JUDGMENT OF THE COURT (First Chamber)

12 May 2005 *

In Case C-452/03,

REFERENCE for a preliminary ruling under Article 234 EC from the High Court of Justice of England and Wales, Chancery Division (United Kingdom), made by decision of 17 October 2003, received at the Court on 27 October 2003, in the proceedings

RAL (Channel Islands) Ltd,

RAL Ltd,

RAL Services Ltd,

RAL Machines Ltd

v

Commissioners of Customs and Excise,

* Language of the case: English.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts (Rapporteur), N. Colneric, K. Schiemann and E. Juhász, Judges,

Advocate General: M. Poiares Maduro,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 24 November 2004,

after considering the observations submitted on behalf of:

— RAL (Channel Islands) Ltd, RAL Ltd, RAL Services Ltd and RAL Machines Ltd, by K. Lasok QC and V. Sloane, Barrister,

— the United Kingdom Government, by K. Manji, acting as Agent, C. Vajda QC and M. Angiolini, Barrister,

— the Irish Government, by D. O'Hagan, acting as Agent, D. McDonald SC and G. Clohessy BL,

— the Portuguese Government, by L. Fernandes and Â. Seiça Neves, acting as Agents,

— the Commission of the European Communities, by R. Lyal, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 27 January 2005,

gives the following

Judgment

Law

1 The reference for a preliminary ruling concerns the interpretation of Articles 2, 4 and 9 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') and of Articles 1 and 2 of Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonisation of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in Community territory (OJ 1986 L 326, p. 40) ('the Thirteenth Directive').

2 That reference was made in proceedings between RAL (Channel Islands) Limited ('CI'), RAL Limited ('RAL'), RAL Services Ltd ('Services') and RAL Machines Limited ('Machines') on the one hand and Commissioners of Customs and Excise ('the Commissioners'), the United Kingdom value added tax ('VAT') authority, on the other hand regarding determination of the place in which gaming machine services are deemed to be supplied.

Relevant provisions

3 Under Article 2(1) of the Sixth Directive, 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is to be subject to VAT.

4 Article 3(1) of the Sixth Directive provides:

'For the purposes of this Directive, the "territory of the country" shall be the area of application of the [EC] Treaty as stipulated in respect of each Member State in Article [299].'

5 Under Article 4(1) of the Sixth Directive, '"taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity'.

6 As regards determination of the place in which a supply of services is deemed to be supplied, Article 9 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:

...

(c) the place of the supply of services relating to:

— cultural, artistic, sporting, scientific, educational, entertainment or similar activities, including the activities of the organisers of such activities, and where appropriate, the supply of ancillary services,

— ...

shall be the place where those services are physically carried out;

...'

7 Article 1 of the Thirteenth Directive is worded as follows:

'For the purposes of this Directive:

1. "A taxable person not established in the territory of the Community" shall mean a taxable person as referred to in Article 4(1) of [the Sixth] Directive ... who, during the period referred to in Article 3(1) of this Directive, has had in that territory neither his business nor a fixed establishment from which business transactions are effected, nor, if no such business or fixed establishment exists, his permanent address or usual place of residence, and who, during the same period, has supplied no goods or services deemed to have been supplied in the Member State referred to in Article 2 ...'

8 Article 2(1) of the Thirteenth Directive provides:

'... each Member State shall refund to any taxable person not established in the territory of the Community, subject to the conditions set out below, any [VAT] charged in respect of services rendered or moveable property supplied to him in the territory or the country by other taxable persons or charged in respect of the importation of goods into the country, in so far as such goods and services are used for the purposes of the transactions referred to in Article 17(3)(a) and (b) of [the Sixth] Directive ... or of the provision of services referred to in point 1(b) of Article 1 of this Directive.'

The main proceedings and the questions referred for a preliminary ruling

9 CI is a company established in Guernsey (Channel Islands). RAL, Services and Machines are companies incorporated in the United Kingdom. Those four companies are subsidiaries of RAL Holdings Limited ('Holdings'), which is a company also incorporated in the United Kingdom. CI, RAL, Services, Machines and Holdings together make up the RAL Group.

10 Until the end of 2000, RAL operated slot gaming machines in the United Kingdom from premises which it owned or leased. It owned the machines installed on those premises and employed its own staff. It held the necessary licences for the operation of both the arcades and the machines.

11 Holdings, as the representative member of the VAT group, was accountable for VAT on the proceeds from the slot gaming machines.

12 Subsequently, a restructuring of the RAL group was planned. According to the national court, by establishing an offshore subsidiary to operate the slot machines and separating that function from the ownership and operation of the premises, the plan was designed to enable the RAL Group to escape liability for VAT on the gaming machine services and to recover input VAT.

13 To that end, CI was incorporated in Guernsey, one of the Channel Islands, which are outside the territory of the Community. As part of the same restructuring plan, Machines and Services were incorporated in the United Kingdom.

14 RAL holds the leases to the premises in which the slot gaming machines are installed and the licences for the operation of amusement arcades. It gives CI a licence to install and operate machines on those premises.

15 Machines owns all of the slot gaming machines used by the RAL Group and holds the licences for those machines. Under a lease contract with CI, Machines is responsible for providing CI with slot gaming machines and for keeping them in good repair.

16 CI's activity is to enable the public to use the slot gaming machines, supplied by Machines, on the premises made available to it by RAL. However, CI carries out that activity by subcontracting the day-to-day management of the machines to Services. Services employs almost all of the RAL Group's staff, some 600 persons. CI has no staff of its own in the United Kingdom.

17 After the restructuring of the RAL Group, CI maintained, on the basis of Articles 2, 4 and 9 of the Sixth Directive, that the gaming machine services were deemed to be supplied in Guernsey. Since those services were therefore, in its view, supplied outside the territory of the Community, it claimed that it was not required to pay VAT on the services supplied to its clients in the United Kingdom. Pursuant to Articles 1 and 2 of the Thirteenth Directive, it also claimed repayment of input VAT.

18 By decision of 28 August 2001, the Commissioners rejected CI's claims. They took the view that CI was subject to VAT in the United Kingdom. In the alternative, they found that the restructuring of the RAL Group was to be disregarded so that the services in question, as in the period prior to that restructuring, continued to be provided by Holdings in the United Kingdom. In any event, according to the Commissioners, CI's claims had to be rejected as being an abuse of right.

19 CI, RAL, Machines and Services challenged that decision before the VAT and Duties Tribunal, London. In its decision of 3 December 2002, the Tribunal held that the services in question were supplied by CI from fixed establishments located in the United Kingdom within the meaning of Article 9(1) of the Sixth Directive. The Tribunal therefore found that CI provided gaming machine services in the United Kingdom and that those activities were subject to VAT in that Member State. However, it allowed the appeal of those companies in so far as it was directed against the Commissioners' alternative contentions, on the ground that the services were in fact supplied by CI, and not by Holdings, and that the principle of abuse of right did not apply in the present case.

20 CI appealed to the referring court against that decision. The Commissioners cross-appealed in so far as it rejected their alternative contentions.

21 It is in those circumstances that the High Court of Justice of England and Wales, Chancery Division, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'In the circumstances of the present case and having regard to [the Sixth Directive], in particular Articles 2, 4, and 9, [the Thirteenth Directive], in particular Articles 1 and 2, and the general principles of Community law:

1. How is the expression "fixed establishment" in Article 9 of the Sixth Directive to be interpreted?

2. What are the factors to be considered in determining whether the supply of slot gaming services is from the business establishment of a company such as CI or from any fixed establishments that a company such as CI might possess?

3. In particular:

(a) Where the business of a company ("A") is structured in circumstances such as those of the present case so that a connected company ("B"), whose business establishment lies outside the territory of the Community, supplies slot gaming services and the sole purpose of the structure is to eliminate A's liability to pay VAT in the State in which it is established:

(i) can the slot gaming services be regarded as supplied from the fixed establishment in that Member State; and, if so,

(ii) are the slot gaming services to be deemed to be supplied from the fixed establishment or are they deemed to be supplied from the place where B has established its business?

(b) Where the business of a company ("A") is structured so that, for the purposes of the place of supply rules, a connected company ("B"), in circumstances such as those of the present case, purports to supply slot

gaming services from a business establishment outside the territory of the Community and has no fixed establishment, from which those services are provided, in the Member State in which A is established and the sole purpose of the structure is to eliminate A's liability to pay VAT in that State on those services:

(i) do the transactions between B and connected companies within the Member State ("A", "C" and "D") qualify for VAT purposes as supplies made by or to those companies in the course of their economic activities; if not,

(ii) what factors should be considered in determining the identity of the supplier of the slot gaming services?

4. (a) Is there a principle of abuse of right which (independently of the interpretation given to the VAT Directives) is capable of precluding the advantage sought in a case such as the present?

(b) If so, how does it operate in the circumstances such as the present?

5. (a) What significance, if any, should be attached to the fact that A, C and D are not subsidiaries of B and that B does not control A, C and D either legally or economically?

(b) Would it make a difference to any of the answers given above if the type of management undertaken by B at its business establishment outside the territory of the Community were necessary for the provision of slot gaming services to customers and neither A, C nor D performs those activities?'

The questions referred for a preliminary ruling

Preliminary observations

22 The activity to which the order for reference relates, namely making available to the public, for consideration, slot gaming machines installed in entertainment arcades, is a supply of services within the meaning of Article 6(1) of the Sixth Directive. By its questions, the national court seeks, essentially, to determine the place in which those services are deemed to be supplied.

23 Article 9 of the Sixth Directive contains rules for determining the place where services are deemed to be supplied for tax purposes. Whereas Article 9(1) lays down

a general rule on the matter, Article 9(2) sets out a number of specific instances of places where certain services are deemed to be supplied. The object of those provisions is to avoid, first, conflicts of jurisdiction which may result in double taxation, and, secondly, non-taxation (see Case 168/84 *Berkholz* [1985] ECR 2251, paragraph 14, Case C-327/94 *Dudda* [1996] ECR I-4595, paragraph 20, and Case C-167/95 *Linthorst, Pouwels en Scheres* [1997] ECR I-1195, paragraph 10).

24 In respect of the relationship between the first two paragraphs of Article 9 of the Sixth Directive, the Court has already held that Article 9(1) in no way takes precedence over Article 9(2). In every situation, the question which arises is whether it is covered by one of the instances mentioned in Article 9(2); if not, it falls within the scope of Article 9(1) (*Dudda*, cited above, paragraph 21, and *Linthorst, Pouwels en Scheres*, cited above, paragraph 11).

25 It must therefore be examined at the outset whether an activity such as the one to which the order for reference relates falls within the scope, as the Irish and Portuguese Governments claim, of Article 9(2)(c) of the Sixth Directive, which determines the place where 'entertainment or similar activities' are deemed to be supplied for tax purposes. It should be recalled here that it is for the Court to provide the national court with all those elements for the interpretation of Community law which may be of assistance in adjudicating on the case pending before it, whether or not that court has specifically referred to them in its questions (see Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8, Case C-315/92 *Verband Sozialer Wettbewerb ('Clinique')* [1994] ECR I-317, paragraph 7, Case C-87/97 *Consorzio per la tutela del formaggio Gorgonzola* [1999] ECR I-1301, paragraph 16, and Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 38).

The interpretation of Article 9(2)(c) of the Sixth Directive

26 The Irish and Portuguese Governments submit that CI's activity falls within the scope of Article 9(2)(c) of the Sixth Directive since it consists of offering services directly related to entertainment. The place where that activity is deemed to take place is therefore the place where those services are physically carried out, which is the United Kingdom in the case in the main proceedings.

27 The United Kingdom Government and the companies belonging to the RAL Group claim, on the other hand, that the supplies of services to which the order for reference relates do not fall within Article 9(2)(c) of the Sixth Directive. They observe for that purpose that the principal objective pursued by the recipient of the services concerned is that of financial gain and not entertainment as such. Those companies add that application of the abovementioned provision involves, in any event, artistic activity on the part of the supplier of the services. The fact that the use of a slot gaming machine can have an entertainment aspect, like the use of a mobile telephone, does not make the provision of services concerned an entertainment activity within the meaning of the first indent of Article 9(2)(c).

28 The Commission takes the view that the purpose of Article 9(2)(c) of the Sixth Directive is to establish a special system for supplies of services between taxable persons where the cost of the services is included in the price of the goods or downstream services (see *Dudda*, cited above, paragraphs 23 and 24). The case in the main proceedings, however, concerns the supply to final consumers of gaming machine services so that only Article 9(1) applies.

29 It is important to note that under Article 9(2)(c) of the Sixth Directive, the place of the supply of services relating to entertainment or similar activities is the place where those services are physically carried out.

30 As for the question whether supplies of services, such as those in question in the main proceedings, are entertainment or similar activities, it should be recalled that CI makes available to the public, for consideration, slot gaming machines in entertainment arcades specially fitted out for that purpose.

31 In this case, the principal objective of the activity to which the order for reference relates is the entertainment of slot machine users and not financial gain on their part. As the Advocate General pointed out in paragraph 29 of his Opinion, the possibility of losing is indeed an essential component of the sort of entertainment sought by slot machine users.

32 Entertainment or similar activities within the meaning of the first indent of Article 9 (2)(c) does not require artistic input by the supplier of the services. An activity — including that of making available machines — in respect of which the principal objective pursued by the supplier of services is the entertainment of its customers constitutes entertainment or similar activities within the meaning of that provision.

33 As the Advocate General also pointed out in paragraph 33 of his Opinion, application of the rule of the place where services are deemed to be supplied laid

down by the abovementioned provision to a situation such as the one in the main proceedings cannot be precluded on the ground that the recipients of the services concerned are final consumers. The scope of application of that provision is not restricted to supplies of services between taxable persons. Moreover, it should be noted that application of that rule of the place where services are deemed to be supplied to such a situation does not raise any practical difficulty. The place where the activities in question are carried out can be readily identified. Finally, application of such a rule leads to a rational solution from the point of view of taxation since the services concerned are subject to the VAT regime of the Member State in the territory of which the recipients of those services are established.

34 It follows that the answer to be given to the national court must be that the supply of services consisting of enabling the public to use, for consideration, slot gaming machines installed in amusement arcades established in the territory of a Member State must be regarded as constituting entertainment or similar activities within the meaning of the first indent of Article 9(2)(c) of the Sixth Directive, so that the place where those services are supplied is the place where they are physically carried out.

Costs

35 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:

The supply of services consisting of enabling the public to use, for consideration, slot gaming machines installed in amusement arcades established in the territory of a Member State must be regarded as constituting entertainment or similar activities within the meaning of the first indent of Article 9(2)(c) 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, so that the place where those services are supplied is the place where they are physically carried out.

[Signatures]