JUDGMENT OF THE COURT (First Chamber)

3 September 2009 *

In Case C-37/08,

REFERENCE for a preliminary ruling under Article 234 EC from the VAT and Duties Tribunal, London (United Kingdom), made by decision of 9 January 2008, received at the Court on 31 January 2008, in the proceedings

RCI Europe

v

Commissioners for Her Majesty's Revenue and Customs,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, M. Ilešič, A. Tizzano, A. Borg Barthet (Rapporteur) and E. Levits, Judges,

* Language of the case: English.

Advocate General: V. Trstenjak,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 February 2009,

after considering the observations submitted on behalf of:

— RCI Europe, by H. Foster, Solicitor, and by M. Hall and M. Angiolini, Barristers,

— the United Kingdom Government, by Z. Bryanston-Cross, acting as Agent, and by R. Hill, Barrister

— the Greek Government, by S. Spyropoulos, I. Bakopoulos, S. Alexandriou and V. Karra, acting as Agents,

— the Spanish Government, by B. Plaza Cruz, acting as Agent,

— the Commission of the European Communities, by R. Lyal and M. Afonso, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 April 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 9(2)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, 'the Sixth Directive'), reproduced essentially in Article 45 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), which entered into force on 1 January 2007.

2 The reference was made in the course of proceedings between RCI Europe and the Commissioners for Her Majesty's Revenue and Customs ('the Commissioners') concerning the recovery of value added tax ('VAT').

Legal background

3 Article 9(1) and (2)(a) of the Sixth Directive provides:

‘1. The place where a service is supplied shall be deemed to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied or, in the absence of such a place of business or fixed establishment, the place where he has his permanent address or usually resides.

2. However:

(a) the place of the supply of services connected with immovable property, including the services of estate agents and experts, and of services for preparing and coordinating construction works, such as the services of architects and of firms providing on-site supervision, shall be the place where the property is situated;

...’

4 Article 26(1) and (2) of the Sixth Directive is worded as follows:

‘1. Member States shall apply [VAT] to the operations of travel agents in accordance with the provisions of this Article, where the travel agents deal with customers in their

own name and use the supplies and services of other taxable persons in the provision of travel facilities. This Article shall not apply to travel agents who are acting only as intermediaries and accounting for tax in accordance with Article 11A(3)(c). In this Article travel agents include tour operators.

2. All transactions performed by the travel agent in respect of a journey shall be treated as a single service supplied by the travel agent to the traveller. It shall be taxable in the Member State in which the travel agent has established his business or has a fixed establishment from which the travel agent has provided the services. The taxable amount and the price exclusive of tax, within the meaning of Article 22(3)(b), in respect of this service shall be the travel agent's margin, that is to say, the difference between the total amount to be paid by the traveller, exclusive of [VAT], and the actual cost to the travel agent of supplies and services provided by other taxable persons where these transactions are for the direct benefit of the traveller.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

The business of RCI Europe

5 RCI Europe was established in the United Kingdom on 29 November 1973. Its business consists in facilitating and organising the exchange of timeshare usage rights held by its members in holiday accommodation outside that Member State.

6 RCI Europe operates a week-for-week timeshare usage rights exchange scheme known as 'RCI Weeks', which has the specific features described below.

7 Holiday resort developers are invited to become 'affiliates'. Individuals who own timeshare usage rights in affiliated resorts can apply to become members of the RCI Weeks scheme.

8 Membership of the RCI Weeks scheme entitles a member to deposit holiday usage rights in respect of his timeshare property into a pool of timeshare accommodation ('the Weeks Pool') and to have made available to him the holiday usage rights deposited by other members into the Weeks Pool. During that process, members are in contact only with RCI Europe. The depositing of holiday usage rights into the Weeks Pool does not entail the transfer to RCI Europe of rights in the property to which the usage rights deposited relate. On the contrary, the original timeshare owner retains his holiday usage right throughout the process.

9 RCI Weeks members pay an enrolment fee, which covers a period from one to five years, and annual subscription fees. In addition, an exchange fee is payable on the date of the request for an exchange. RCI Europe treats this fee as a returnable deposit. If RCI Europe is unable to identify an exchange acceptable to the member within the Weeks Pool, it will hold the exchange fee as a credit to the member's account against future exchange fees or, if requested by the member, refund it.

10 RCI Europe can supplement the Weeks Pool by buying in accommodation from a third party or by a developer making extra weeks available. A member can request an exchange in respect of this supplemental accommodation on payment of an exchange fee.

The procedure before the national tax authorities

11 RCI Europe has its registered office in the United Kingdom. A large proportion of its members are nationals of that Member State. On the other hand, a large proportion of the properties which are subject to the RCI Weeks exchange scheme is in Spain. The United Kingdom and Spanish tax authorities have both claimed payment of VAT on RCI Europe's transactions, which ultimately amounts to double taxation in two different Member States.

12 It is apparent from the reference for a preliminary ruling that, until 31 December 2003, RCI Europe paid VAT in the United Kingdom on all enrolment fees received from new members and on all annual subscription fees received from existing members. In addition, until 31 December 2005, RCI Europe was also paying VAT in the United Kingdom on all exchange fee income received from members who had acquired a timeshare usage right in a property located in the European Union. It did not pay VAT in the United Kingdom on all exchange fees received from members who had acquired such a timeshare usage right in a property located outside the European Union.

13 The Spanish tax authorities take the view that the services supplied by RCI Europe are directly connected with immovable property and are, accordingly, subject to VAT in the State in which the timeshare property is located. The assessment certificates issued by the Spanish tax authorities against RCI Europe and the decisions of the financial administrative courts dismissing RCI Europe's complaint are currently the subject of an appeal in cassation before the Tribunal Supremo (Spain).

14 As from 1 January 2004, RCI Europe ceased to account for VAT in the United Kingdom on its enrolment and annual subscription income from members whose holiday usage rights relate to timeshare properties in Spain. It also ceased to account for VAT in the United Kingdom on exchange fee income that it received from members who exchanged their holiday usage rights for equivalent rights in respect of a Spanish property.

15 On 23 March 2005, the Commissioners decided to raise an assessment to recover the amount of VAT that they considered RCI Europe should have accounted for in 2004 on enrolment and annual subscription income received from members with holiday usage rights in properties in Spain and exchange fees received for holiday usage rights in respect of Spanish properties. The assessment was raised on 5 April 2005 for the sum of GBP 1 339 709.

16 On 5 May 2005, RCI Europe lodged an appeal against that assessment before the referring tribunal.

17 In its reference for a preliminary ruling, the referring tribunal refers to the continuing legal uncertainty as to the correct place of supply that is adversely affecting RCI Europe in the conduct of its business.

18 In those circumstances the VAT and Duties Tribunal, London, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) In the context of the services supplied by [RCI Europe] for:

— the enrolment fee;

— the subscription fee; and

— the exchange fee

paid by members of [RCI Europe's] Weeks Scheme, what are the factors to be considered when determining whether the services are "connected with" immovable property within the meaning of Article 9(2)(a) of the Sixth ... Directive ...?

(2) If any or all of the services supplied by [RCI Europe] are "connected with" immovable property within the meaning of Article 9(2)(a) of the Sixth ... Directive ..., is the immovable property with which each or all of the services are connected the immovable property deposited into the pool, or the immovable property requested in exchange for the deposited immovable property, or both of these properties?

(3) If any of the services are "connected with" both immovable properties, how are the services to be classified under the Sixth ... Directive ...?

(4) In light of the divergent solutions found by different Member States how does the Sixth ... Directive ... characterise the "exchange fee" income of a taxable person received for the following supplies:

— facilitating the exchange of holiday usage rights held by one member of a scheme run by the taxable person for the holiday usage rights held by another member of that scheme; and / or

— supplying usage rights in accommodation purchased by the taxable person from taxable third parties to supplement the pool of accommodation available to members of that scheme.'

The questions referred for a preliminary ruling

19 By its questions, the referring tribunal asks, essentially, which place is, within the meaning of Article 9(2)(a) of the Sixth Directive, the place of supply of the services provided by an association whose business consists in organising the exchange between its members of their holiday usage rights in timeshare accommodation, in return for which that association receives enrolment, annual subscription and exchange fees from its members.

20 Article 9 of the Sixth Directive contains rules for determining the place where services are deemed to be supplied for tax purposes. Article 9(1) sets out a general rule in that regard, while Article 9(2) lists a number of specific connecting rules. The object of those provisions is to avoid, first, conflicts of jurisdiction, which may result in double taxation, and, secondly, non-taxation (Case 168/84 *Berkholz* [1985] ECR 2251, paragraph 14; Case C-327/94 *Dudda* [1996] ECR I-4595, paragraph 20; and Case C-291/07 *Kollektivavtalsstiftelsen TRR Trygghetsrådet* [2008] ECR I-8255, paragraph 24).

21 The referring tribunal asks the Court more specifically what factors must be considered in order to determine whether the services supplied in return for each of the payments made in the overall framework of the RCI Weeks scheme are connected with immovable property.

22 As stated by the Advocate General in point 56 of her Opinion, the questions referred for a preliminary ruling can reasonably be construed as seeking to establish the extent to which the various types of fees payable by members participating in the RCI Weeks exchange scheme can be attributed to individual services supplied by RCI Europe.

23 Therefore, it is appropriate to examine separately the various transactions concluded by the parties under the RCI Weeks scheme in the light of the synallagmatic legal relationship to which the Advocate General refers in point 57 of her Opinion.

24 In that regard, the Court has already held that a supply of services is effected 'for consideration', within the meaning of Article 2(1) of the Sixth Directive, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient (Case C-16/93 *Tolsma* [1994] ECR I-743, paragraph 14; Case C-172/96 *First National Bank of Chicago* [1998] ECR I-4387, paragraphs 26 to 29; and Case C-174/00 *Kennemer Golf* [2002] ECR I-3293, paragraph 39).

25 In those circumstances, it is necessary to examine each transaction under the RCI Weeks scheme in order, first, to identify the supply of services effected in return for the various fees invoiced by RCI Europe and, second, to assess the characteristics of those supplies of services in the light of the criteria laid down in Article 9 of the Sixth Directive.

The supply of services effected in return for the various fees invoiced by RCI Europe

26 In the first place, as regards its membership and subscription fees, RCI Europe takes the view that the services supplied in return do not have a sufficient connection with a particular property and do not therefore fall within the scope of Article 9(2) of the Sixth Directive. To the contrary, it submits that the general rule laid down by Article 9(1) thereof should be applied, with the consequence that the place of supply of the services relating to the enrolment of new members and the corresponding subscriptions is the place where the supplier has established his business.

27 Like RCI Europe, the United Kingdom Government takes the view that there is not a sufficiently direct connection between the supply of services effected in return for the enrolment and subscription fees at issue in the main proceedings and any immovable property. That point of view is based, in particular, on the fact that RCI Europe provides access to a type of market in which its members may exchange their timeshare usage rights.

28 Although it is true that, as the Advocate General notes in point 65 of her Opinion, a closer examination of RCI Europe's business model, as described in detail by the latter, shows that in return for payment of the enrolment fee, a member initially receives only access to the RCI Weeks exchange scheme, it is also true that, for the owner of timeshare usage rights, membership of such a scheme would be pointless if he had no intention of exchanging his right for those of other members.

29 Furthermore, it is in that context that the synallagmatic nature of the contract concluded between RCI Europe and each of its members must be taken into consideration. Even if the various stages of the RCI Weeks system are taken into

account, the fact remains that, if there was no intention to exchange timeshare usage rights through the market created by RCI Europe, the enrolment and annual subscription fees would lack any point.

30 In that connection, it is clear from the case-law of the Court that the basis of assessment for a supply of services is everything which makes up the consideration for the service and that a supply of services is therefore taxable only if there is a direct link between the service supplied and the consideration received (Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, paragraph 11 and 12, and *Tolsma*, paragraph 13).

31 In the case in the main proceedings, the service provided by RCI Europe is certainly not immediate. However, it undertakes to supply in the future the service required at the request of one of its members.

32 Although the owner of a timeshare usage right always has the possibility of renting another property if he so wishes, by paying another rental fee for the property he wishes to rent, the owner of such a right who is registered with the RCI Weeks scheme and regularly pays annual subscription fees has the opportunity, with the help of RCI Europe, of exchanging his right for that of another owner and paying merely the exchange fee. The enrolment and subscription fees are in fact paid by members in return for a service provided, or to be provided, by RCI Europe in order to facilitate the exchange of its members' timeshare usage rights, rather than rental through a third-party agency.

33 In a similar situation, the Court had occasion to state that the fact that an annual subscription fee is a fixed sum which cannot be related to each case of use does not alter the fact that there is reciprocal performance between the members and the supplier of services (see, to that effect, *Kennemer Golf*, paragraph 40). The annual subscription fees of members of an association can constitute consideration for the services provided by

the association, even though members who do not use or do not regularly use the association's services must still pay their annual subscription fees (see, to that effect, *Kennemer Golf*, paragraph 42).

34 In that light it follows that the enrolment and annual subscription fees must be regarded as constituting consideration for participation in a system originally conceived to enable each member of RCI Europe to exchange his timeshare usage right. The service supplied by RCI Europe consists in facilitating the exchange and the enrolment and annual subscription fees represent the consideration paid by members for that service.

35 Secondly, as far as concerns the exchange fee, it should be noted that the supply of services in return for which members of RCI Europe pay enrolment fees is the exchange itself, or the possibility of participating in such an exchange in the future, which is the main objective of each member, access to the accommodation exchange pool and the information relating to it being only ancillary to that aim.

Application of the criteria in Article 9(2)(a) of the Sixth Directive

36 In that connection, it must be recalled that the Court has defined the conditions for the application of that provision to the effect that there must be a 'sufficiently direct connection' between the supply of services and the immovable property concerned, on the ground that it would be contrary to the general scheme of that provision to place within the scope of that special rule every supply of services provided that it has a connection, even a very tenuous one, with immovable property, since a large number of services are connected in one way or another with immovable property (Case C-166/07 *Heger* [2006] ECR I-7749, paragraph 23).

37 In the case in the main proceedings, it is difficult to establish the relationship between RCI Europe and its members without taking account of the purpose of that relationship. Furthermore, it is common ground that timeshare usage rights are rights in immovable property and their transfer in exchange for the enjoyment of similar rights constitutes a transaction connected with immovable property.

38 An owner who wishes to exchange his timeshare usage right with that of another member enters into direct contact, not with the other member, but with RCI Europe. What distinguishes the RCI Weeks system from a simple rental from any travel agency is the fact that, under such a system, the person concerned pays not for the supply of a holiday, but for the service provided by RCI Europe in order to facilitate the exchange of his right relating to a particular property. It follows that the property with which RCI Europe's services are connected is the property in which the owner who wishes to exchange has a right.

39 It should also be borne in mind that the underlying logic of the provisions concerning the place where a service is supplied in Article 9 of the Sixth Directive requires that goods and services are taxed as far as possible in the place of consumption.

40 It follows that, if the general rule laid down in Article 9(1) of the Sixth Directive applied, it would be easy for an economic operator such as RCI Europe completely to avoid VAT on its supply of services by establishing its registered office outside the area where Community VAT applies.

41 In the case in the main proceedings, the services supplied are not consumed in the place where RCI Europe is established, but in the place where the immovable property in respect of which timeshare usage rights are exchanged is situated. As regards the

enrolment, annual subscription and exchange fees, that property is the property in respect of which the member of RCI Europe has timeshare usage rights that he makes available in the RCI Weeks system.

42 As far as concerns the supply of timeshare usage rights in accommodation acquired by RCI Europe from taxable third parties in order to supplement the accommodation exchange pool made available to members of the scheme, RCI Europe receives enrolment, annual subscription and exchange fees from its members only for the timeshare usage rights that each member exchanges. In such a case, RCI Europe does not receive any sums from third parties who may be liable to VAT. As regards the supply in question, RCI Europe is not liable to VAT in respect of that transaction on the accommodation made available to its members by a third party.

43 In those circumstances, the answer to the questions referred for a preliminary ruling must be that Article 9(2)(a) of the Sixth Directive is to be interpreted as meaning that the place where services are supplied by an association whose business consists in organising the exchange between its members of their timeshare usage rights in holiday accommodation, in return for which that association receives from its members enrolment, annual subscription and exchange fees, is the place where the property in respect of which the member concerned holds timeshare usage rights is situated.

Costs

44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 9(2)(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment must be interpreted as meaning that the place where services are supplied by an association whose business consists in organising the exchange between its members of their timeshare usage rights in holiday accommodation, in return for which that association receives from its members enrolment, annual subscription and exchange fees, is the place where the property in respect of which the member concerned holds timeshare usage rights is situated.

[Signatures]