs 266 and 318). While certain services supplied by the appellant clearly related directly to the vacation homes, others were found not to relate directly to the vacation homes. For example, the general and administrative services provided at the appellant's Vancouver office did not relate directly to the vacation homes. Rather, these services were in relation to the operation of the appellant as a corporation (reasons, paragraph 268).

[38] As a result of this analysis, because the single supply related, at least in part, to things other than real property, the place-of-supply of the service was determined under paragraphs 142(1)(*g*) and 142(2)(*g*) of the Act. On this analysis, paragraph 142(1)(*g*) deemed the supply to be made in Canada because the appellant performed the service partially in Canada. It further followed that the GST applied to the totality of the resort fees paid by the members of the Intrawest program (reasons, paragraphs 321 and 322).

[39] The Tax Court completed its analysis by noting that its analysis resulted in more tax being payable than would be exigible under the applicable Canada Revenue Agency administrative policy. However, the Tax Court found that the administrative policy did not comply with the relevant provisions of the Act. Finally, because the Minister could not appeal its own assessment, notwithstanding the conclusion that GST applied to the totality of the resort fees, the judgment could not increase the tax assessed by the Minister (reasons, paragraph 323).

IV. Consideration of the Issues

1. The Agency Issue

[40] The appellant acknowledges that the Tax Court correctly articulated the components of an agency relationship. The appellant argues, however, that the Tax Court erred in law in the application of the test for agency by failing to give effect to the provisions of the Master Declaration, the Purchase and Membership Agreement and notes to the appellant's financial statements.

[41] I begin consideration of the agency issue by rejecting the submission that the asserted errors are errors of law. The appellant challenges the Tax Court's conclusion that the appellant did not receive the resort fees as agent of its members and the weight the Court gave to the evidence before it. Absent an extricable error of law, the appellant must demonstrate a palpable and overriding error of fact or mixed fact and law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraphs 36 and 46).

[42] I turn now to the substance of the asserted errors.

[43] The appellant relies upon the Fourteenth Amended and Restated Master Declaration executed by the Canadian developer and the appellant effective October 27, 2006. The appellant points to and relies upon Articles 9.1 and 9.3, as well as the definitions of "membership costs" and "resort fees".

[44] In Article 9.1, under the heading “Management, Maintenance, and Repairs”, responsibility for the repair, replacement, restoration, improvement, operation and administration of the vacation homes is vested in the appellant. Thereafter, “[t]he [appellant] shall act as the agent of all of the Members in collecting Assessments and in paying taxes, utility costs, and other Membership Costs” (emphasis added).

[45] Article 9.3, subject to certain limited exceptions, provides that “exclusive control and responsibility over the maintenance, repair, modification, and alteration of all Resort Accommodations and the Equipment therein is vested in the [appellant], as agent for the Members” (emphasis added).

[46] Article 1 contains the defined terms. Article 1.37 defines “Membership Costs” to mean and include “all costs incurred by the [appellant] for and on behalf of the Members”. Article 1.50 defines “Resort Fees” to mean “the annual assessment levied by the Board upon all Members for their proportionate share of the annual Membership Costs”.

[47] Next, the appellant points to Articles 5 and 7 of the Purchase and Membership Agreement. This is the only purchase and membership agreement placed in evidence and it is an agreement between the Canadian developer and the Canadian resort point purchasers.

[48] In Article 5, the purchaser acknowledges receiving copies of the agreement together with copies of a number of other specified documents. The purchaser states that he or she has been given the opportunity to read the documentation and that he or she understands their provisions.

The purchaser also "agrees to be bound by, to be subject to and to abide by the provisions of all Club Instruments as they may be amended from time to time."

[49] In Article 7, the purchaser signifies his or her understanding and agreement that the appellant will incur membership expenses "as the agent for all Members in accordance with their proportionate share of the Resort Points" (emphasis added). The purchaser agrees to reimburse the appellant "on a cost-sharing basis for the Purchaser's share of the Membership expenses as determined annually by the [appellant] and referred to as the Resort Fee".

[50] Finally, in the notes to appellant's financial statements as at December 31, 2003, the appellant is said to incur expenses and to recover costs as "agent of the members". The members' assets are described to include real estate and equipment at vacation home resorts.

[51] In addition to arguing that the Tax Court failed to give effect to this evidence, the appellant argues that the Tax Court erred by requiring an express, standalone written agency agreement.

[52] Illustrative of this error is said to be the summary manner in which the Tax Court dismissed the significance of the reference to agency in Article 7 of the Purchase and Membership Agreement. At paragraph 156 of its reasons, the Tax Court wrote that it could not see how this could constitute an agency agreement between the resort point purchasers and the appellant because the appellant was not a party to the agreement. The appellant argues that this statement ignores that in the Master Declaration the appellant expressly accepted its role as agent

for the members, and ignores that the members agreed in the Purchase and Membership Agreement to be bound by the Club Instruments, including the Master Declaration.

[53] I begin by rejecting the argument that the Tax Court erred by requiring an express, standalone written agency agreement.

[54] It is correct that the Tax Court drew a negative inference from the failure of the appellant to provide the Court with a written agreement whereby the Canadian and American developers and the Canadian and American resort point purchasers appointed the appellant to act as their agent with respect to the operating costs of the vacation homes (reasons, paragraph 148). The Court found it to be implausible that the resort point purchasers would appoint the appellant as their agent without entering into an agreement specifying such things as the actual expenses that the appellant could incur as agent (reasons, paragraph 149). This was particularly so in light of the terms of the Management Agreement entered into between the appellant and the Canadian developer in which the appellant appointed the Canadian developer as its agent for specific functions. This agreement contained numerous clauses "that one would expect in an agency agreement" such as an indemnification clause and a standard of care clause (reasons, paragraphs 146-147). The appellant has not shown that the negative inference drawn by the Tax Court was palpably and overridingly wrong.

[55] This said, in any event I am not persuaded that the negative inference drawn as a result of the appellant's failure to produce a written agency agreement was material to the Court's conclusion that the appellant had failed to demonstrate the existence of an agency relationship.

[56] The negative inference was not material because the Tax Court recognized, citing G.H.L. Fridman, *Canadian Agency Law*, 2nd ed. (Markham, Ont: LexisNexis, 2012) at paragraphs 3 through 7, that where no express, written agency agreement exists it remains necessary to "look at the conduct of the parties to determine whether an agency relationship has come into existence" (reasons, paragraph 166). The Court's reliance on this passage and subsequent examination of parties' conduct show that the Court did not consider it was necessary for the appellant to produce an express, standalone written agency agreement.

[57] The Tax Court also considered in detail the appellant's argument, which it re-argues in this Court, that the Purchase and Membership Agreement and the Master Declaration constitute agency agreements (reasons, paragraph 152). The Court rejected this argument for the following reasons:

i. With respect to the reference to the appellant incurring membership expenses "as the agent for all Members" in Article 7 of the Purchase and Membership Agreement, this reference to agency did not exist in the first iteration of the agreement; this reference was only added three years after the creation of the Intrawest program. The only explanation given for this addition was that the reference to agency was added on the advice of an accountant. Because the Canadian developer added these words three years after the program was created, some Canadian resort point purchasers acquired their resort points and memberships pursuant to an agreement that did not refer to the appellant acting as their agent (reasons, paragraphs 153-155).

ii. With respect to Articles 9.1 and 9.3 of the Master Declaration and their references to agency, again such references were not contained in the original Master Declaration. Rather, the words were added three years after the Master Declaration was first executed, also at the direction of an accountant (reasons, paragraph 161).

iii. The late addition of the reference to agency in these agreements might explain internal inconsistencies in Article 9 of the Master Declaration. To illustrate, the first sentence in Article 9.1 states that the responsibility for the maintenance, repair, replacement, restoration, improvement, operation and administration of the vacation homes is vested in the appellant. Further, the first sentence of the second paragraph of Article 9.3 prohibits any member from making or doing any repairs, modifications or the like. These two clauses state that it is the appellant, not the members, who is responsible for the operation and upkeep of the vacation homes (reasons, paragraph 162).

iv. This conclusion is consistent with the Court's finding of fact that the beneficial interest in the vacation homes held by the appellant included the risk of damage or loss attached to the homes, including the obligation to pay the expenses incurred in respect of the operation, repair and maintenance of the homes (reasons, paragraph 163).

v. This conclusion that it is the appellant that is responsible for the operation and upkeep of the vacation homes is inconsistent with the references in Articles 9.1 and 9.3 to the appellant incurring operating costs as agent for its members. Notwithstanding the addition of the agency language, the Court was not of the

view that this addition reflected the actual relationship between the appellant and its members (reasons, paragraph 164).

vi. Further, these agreements cannot constitute an agency agreement between the American resort point purchasers and the appellant, or between the American developer and the appellant because they were not parties to the agreements. No written agreements or *viva voce* evidence was provided with respect to any agreements entered into by the American resort point purchasers or the American developer in respect of the Intrawest program (reasons, paragraph 165).

The Court noted the failure of the appellant to call any resort point purchaser or any officer or director or employee of the appellant to testify about the agency relationship and drew an adverse inference from this failure (reasons, paragraph 167).

[58] The Court then turned to other evidence that in its view negated the existence of an agency relationship (reasons, paragraph 173):

i. The first matter considered was that the appellant calculated the annual resort fee in part on the basis of expenses other than vacation home operating costs. The appellant included its own internal costs, such as the cost of its annual general meeting, the cost of its auditor, its income tax obligations and legal costs. The Court found that these were costs of the appellant, not its members. They were not costs incurred by the appellant as agent for the appellant's members. Similarly, a portion of the annual resort fee related to a reserve fund maintained by the appellant as a contingency fund for future unexpected costs. This too did not

represent an expense incurred by the appellant as agent of its members (reasons, paragraphs 174-175).

ii. The Court then turned to the content of the appellant's bylaws and the Master Declaration. Section 7.2 of the bylaws provides that the appellant's members are required to pay the annual resort fee to the appellant in accordance with the terms of the Master Declaration. The bylaws did not oblige the members to personally incur the vacation home operating costs or any other expenses related to the vacation homes. Article 10.1 of the Master Declaration obligates a member to pay the annual resort fee. This is a distinct obligation from one where the member is personally liable for the vacation home operating costs. Further, Article 10.4 of the Master Declaration provides that while the annual resort fee is to be based on estimated costs, the actual amount of the resort fee is in the sole discretion of the appellant's board and may be adjusted "based on the additional expenses incurred by [the appellant]." The Court found that these clauses were based on the assumption that the costs incurred by the appellant were costs incurred on its own account and not as agent for its members (reasons, paragraphs 176-181).

iii. Finally, the Court considered the evidence that the Canadian developer had an option not to pay the annual resort fee if it elected to subsidize the financial operations of the appellant. This is provided for in Articles 10.7 and 1.8 of the Master Declaration which allow the Canadian developer to subsidize the appellant's financial operations in the event that the assessments, including the annual resort fee, and "every other revenue source (income) received by" the appellant fails to equal or exceed the actual expenses incurred during the fiscal

> year. Thus, Article 10.7 does not contemplate the situation where the appellant incurs costs as the Canadian developer's agent. Rather, the article is based upon the assumption that the appellant incurs costs on its own account. The Canadian developer agrees to provide financial assistance if such costs exceed the appellant's annual revenue (reasons, paragraphs 182-183).

[59] Read fairly, the Tax Court did not require evidence of an express, standalone written agency agreement. Rather, the Court carefully examined the relevant agreements and concluded that they did not support the existence of an agency relationship. The Court then looked at the conduct of the parties for the purpose of determining whether the conduct evidenced an agency relationship and found it did not. I can detect no palpable and overriding error of fact or mixed fact and law in the reasoning of the Tax Court. Nor can I detect any extricable legal error. It follows that the appellant has failed to demonstrate that the Tax Court erred in finding that the resort fees paid to the appellant by its members did not represent the reimbursement of expenses incurred by the appellant as agent for its members.

[60] Before leaving this issue, two final points should be addressed.

[61] First, the listing in paragraph 57 above of the findings the Tax Court relied on to conclude that the Canadian Purchase and Membership Agreement and the Master Declaration do not evidence an agency relationship, did not enumerate the Tax Court's reference to the evidence of a Canadian resort point purchaser, Mr. Abraham. Mr. Abraham testified that he did not know that the appellant was holding itself out as his agent (reasons, paragraph 171). The appellant

argues that such evidence was inadmissible and contrary to the parol evidence rule. I agree that the parol evidence rule precludes, among other things, evidence about the subjective intentions of the parties to a contract (*Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at paragraphs 54-59; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paragraph 59). However, in light of the extensive reasons given by the Tax Court for its conclusion on the agency issue, I am satisfied that the brief reference to Mr. Abraham's testimony was not in any way material to the ultimate conclusion reached by the Tax Court.

[62] Second, while the Tax Court did not expressly deal with the notes to the appellant's financial statements, given the Tax Court's detailed reasons for its conclusion on the agency issue, I am not persuaded that an auditor's characterization of the appellant's relationship to its members is of such import that it required comment.

2. An Agency Sub-Issue: The Inquiry into Beneficial Ownership

[63] Before the Tax Court, the appellant argued that the beneficial interest in the vacation homes is held by the appellant's members – the members of the Intrawest program. As explained above at paragraphs 19 and 20, the Tax Court rejected this argument. Instead, the Tax Court found that the appellant held a beneficial interest in the vacation homes, subject to the occupancy rights held by the Canadian and American developers.

[64] In its written argument, the appellant characterizes the Tax Court's analysis to be misguided; it asserts that the Court erroneously concluded that the appellant bore the onus of proving that its members held beneficial ownership of the vacation homes.

[65] During oral argument, counsel for the appellant resiled to a degree from this argument. Counsel stated that he was no longer certain that the bundle of rights members acquired when purchasing their interest in the vacation homes rose to the level of beneficial ownership. Counsel did not, however, withdraw the argument.

[66] I will therefore deal briefly with this issue.

[67] I begin by rejecting the notions that the Tax Court's analysis was misguided and that it imported a requirement that the appellant prove that its members were the beneficial owners of the vacation homes. Rather, the appellant asserted in its notice of appeal such ownership to be one of the material facts it relied upon. In argument before the Tax Court, the appellant characterized this to be one of the "key issues" (reasons, paragraph 79). The Tax Court therefore did not engage in a legal detour as the appellant now asserts. The Court dealt with the issue placed before it by the appellant. The point the appellant sought to make was that if the members were the beneficial owners of the vacation homes it would follow that when the appellant acquired goods and services in the course of maintaining the vacation homes, it did so as agent of the beneficial owners.

[68] I also reject the appellant's argument that the Tax Court erred by ignoring key documents such as the Trust Indenture and the Master Declaration.

[69] The Tax Court began its analysis with the Agreed Statement and the Trust Indenture, finding that initially the legal and beneficial interests in the Canadian vacation homes were held

by the Canadian developer. The Canadian developer then transferred the legal and beneficial ownership of the Canadian vacation homes to the appellant. Simultaneously with its acquisition of the Canadian vacation homes, the appellant transferred legal title to the homes to the Canadian bare trustee to hold such title "in trust for and on behalf of the [appellant]" (Article 2.1 of the Trust Indenture). Finally, as consideration for the Canadian vacation homes, the appellant transferred the occupancy rights in the homes in perpetuity to the Canadian developer (reasons, paragraphs 86-89).

[70] The Tax Court then moved to apply the legal criteria of possession, use, risk and control in order to follow and determine the beneficial ownership of the vacation homes. The Tax Court found that:

i. The Canadian developer held the right to use the Canadian vacation homes (reasons, paragraph 92).

ii. The absence of evidence made it impossible to make a definitive finding about possession – the Canadian developer probably held possession rights in the Canadian vacation homes, subject to any residual interest the appellant may hold (reasons, paragraph 95).

iii. Risk referred to the risk of damage to the property. There was no evidence that the appellant transferred any risk with respect to the Canadian vacation homes to the Canadian developer. The Court drew an adverse inference from the appellant's failure to adduce the Canadian Vacation Home Transfer Agreement or to call a witness to speak to the terms of the transfer (reasons, paragraphs 98, 99 and 102).

iv. The conclusion that the appellant retained the risk was consistent with the testimony that the appellant, not the developer, paid the repair, maintenance and operating costs of the Canadian vacation homes (reasons, paragraph 101).

v. In the absence of the relevant transfer agreement or *viva voce* evidence, the best evidence was that the appellant and the Canadian developer shared control of the Canadian vacation homes (reasons, paragraph 105).

vi. Both the appellant and the Canadian developer held beneficial interests in the Canadian vacation homes. The risk of damage to the property rested with the appellant (reasons, paragraph 108).

vii. For the same reasons, the Court found that the appellant and the American developer held beneficial interests in the American and Mexican vacation homes. The appellant also bore the risk of damage to these properties (reasons, paragraph 110).

viii. The sale by the Canadian developer of resort points and memberships in the appellant amounted to the granting of a contractual right to occupy a vacation home pursuant to the rules set out in the Master Declaration and the Membership Guidelines. This is a contractual right. A Canadian resort point purchaser did not receive a beneficial interest in a specific vacation home (reasons, paragraphs 115-116).

ix. Further, because the Canadian developer was not at risk with respect to the Canadian vacation homes, the developer could not transfer the obligation to repair and maintain the Canadian vacation homes to the Canadian resort point purchasers (reasons, paragraph 118).

x. There was no evidence that either the appellant or the American developer transferred any beneficial interests in the American and Mexican vacation homes to the Canadian developer. It followed that the Canadian developer could not transfer beneficial interest in the American and Mexican vacation homes to the Canadian resort point purchasers (reasons, paragraph 119).

xi. There was no evidence of any transaction between the American developer and Canadian resort point purchasers. It followed that there was no evidence that either the Canadian or American developer transferred beneficial ownership in any vacation home to the Canadian resort point purchasers (reasons, paragraphs 120-121).

xii. There was no evidence that an American resort point purchaser acquired a beneficial interest in any vacation home (reasons, paragraph 124).

xiii. There was no evidence that the appellant transferred beneficial interests in the vacation homes directly to resort point purchasers (reasons, paragraph 128).

xiv. Similarly, there was no evidence that the appellant transferred beneficial interests in the vacation homes to a trust for the benefit of the members. While a witness on behalf of the appellant testified to the existence of a trust, the witness did not provide the Court with any trust agreement or provide any oral evidence with respect to the terms of such a trust. While Article 4.4 of the Master Declaration referred to a trust for the benefit of the members, the clause did not create a trust. It simply evidenced that the American and Canadian developers agreed that the appellant would create a trust. There was no evidence that the appellant created such a trust (reasons, paragraphs 129-135).

xv. Further, Article 4.4 of the Master Declaration was ambiguous because it stated that "the value of each Member's beneficial interest in the Resort Accommodation shall be paid out and distributed to each Member of the [appellant] in accordance with Article X of the Bylaws of the Club." However, Article 10.2 of the bylaws stated that the assets, including the vacation homes, are assets of the appellant and so are only distributed to the appellant's members on a winding up and dissolution of the appellant. The appellant's bylaws contain no reference to the appellant holding any of its assets in trust for its members. Rather, Article X contemplates the situation where the appellant holds its assets for its own account, not in trust for its members (reasons, paragraph 136).

[71] To conclude on this issue, the Tax Court did not ignore key documents. Rather, the Court carefully examined the relevant documents and concluded that they did not support the appellant's assertion that its members held the beneficial interest in the vacation homes. I can detect no palpable and overriding error of fact or mixed fact and law in the reasoning of the Tax Court. Nor can I detect any extricable legal error. It follows that the appellant has failed to demonstrate that the Tax Court erred in finding that the appellant, not its members, held a beneficial interest in the vacation homes.

3. The GST Issue

[72] As noted at the beginning of these reasons, subsection 165(1) of the Act imposes GST in respect of taxable supplies made in Canada. To determine whether GST is exigible, it is

necessary to both correctly characterize the supply in issue and to correctly determine whether the supply was “made in Canada”.

[73] With respect to the characterization of the supply, the appellant argues that the Tax Court correctly concluded that, if the appellant did not incur the costs of operating the vacation homes as agent, it supplied a service to the members of the Intrawest program. The appellant asserts, however, that the Tax Court erred in failing to characterize the predominant element of the service. Had it done so, the appellant submits that the Tax Court would have found there to be a single supply: the operation of each resort property.

[74] This conclusion is said to flow from the decision of the Tax Court in *O.A. Brown* (cited above at paragraph 31) and the decision of this Court in *Global Cash Access (Canada) Inc. v. Her Majesty The Queen*, 2013 FCA 269, 451 N.R. 358. The appellant provides one single supply because no component of the supply has any commercial efficacy on its own. While the services in respect of each individual resort property are interdependent and inextricably intertwined, the same is not true of the overall operation of all of the resort properties. The operation and costs incurred with respect to each property are independent from the other properties. Thus, resort properties have been added to, and removed from, the Intrawest program over time.

[75] I begin by reviewing the reasons of the Tax Court which address the appellant’s submissions on this point. At paragraph 257 of the reasons, the Court noted that members of the appellant pay the annual resort fee in order to fund membership costs as defined in Article 1.37

of the Master Declaration. Such costs include, but are not limited to, the items set out in paragraph 11 above.

[76] The service provided by the appellant is its agreement to use the annual resort fees to fund its operations. Specifically, the appellant agrees to use the funds to pay the vacation home operating costs, to pay the costs incurred to operate the Intrawest program, to pay its own internal expenses and to hold a portion of the funds in a reserve fund for future unexpected expenses (reasons, paragraph 237).

[77] The Tax Court found as a fact that the appellant made a single supply by agreeing to use the annual resort fee to fund its operations. In so concluding, the Tax Court relied upon the Master Declaration's treatment of the supply as a single supply "with the consideration being based upon the Appellant's total estimated costs" and the fact that the appellant could only continue to operate the Intrawest program if it incurred all of the membership costs (reasons, paragraph 259).

[78] The next question is to determine whether the Tax Court erred in ascertaining the place of the supply. More particularly, was the supply "a service in relation to real property" or a service falling within the general place-of-supply rule?

[79] As explained above in paragraphs 37 and 38, the Tax Court characterized the single supply to be the use of the annual resort fees to fund the appellant's operations, but found that

some of the services included therein did not relate directly and solely to real property. Therefore the Court determined the place-of-supply under paragraphs 142(1)(*g*) and 142(2)(*g*) of the Act.

[80] In order to determine whether an overall supply consists of more than one supply, that is whether a supply consists of a compound supply or multiple supplies, one must determine whether an "alleged separate supply is an integral part, integrant or component of the overall supply. … One factor to be considered is whether or not the alleged separate supply can be realistically omitted from the overall supply." (*O.A. Brown*, paragraphs 22-23).

[81] More recently, in *Global Cash Access*, this Court looked to the commercial efficacy of an arrangement in order to determine the predominant element of a single supply. As that predominant element fell within the statutory definition of "financial service" in subsection 123(1) of the Act, and did not fall within any statutory exception, the consideration received by the taxpayer in exchange for the supply was not subject to GST.

[82] What I take from *Global Cash Access* is that when applying the Act regard must be had to the predominant element of a single supply. It is an error of law to apply the Act having regard to services that do not form the predominant element of a single supply (see also: *Great-West Life Assurance Company v. Her Majesty The Queen*, 2016 FCA 316, [2016] F.C.J. No. 1408, at paragraph 43).

[83] It follows, in my respectful view, that the Tax Court erred in its application of subsections 142(1) and 142(2) of the Act when it broke down the single supply into its

constituent elements for the purpose of determining whether each constituent element related directly and solely to real property (reasons, paragraphs 264-271 and 318).

[84] While the Tax Court's approach avoided to a degree the conflict between paragraphs 142(1)(*d*) and 142(2)(*d*) of the Act which it identified earlier, the approach is contrary to both *O.A. Brown* and the jurisprudence of this Court. The administrative services the Tax Court relied upon to apply the general place-of-supply rule were an integral part of the operation of the Intrawest program – they could not be realistically omitted from the supply. Nor were the administrative services the predominant element of the supply.

[85] This conclusion squarely engages the inconsistency between paragraphs 142(1)(*d*) and 142(2)(*d*). In the present case, the predominant element of the supply is the use of the annual resort fee to fund the operation of the Intrawest program. Because the Intrawest program operates vacation homes in Canada, the United States and Mexico, the predominant element of the supply is in relation to real property situated both inside and outside of Canada.

[86] The legislative inconsistency arises because Parliament, when drafting the place-of-supply rules, appears not to have contemplated that a single supply could be made in respect of multiple real properties, some inside Canada and others outside Canada.

[87] In the Tax Court, the parties submitted a practical solution: interpret subsection 165(1) so that tax is levied on only a portion of the consideration of the single taxable supply.

[88] In my view, the Tax Court correctly rejected this interpretation for the reasons set out at paragraphs 275 through 288 of its decision. I agree that the Act contemplates that a single supply will either be subject to tax on the whole of the consideration paid for the supply or be not subject to tax at all.

[89] To resolve the legislative inconsistency the Tax Court reasoned at paragraphs 310 and 316:

> In my view, section 142 must be interpreted in a manner that respects Parliament's intention to impose the tax, at the applicable rate, on all of the consideration for a single taxable supply that is deemed to be made in Canada, its general intention to deem, under section 142, supplies of services that are performed inside and outside of Canada to be made in Canada, and its intention to impose the tax on supplies of services to residents of Canada where the services are consumed at least partly in Canada.
>
> …
>
> Paragraphs 142(1)(g) and 142(2)(g) apply to the supply of all services that do not relate to real property. There is no inconsistency in the application of these paragraphs and they address all situations that may arise: namely, a service performed completely in Canada, a service performed completely outside of Canada and a service performed both inside and outside of Canada. In my view, these paragraphs reflect Parliament's intention with respect to the application of the deeming rules to supplies of services. If the service is performed partially or wholly inside of Canada, the supply is deemed to be made in Canada; it is only when the service is performed wholly outside of Canada that the supply is deemed to be made outside Canada.

[90] There are, in my view, two principal difficulties with the Tax Court's resolution of the legislative inconsistency.

[91] First, paragraphs 142(1)(*d*) and 142(2)(*d*) apply to both a supply of real property and a service "in relation to real property". While the Tax Court, citing *Nowegijick v. Her Majesty The*

Queen, [1983] 1 S.C.R. 29, agreed that the phrase "in relation to" used in the two paragraphs "should be given a wide scope" (reasons, paragraph 265), it read words into the provisions to conclude that:

i. the relevant paragraphs "only apply to services performed by the Appellant that relate **directly** to real property" (emphasis added) (reasons, paragraph 266); and,

ii. the relevant paragraphs only apply if the single supply of a service relates **solely** to real property (emphasis in original) (reasons, paragraph 318).

[92] Second, the Court's interpretation rendered paragraph 142(1)(*d*) redundant. A supply of a service in relation to real property located in Canada is subsumed into the general place-of-supply rule unless the supply relates to real property located exclusively outside of Canada. Put another way, the Tax Court's interpretation elevates paragraph 142(1)(*g*) to a default provision, applying to all services performed inside and outside of Canada. Had this been Parliament's intent, it would have been a simple matter to so legislate, and then enumerate express exceptions to this default provision.

[93] The resolution I propose builds on the jurisprudence relied upon by the Tax Court in the present case at paragraph 256 of its reasons: the question of whether two elements constitute a single supply or two or more supplies is a question of fact to be determined with a generous application of common sense. It also recognizes that the single supply principle is a common law approach adopted by the Tax Court, based upon jurisprudence from the United Kingdom decided in the context of its value-added tax legislation (*Great Canadian Trophy Hunts Inc. v. The Queen*, 2005 TCC 612, [2005] G.S.T.C. 162, at paragraph 39).

[94] Generally, as explained above, a single supply of services is a supply of services that are inextricably intertwined. If such services are partially consumed in Canada they will be deemed to be supplied wholly in Canada under the general place-of-supply rule.

[95] In this circumstance, I see no reason in principle that precludes splitting up the supply so that the supply is treated as two supplies in order to recognize that ultimately the services are inherently distinct in one important respect: the services relating to the operation of the vacation homes located in Canada are services in relation to real property situated in Canada and hence are a taxable supply – the services relating to the operation of the Intrawest vacation homes situated outside of Canada are services related to real property situated outside of Canada and hence are a non-taxable supply.

[96] The Tax Court rejected this approach because in its view to accept the approach would require the Court "to accept that the Appellant made separate supplies in respect of the other three groups of activities" (reasons, paragraph 258).

[97] I disagree. This approach simply recognizes the distinction between the intertwined bundle of services that constitute the Intrawest program and the reality that the bundle of services are operated on a property-by-property basis. Thus, as the appellant argues, resort properties are added to and removed from the Intrawest program without affecting the nature and character of the program.

[98] It follows from this approach that it will be necessary to quantify the consideration paid for the taxable supply, i.e. the consideration paid for the services provided in relation to real property situated in Canada. The balance of the consideration paid to the appellant by way of the annual resort fees will be in respect of the non-taxable supply. The method of quantification must be fair and reasonable.

[99] The assessments under appeal were based on the Minister's conclusion that a portion of the resort fees was paid for the supply of intangible personal property related to real property situated in Canada. To allocate a portion of the resort fees to the supply of intangible personal property related to real property situated in Canada, the Minister used the ratio of resort points issued by the appellant in respect of vacation homes in resorts situated in Canada to the total resort points issued in respect of all vacation homes held by the appellant.

[100] The appellant proposed an alternative approach. The appellant proposed that the resort fees should be allocated based on the ratio of membership costs associated with the operation of the vacation homes in resorts situated in Canada to the total membership costs for all resorts.

[101] In my view, the allocation proposed by the appellant more fairly and reasonably reflects the nature of the taxable supply: the resort fees paid to operate the vacation homes in resorts situated in Canada. The consideration paid for the taxable supply should be calculated on this basis.

V. Conclusion

[102] The judgment of the Tax Court dismissed the appellant's appeals from the assessments issued with respect to the reporting periods ending October 31 for each year from 2002 to 2007, and awarded costs to the respondent.

[103] For the reasons set out above, I would allow the appeal from the judgment of the Tax Court and set aside the judgment of the Tax Court, with costs both here and in the Tax Court. Pronouncing the judgment that the Tax Court should have pronounced, I would refer the GST assessments back to the Minister for reconsideration and reassessment on the basis that GST is exigible only on that portion of the resort fees paid to the appellant on account of the services it provided in relation to the vacation homes situated in Canada.

"Eleanor R. Dawson"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Chia-yi Chua Wendy Brousseau	FOR THE APPELLANT
Lynn M. Burch Shannon Currie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McCarthy Tétrault LLP Toronto, Ontario	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT