GST, Place of Supply, Intangible Personal Property - Sas Ansari

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Place of Supply rules in the Excise Tax Act - Intangible Personal Property

Club Intrawest v The Queen, 2016 TCC 149

This is a lengthy decision with a number of issues at play. This summary will look only at the place-of-supply rules, *Excise Tax Act* section 142, as they apply to intangible personal property or a service that relates to both real property in and outside of Canada.

The Court held that the supply of a single service that related to real property situated in Canada and outside of Canada is fully taxable in Canada and cannot be apportioned among the real property locaitons.

NOTE - this case demonstrates the need for persons in business to engage a lawyer, not just an accountant, to ensure that purported transactions are legally effective and appropriately documented, and that the tax outcomes of relationship structures are adequately considered.

FACTS

The Appellant was a non-profit, non-stock e established in Deleware. It was a GST stablished registrant in Vancouver, BC, and was assume (with this assumption unrebutted) at all times a resident of Canada.

NOTE: IT appears that the Court did not consider the residency tie-breaker rules in the Canada-US tax convention*. Article IV(3) deems a company to be a resident of the contracting state it was created in unless continued into the other state*.

The intangible property at issue was not the resort points that allowed persons to purchase residency rights at resorts, but rather the annual resort fee paid by the members (purchasers of resort points) to the Appellant. Both Canadian and US resort point purchasers, as well as both the Canadian and US developer, had an obligation to pay an annual resort fee (para 48).

ANALYSIS

Subsections 165(1) and (2) of the Excise Tax Act impose a federal and, where a supply is made

in a participating province, provincial rates on the value of the consideration for the supply made in Canada.

A taxable supply is a supply made in the course of commercial activity, defined as the provision of property or service in any manner, include sale, transfer, barter, exchange, license, rental, lease, gift, or disposition (para 70). However, a reimbursement for expenses incurred as agent for others is not subject to GST/HST as there is no service being provided.

The Court noted that the Appellant failed to lead expert evidence as to the law of agency in the US and Canada, forcing the court to assume that the law is the same as in Canada. There are three components of an agency relationship - *Royal Securities Corp Ltd. v Montreal Trust Co*, [1966] OJ No 1078 (QL) at paragraph 55 (Ont HCJ), aff'd [1967] OJ No 997 (QL) (Ont CA):

- Consent of both the principal and agent;
- Authority given to the agent by the principal allowing the agent to affect the principal's legal position; and
- the principal's control of the agent's actions.

In this case, if the resort point purchasers has no beneficial interest in the real property, evidenced by appropriate documents, then there was no legal right that could be affected and no possibility, at law, to have an agency relationship. There are four elements in considering attribution of beneficial ownership - *Velcro Canada Inc v The Queen,* 2012 TCC 57, *Prévost Car Inc. v The Queen*, 2008 TCC 231*, affirmed in* 2009 FCA 57***:***

- possession;
- use;
- risk; and
- control.

The court held that there was evidence that use and possession were transferred, but no evidence was led that would allow the court to hold that any risk was transferred. The Court drew an adverse inference from the Appellants failure to produce the type of documents that would have evidenced transfer of risk - *Lévesque v Comeau et al*, [1970] SCR 1010. Finally, the court determined that control was shared between those with the right to occupy and those with the residual right. The documents did not evidence the transfer of beneficial ownership to the resort point purchasers, though the court noted a significant lack of documentation that would be relevant. The Court concluded that theAppellantt held beneficial title and, therefore, that there was no agency relationship.

The fees paid were a supply and not reimbursement.

The question then was whether the supply was made in Canada. GST aims to tax consumption in Canada. Section 142 contains two place- of-supply rules for intangible personal property:

- The first considers where the intangible personal property may be used; and
- The second looks at the locaiton of related real prperty, tangiple property, or services.

Subparagraph 142(1)(c)(i) deems a supply of intangible property to be made in Canada if the property may be used in whole or part in Canada and to be made outside of Canada if the property may not be used in Canada. Subparagraph 142(1)(c)(ii) seems a supply of intangible personal property to be made in Canada if the property related to real property situated in Canada, to tangible personal property ordinarily situated in Canada or to a service to be performed in Canada, and NOT to be made in Canada where the property related to real property situated outside of Canada, to tangible personal property ordinarily situated outside of Canada, or to a service to be performed wholly outside of Canada.

Paragraphs 142(1)(g) and (2)(g) apply to services not in relation to real property and deem them to be made in Canada if the service is performed in whole or part in Canada. Paragraphs 142(1)(d) and (2)(d) provide that a supply of a service in relation to real property is made in Canada is the real property is located in Canada and deemed to not be made in Canada if the real property is not located in Canada.

The problem here was that the resort points allowed the person to book property in Canada and outside of Canada, and the mutually exclusive rules would deems the services to be both in Canada and not in Canada (para 214). The Court must interpret the provision to avoid an absurd result, while doing so in a textual, contextual, and purposive manner that does not require words to be added to the legislation that would do anything more than express what is already implied in the statute and without rendering a portion of the statute meaningless or redundant (paras 216-23).

The Court had to determine whether the supply was in respect of a service or tangible personal property. In the ETA, if anything is not property, money or an employee service, then it is a "service" (para 235). The Court held that the annual fees were as consideration for services as no rights were supplied by the payment of the fee (para 237).

Next, the Court had to determine whether there was a single supply with a number of elements, or multiple single supplies. To determine this, the courts must determine whether or not the alleged separate supply is an integral part or component of the overall supply based on the true nature of the transaction (paras 254-56). The court held that there was only one supply - the agreement to use the annual fees to fund its operations, and not the separate supply of maintenance operation, improvement of properties, and maitenance of the program (para 259).

The court had to determine whether the single supply was made "in relation to real property" - which is to be given a wide scope - *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29. As used in the provision, the court held that 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. The Court held that the Appellants only business was the operation of the program which relates directly or indirectly to the real property, and examined the services provided in detail. This led the court to conclude that (para 271):

> the Appellant made a single supply of services that relate to real property situated

outside of Canada (the U.S./Mexico Vacation Homes), real property situated in Canada (the Canadian Vacation Homes) and things other than real property, such as the operating costs of the Appellant

In addressing the legislative inconsistency and held that the ETA can not be interpreted to allow for an apportionment of the consideration as between inside and outside of Canada where there is only a single supply (para 276). Where a person made a taxable supply and it is made in Canada then tax is payable on the whole value of the supply. The Court summarized its findings:

[288] In summary, the *GST Act*, particularly the sections that impose the tax and the sections that allow for the claiming of input tax credits, contemplates a single supply which is either subject to tax on the whole of the consideration paid for the supply or not subject to tax at all.

[289] Both of the parties appear to be arguing that it is not the intent behind the section 142 place-of-supply rules that a supply consumed both inside and outside of Canada be deemed to be made in Canada. I do not agree.

[290] Paragraphs 142(1)(g) and 142(2)(g) contain what is normally referred to as the general place-of-supply rules for services. The two paragraphs apply to the supply of all services other than a service that is in relation to real property. The two paragraphs determine the place-of-supply according to where the service is physically performed. Parliament has equated the place of consumption of a service to the place where the supplier of the service performs the service.

[291] The only exception to the general rule is where the supply is a supply of a service in relation to real property. In such a situation, paragraphs 142(1)(d) and 142(2)(d) look at the location of the real property.

[292] The effect of the general rule contained in paragraphs 142(1)(g) and 142(2)(g) is that a single supply of a service that is performed both inside and outside of Canada and does not relate to real property will be deemed to be a supply made in Canada. This means that, for most supplies of services (i.e. supplies of services that do not relate to real property), Parliament has decided that the supply will be deemed to be a supply made in Canada even if the supply is consumed both inside and outside of Canada.

[293] Similarly, under paragraphs 142(1)(c)(i) and 142(2)(c)(i) a single supply of intangible personal property that may be used both inside and outside of Canada and does not relate to real property, tangible personal property or a service will be deemed to be a supply made in Canada.

The Court went on to examine the override rules in section 143 and the export rules, and drop-shipment rules in 179. After this consideration, the Court held that section 142 is to be interpreted to respect the intention to impose tax on all of the consideration of a single supply deemed to made in Canada. With respect to services, so long as the supply is consumed in part in Canada, the entire value is taxable (para 310).

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