CUSTOMS AND EXCISE

EXCISE TAX ACT

Appeal from Tax Court of Canada (T.C.C.) decision (2016 TCC 149) dismissing appellant's appeal from assessment under *Excise Tax Act*, R.S.C., 1985, c. E-15 in respect of annual resort fees paid by members of Intrawest program — Intrawest timeshare program offering vacation homes built by Canadian, American developers in resorts located in Canada, U.S., Mexico — Members of program purchasing points to rent vacation homes — Developers transferring vacation homes to appellant in exchange for points required to acquire right to occupy, use homes for entire year in perpetuity — Developer then selling resort points acquired from appellant to home timeshare purchaser who then uses resort points to reserve occupancy of vacation home for specified period of time each year — Act, s. 165(1) imposing GST in respect of taxable supplies "made in Canada" — S. 142(1) deeming certain supplies to be made in Canada; s. 142(2) deeming certain other supplies to be made outside of Canada — Appellant not collecting GST on resort fees charged annually to members of Intrawest program — Assessed under the Act in respect of annual resort fees paid to it by members of Intrawest program — Objecting to assessment, ultimately appealing from it to T.C.C. — Arguing that resort fees paid to it as reimbursement for expenses it incurred as agent for members of Intrawest program, GST therefore not exigible — In the alternative, if GST applying to resort fees, appellant arguing that because resort accommodations administered, operated under Intrawest program located both inside, outside of Canada, GST should be allocated on basis it proposed, not on basis applied by Minister of National Revenue — T.C.C. concluding, *inter alia*, that: appellant itself holding beneficial interest in vacation homes; members not responsible for operation, repair, maintenance of vacation homes; because no legal rights existing for members with respect to operating expenses, no agency relationship existing between appellant, members — T.C.C. also concluding resort fees constituting consideration paid for supply — Finding that appellant made single supply of service — Observing inconsistency in wording of Act, ss. 142(1)(d), 142(2)(d) when supplied service "in relation to real property" — Resolving this inconsistency by concluding that service must be performed directly on real property or relate directly to real property — Deeming supply to be made in Canada pursuant to Act, s. 142(1)(g) because appellant performing service partially in Canada; GST applying to totality of resort fees paid by members of Intrawest program — Whether T.C.C. erring: in failing to find that resort fees representing reimbursement of expenses incurred by appellant as agent for members of Intrawest program; in interpreting, applying place-of-supply rules — Appellant failing to demonstrate that T.C.C. erred in finding that resort fees not representing reimbursement of expenses incurred by appellant — Negative inference of T.C.C. resulting from failure of appellant to provide written agreement whereby developers, resort point purchasers appointing appellant to act as agent with respect to the operating costs not material — T.C.C.'s examination of parties' conduct sufficient — T.C.C. not ignoring key documents — T.C.C. erring in application of Act, ss. 142(1), 142(2) when breaking down single supply into its constituent elements for purpose of determining whether each constituent element related directly, solely to real property — Administrative services relied upon by T.C.C. to apply general place-of-supply rule integral part of operation of Intrawest program, could not be omitted from supply — This conclusion squarely engaging inconsistency between ss. 142(1)(d), 142(2)(d) — Here, predominant element of supply use of annual resort fee to fund operation of program — Legislative inconsistency arising because Parliament not contemplating that single supply could be made in respect of multiple real properties, some inside, others outside Canada — Act contemplating that single supply either be subject to tax on whole of consideration paid for supply, or not be subject to tax at all — Ss. 142(1)(d), 142(2)(d) applying to both supply of real property, service "in relation to real property" — T.C.C.'s interpretation rendering s. 142(1)(d) redundant, elevating s. 142(1)(g) to default provision, applying to all services performed inside, outside of Canada — Whether two elements constituting single supply or two or more supplies question of fact to be determined with generous application of common sense — Single

supply services partially consumed in Canada deemed to be supplied wholly in Canada under general place-of-supply rule — No reason in principle precluding splitting up supply so that supply is treated as two supplies in order to recognize that ultimately services are inherently distinct — Services relating to operation of vacation homes in Canada taxable supply — Services relating to operation of Intrawest vacation homes outside Canada related to real property situated outside of Canada, hence non-taxable supply — This approach recognizing distinction between intertwined bundle of services constituting Intrawest program, reality that bundle of services operated on property-by-property basis — Allocation proposed by appellant more fairly, reasonably reflecting nature of taxable supply — GST assessments referred back to Minister for reconsideration, reassessment on basis that GST exigible only on portion of resort fees paid to appellant on account of services it provided in relation to vacation homes situated in Canada — Appeal allowed.

CLUB INTRAWEST V. CANADA (A-249-16, 2017 FCA 151, Dawson J.A., judgment dated July 11, 2017, 38 pp.)