**Case C-270/09**

**MacDonald Resorts Ltd**

**v**

**The Commissioners for Her Majesty's Revenue & Customs**

(Reference for a preliminary ruling from the Court of Session (Scotland))

(VAT – Sixth Directive 77/388/EEC – Exemptions – Article 13(B)(b) – Letting of immovable property – Sale of contractual rights convertible into usage rights for timeshare holiday accommodation)

Summary of the Judgment

1. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Taxable transactions – Supply of services effected for consideration – Chargeability of the tax*

*(Council Directive 77/388, Arts 2, point 1, 9(2)(a), and 10(2), first para.)*

2. *Tax provisions – Harmonisation of laws – Turnover taxes – Common system of value added tax – Exemptions provided for in the Sixth Directive – Exemption for lettings of immovable property*

*(Council Directive 77/388, Art. 13B(b))*

1. The supply of services by an operator under an options scheme, amongst which is the supply characteristic of this type of service consisting in the award of contractual rights called 'Points Rights', which enables the other party to the contract to acquire points that may be converted every year into a right to temporary occupation of accommodation in the holiday resorts of the supplier of services or to obtain hotel accommodation or other services which are not listed in the contractual documents, must be classified at the time when the customer participating in such a scheme converts the rights he initially acquired into a service offered by that operator. Where those rights are converted into hotel accommodation or into a right to temporarily use a property, those supplies are supplies of services connected with immovable property within the meaning of Article 9(2)(a) of Sixth Council Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes, which are performed at the place where the hotel or that property is situated.

In such a scheme in which, formally, there is no exchange of timeshare usage rights, 'Points Rights' under the options scheme are purchased with the intention of using those rights in order to convert them into services offered under the options scheme. Therefore, the actual service for which 'Points Rights' are acquired is the making available to participants in that scheme of the various possible benefits that may be obtained by virtue of the points deriving from those rights, the service not being fully supplied until those points are converted. It follows that, in cases in which the service consists in providing hotel accommodation or a right to use a property temporarily, it is when the points are converted into specific services that the connection between the service supplied and the consideration paid by the customer is established, the consideration

being constituted by points deriving from previously acquired rights.

Furthermore, since, when ‘Points Rights’ are acquired, the customer does not know exactly which accommodation or other services is or are available in a given year or the value in points of a holiday in that accommodation or of those services, and it is the supplier that determines the points classification of the available accommodation and services, so that the customer’s choice is limited from the outset to accommodation or services accessible to him with the number of points he has available, the factors necessary for value added tax to become chargeable are not established when rights such as ‘Points Rights’ are initially acquired. Since the real service is obtained only when the customer converts the points attaching to the ‘Points Rights’ that he has previously acquired, the chargeable event occurs and the tax becomes chargeable only at that moment, in accordance with the first subparagraph of Article 10(2) of the Sixth Directive.

It follows that, under such a scheme, it is only when the client converts the points deriving from rights previously acquired into the temporary use of a property or hotel accommodation or another service that it is possible to determine the treatment for VAT purposes applicable to the transaction, according to the type of service supplied. Therefore, in particular, the place of supply is the place where the property or hotel is situated in which the customer obtains the right to stay after conversion of those points.

(see paras 17, 23, 27-30, 32-33, 42, 53, operative part 1)

2. Under a scheme such as the options scheme, the characteristic supply of which consists in awarding contractual rights called ‘Points Rights’, which enables the other party to the contract to acquire points that may be converted every year into a right to temporary occupation of accommodation in the holiday resorts of the supplier of services or to obtain hotel accommodation or other services which are not listed in the contractual documents, when the customer converts the rights he initially acquired into a right to use a property temporarily, the supply of services concerned constitutes the letting of immovable property within the meaning of Article 13B(b) of Sixth Directive 77/388 on the harmonisation of the laws of the Member States relating to turnover taxes. However, that provision does not prevent Member States from excluding that supply from exemption.

The right to temporary use of a property obtained in exchange for rights initially acquired fulfils the conditions for a letting, as once he has converted his points into such a right, the customer is entitled to occupy the property as if he were the owner and to exclude any other person from its enjoyment for a specific period, and, therefore, that right of use displays characteristics corresponding to the concept of ‘letting’ within the meaning of Article 13B(b) of the Sixth Directive. As regards the exclusion set out in subparagraph 1 of Article 13B(b), which concerns not only accommodation in the hotel sector but also the provision of accommodation in sectors with a similar function, the words ‘sectors with a similar function’ should be given a broad construction, for their purpose is to ensure that the provision of temporary accommodation similar to, and hence in potential competition with, that provided in the hotel sector is subject to tax. In defining the classes of provision of accommodation which are to be taxed by derogation from the exemption for the leasing or letting of immovable property, in accordance with Article 13B(b)(1) of the Sixth Directive, the Member States enjoy some discretion. It is consequently a matter for the Member States, when transposing that provision, to introduce those criteria that seem to them appropriate in order to draw the distinction between taxable transactions and those that are not, that is, the leasing and letting of immovable property. Consequently Article 13B(b) of the Sixth Directive does not preclude a Member State from imposing VAT on the transfer for consideration of rights held by third parties to the temporary use of a property.

(see paras 47, 49-52, 54, operative part 2)

JUDGMENT OF THE COURT (First Chamber)

16 December 2010 (*)

(VAT – Sixth Directive 77/388/EEC – Exemptions – Article 13(B)(b) – Letting of immovable property – Sale of contractual rights convertible into usage rights for timeshare holiday accommodation)

In Case C-270/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Court of Session (Scotland) (United Kingdom), made by decision of 10 July 2009, received at the Court on 14 July 2009, in the proceedings

**MacDonald Resorts Ltd**

v

**The Commissioners for Her Majesty's Revenue & Customs,**

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel, A. Borg Barthet (Rapporteur), M. Ileši? and M. Berger, Judges,

Advocate General: V. Trstenjak,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 10 June 2010,

after considering the observations submitted on behalf of:

– MacDonald Resorts Ltd, by C. Tyre QC, and D. Small, Advocate,

– the United Kingdom Government, by S. Hathaway and F. Penlington, acting as Agents, and P. Mantle, Barrister,

– the Greek Government, by G. Kanellopoulos, S. Trekli, M. Tassopoulou and S. Spyropoulos, acting as Agents,

– the Portuguese Government, by L. Inez Fernandes, acting as Agent,

– the European Commission, by M. Afonso and R. Lyal, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2010,

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Articles 2, 9, 10 and 13B 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), as amended by Council Directive 2001/115/EC of 20 December 2001 (OJ 2002 L 15, p. 24, 'the Sixth Directive').

2 The reference was made in the course of proceedings between MacDonald Resorts Ltd ('MRL') and the Commissioners for Her Majesty's Revenue & Customs ('the Commissioners') regarding the scheme for value added tax ('VAT') applicable to supplies of certain services by MRL.

**Legal context**

3 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:

(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 10(1) and (2) of the Sixth Directive state:

'1. (a) "Chargeable event" shall mean the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled.

(b) VAT shall become "chargeable" when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay, even though the time of payment may be deferred.

2. The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed. Deliveries of goods other than those referred to in Article 5(4)(b) and supplies of services which give rise to successive statements of account or payments shall be regarded as being completed at the time when the periods to which such statements of account or payments pertain expire. Member States may in certain cases provide that continuous supplies of goods and services which take place over a period of time shall be regarded as being completed at least at intervals of one year.

However, where a payment is to be made on account before the goods are delivered or the

services are performed, the tax shall become chargeable on receipt of the payment and on the amount received.

By way of derogation from the above provisions, Member States may provide that the tax shall become chargeable, for certain transactions or for certain categories of taxable person, either:

– no later than the issue of the invoice, or

– no later than receipt of the price, or

– where an invoice is not issued, or is issued late, within a specified period from the date of the chargeable event.'

5 Under Article 13B of the Sixth Directive:

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

…

(b) the leasing or letting of immovable property excluding:

1. the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

2. the letting of premises and sites for parking vehicles;

3. lettings of permanently installed equipment and machinery;

4. hire of safes.

Member States may apply further exclusions to the scope of this exemption.

…'

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

*MRL's activities*

6 MRL is a company which has its registered office in the United Kingdom. It is registered for VAT in that Member State and for IVA, the Spanish equivalent of VAT.

7 MRL's business, which is carried on in the United Kingdom and in Spain, consists in selling timeshare usage rights in properties in holiday resorts situated in those two Member States ('timeshare usage rights'). It uses the same contractual documents in the United Kingdom and Spain.

8 Since 3 October 2003, MRL has being marketing a new product consisting of an options programme called 'Options by Macdonald Hotels and Resorts' ('the Options Scheme'). That scheme was set up in order to make better use of the unsold timeshare inventory, and to offer to MRL's customers greater flexibility in how they could enjoy accommodation in MRL's resorts, in particular as regards the choice of resort and period of occupation.

9 To set up Options, MRL established a club called ‘Options by Macdonald Hotels and Resorts’ (‘the Club’). It is a non-profit-making unincorporated body governed by a written constitution (‘the Constitution’). According to the Constitution, its principal object is ‘to secure for the Members rights to reserve holiday accommodation and other ancillary benefits for specified periods in each year during the period of 30 years hereinafter mentioned in terms of the [Options Scheme] as defined by this Constitution’.

10 According to the order for reference, the main characteristics of the Constitution and the contracts relating to it may be described as follows:

– the Club was constituted for a term of 30 years, from 3 October 2003 until 2 October 2033;

– MRL is the founder member, with the power and responsibility to conduct the business and affairs of the Club and administer the Options Scheme and take any steps that it considers necessary for that purpose;

– as founder member, MRL appointed a trustee and transferred to it its right and title to its timeshare accommodation inventory. Under the Constitution MRL became entitled to the ‘Points Rights’ accruing to that accommodation. Those rights are available for sale by MRL to ordinary members;

– MRL’s customers who apply to join the Options Scheme, and who comply with the conditions for membership, become ordinary members of the Club. They acquire ‘Points Rights’ either by purchasing them from MRL or by depositing timeshare usage rights relating to fixed weeks with the trustee;

– MRL attributes a value to all timeshare weeks available for use by members. The values are expressed as a certain number of points determined according to the location, standard and type of accommodation and the time of year concerned. Members are credited each year with a number of points according to their Points Rights. They may redeem those points in the year concerned by occupying particular accommodation for a chosen period, up to the value of their points and the number of weeks available. The expression ‘Points Rights’ means the entitlement of members to be credited each year with points so that they can exercise their rights to occupy accommodation during the year concerned.

– there is no joining fee payable on first becoming a member of Options Scheme, but on applying to join it a new ordinary member must acquire Points Rights. He may do so in one of two ways. He may purchase points rights from MRL (currently at GBP 2.50 per Points Right, subject to promotional discounts). The purchase is effected by way of a ‘Points Sales Contract’ between the new member and MRL. Or he may receive points rights in return for depositing with the trustee timeshare usage rights which he has acquired from MRL and payment of an ‘Enhancement Fee’;

– the second of those methods can be effected in two different ways. First, a pre-existing MRL timeshare owner may bring his property to which those rights pertain within the Options Scheme by entering into an ‘Enhancement Contract’ with MRL, thereby receiving Points Rights relating to that timeshare interest. Second, a person who does not own timeshare usage rights may enter into a ‘Resale and Enhancement Contract’ with MRL by which he simultaneously acquires such rights and brings them within the Options Scheme. Members who have entered either of those contracts are referred to as ‘Enhanced Members’. Such a member retains the right, exercisable within the first two months of each year, to use the timeshare usage rights that he brought into the Options Scheme in the relevant year. If he does not do so he is credited with a number of points which he may use on other accommodation of equivalent value in the Options Scheme. If the Enhanced

Member deposits his timeshare usage rights with the trustee they are made available for use by any other members who may redeem their points in order to use the accommodation for those weeks;

– ordinary members agree to pay annual management charges appropriate to their holding of points rights and transaction fees for reserving accommodation when redeeming points. Payment is made to MRL in Scotland;

– additional Points Rights may be purchased from MRL by ordinary members at any time;

– MRL may permit members to exchange points for accommodation in hotels operated by it or for other benefits. Thus, MRL has offered members the possibility to request, up to 10 months in advance, the exchange of their points for accommodation for periods of 3, 4 or 7 nights in one of over 70 hotels, subject to availability. The number of points required for such a booking varies according to a specified classification into which the hotels concerned are ordered. Once the booking has been confirmed, MRL becomes responsible to the hotel for the accommodation cost;

– members may save up points unused in one year to be used in the following year. Their whole points entitlement may be saved if the request is made not later than nine months before the end of the current year, and up to 50% may be saved if the request is made between nine and three months before the end of the year;

– conversely, until three months before the end of the year, members may borrow points from their following year's entitlement in order to make a booking that calls for points exceeding their Points Rights for the current year, if they pay the next year's estimated management charges at the time of making the reservation;

– MRL may arrange for members of the Club to have access to an external (that is run by a third party) timeshare exchange programme. MRL has established links with a programme known as Interval International, so that on joining the Options Scheme, members acquire, at no extra cost, two years' membership of the Interval International programme. Thereafter, members may continue as members of the Interval International programme by separate arrangement and at their own expense. Membership of Interval International entitles members of the Options Scheme to exchange timeshare weeks in the Options Scheme, for which they have redeemed their points in a given year, for accommodation made available by other members of Interval International. MRL is entitled to terminate or to change any affiliation to an external timeshare programme which it has arranged;

– MRL has the power at any time to remove from the Options Scheme any of the timeshare weeks which it has deposited with the trustee. However MRL is obliged to ensure that there is always sufficient accommodation available to satisfy the total of the Points Rights held by itself and by ordinary members. MRL also has the power to determine and vary the points grading of accommodation, and to re-denominate points and 'Points Rights' by increasing or decreasing their number in line with each other whilst maintaining their value.

*The proceedings before the national authorities*

11 The dispute in the main proceedings concerns the proper classification, for the purposes of liability to VAT, of the supply of certain services made by MRL in the course of its timeshare usage rights business. The place of supply of those services is also at issue

12 The dispute arises from a decision of the Commissioners in March 2004 that the sale of 'Points Rights' is to be treated as the taxable supply of benefits derived from membership of a club

and that the place of that supply is the United Kingdom.

13 MRL's appeal against that decision to the VAT and Duties Tribunal, Edinburgh, was dismissed by decision of 16 June 2006.

14 The Court of Session (Scotland), before which an appeal against that decision was brought, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Where the applicant, in accordance with the provisions of the Constitution of the Club and the contracts associated therewith, makes supplies of contractual rights ("Points Rights") which entitle the purchaser to points redeemable annually for the occupation and use of timeshare accommodation in MRL's resorts, is that supply to be characterised as the leasing or letting of immovable property within the meaning of Article 13B(b) of the Sixth … Directive, or … as membership of a club, or … in some other manner?

2. Does it affect the answer to question 1 that:

(a) in some cases the contractual rights are acquired in return for the customer depositing with MRL pre-existing [timeshare usage] rights … held by the customer in … accommodation at a particular place for one or more fixed weeks?

(b) the customer may in any year decide not to redeem his or her points entitlement for that year in whole or in part for any rights of occupation and may instead elect to augment his or her entitlement in the following year, or, subject to the contractual conditions of the [Options Scheme] in any year, may augment that year's entitlement by "borrowing" – from his or her entitlement to points in the following year;

(c) the properties comprising the pool of accommodation may change between the time when "Points Rights" are acquired and the time when points are redeemed for the right to occupy a property;

(d) the number of points to which the customer is entitled each year may be varied by the supplier in accordance with the contractual conditions of the [Options Scheme];

(e) [MRL] may from time to time arrange for persons holding Points Rights to have access to [another] timeshare programme;

(f) [MRL] may from time to time arrange for persons holding Points Rights to exchange their points for accommodation in hotels operated by [MRL] or for other benefits provided by [MRL]?

3. Where a taxable person makes supplies of the services described in questions 1 and 2 above,

(a) are these "services connected with immovable property" within the meaning of Article 9(2)(a) of the Sixth VAT Directive …?

(b) [If] the answer to question 3(a) is [affirmative]: in circumstances where members of the Club may exercise their contractual rights by occupying timeshare accommodation in more than one Member State, and it is not known at the time of supply which accommodation will be so occupied, how is the place of supply to be determined?'

**The questions referred for a preliminary ruling**

15 By its questions, which it is appropriate to examine together, the national court is, in essence, asking, first, for guidance as to the classification of supplies of services such as those at issue in the main proceedings and the place where such services are supplied and, second, whether the derogating arrangements laid down in Article 13B(b) of the Sixth Directive are applicable to those services.

*The classification of the supply of services*

16 It should be recalled that, 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. In that regard, the Court has already held that a supply of services is effected 'for consideration', within the meaning of that provision, and hence is taxable, 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, paragraph 26; and Case C?174/00 *Kennemer Golf* [2002] ECR I-3293, paragraph 39).

17 The supply that is characteristic of the type of service which is the subject of the contract at issue in the main proceedings consists in awarding contractual rights called 'Points Rights', which enables the other party to the contract to acquire points which may be converted every year into a right to temporary occupation of accommodation in the holiday resorts of the supplier of services or to obtain hotel accommodation or other services which are not listed in the contractual documents.

18 In those circumstances, it is necessary to examine the components of that contract in order to identify the services supplied as consideration for the fees charged by the supplier of services. In that connection, it is appropriate to follow the method used by the Advocate General, in point 51 of her Opinion, and thus identify first of all the different kinds of fees provided for by that contract.

19 It is apparent from the order for reference that, under the Options Scheme, customers may acquire 'Point Rights' either by purchasing them from MRL by paying a purchase fee, or by depositing timeshare usage rights for fixed weeks with the trustee and paying an 'Enhancement Fee'.

20 In the second case, 'Points Rights' may be acquired by a pre-existing holder of timeshare usage rights who transfers those rights to the Options Scheme under an 'Enhancement Contract' concluded with MRL. Once he acquires rights in the Options Scheme, that person loses, in principle, the link with the specific timeshare usage rights which enabled that acquisition.

21 It is true that the latter characteristic distinguishes the Options Scheme at issue in the main proceedings from the scheme in the case which gave rise to the judgment in Case C-37/08 *RCI Europe* [2009] ECR I-7533, to which MRL refers. Access to MRL's Options Scheme is obtained purely and simply by the acquisition of points, and it is those points which may subsequently be converted into services provided by MRL under that scheme. Therefore, the points, to which every 'Points Rights' holder is entitled, reflect the value of a stay in specific accommodation or other services supplied by MRL while constituting in a way the means of payment that customers use, in particular, to pay for the acquisition of a right to temporarily occupy accommodation. On the other hand, the scheme at issue in the case which gave rise to the judgment in *RCI Europe* was a simple scheme for the exchange of timeshare usage rights.

22 However, that distinction does not prevent the same criterion from being used for its

assessment, namely the members' ultimate intention when they pay for the services received ( *RCI Europe*, paragraph 29).

23 Applying that criterion in a scheme in which, formally, there is no exchange of timeshare usage rights, such as the scheme at issue in the main proceedings, it appears that 'Points Rights' under the Options Scheme are purchased with the intention of using those rights in order to convert them into services offered under the Options Scheme.

24 As the Advocate General pointed out in point 74 of her Opinion, the customer completes the first transaction not to collect points, but with the intention of temporarily using accommodation or of obtaining other services which he will choose at a later date. Therefore, the purchase of 'Points Rights' is not an aim in itself for the customer. The acquisition of such rights and the conversion of points must thus be regarded as preliminary transactions in order to be able to exercise the right to temporarily use a property, or to stay in a hotel or to use another service.

25 Therefore, it is at the final moment of that conversion that the purchaser of 'Points Rights' receives the consideration for his initial payment.

26 According to the case-law of the Court, the basis of assessment for a supply of services is everything which makes up the consideration for the service supplied and a supply of services is taxable only if there is a direct link between the service supplied and the consideration received by the supplier (see, to that effect, Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, paragraphs 11 and 12, and *Tolsma*, paragraph 14).

27 Therefore, it appears that, in a scheme such as the Options Scheme, the actual service for which 'Points Rights' are acquired is the making available to participants in that scheme of the various possible benefits which may be obtained by virtue of the points deriving from those rights. The service is not fully supplied until those points are converted.

28 It follows that, in cases where the service consists in providing hotel accommodation or a right to temporarily use a property, it is when the points are converted into specific services that the connection between the service supplied and the consideration paid by the customer is established, the consideration being constituted by points deriving from previously acquired rights.

29 Furthermore, as regards a system such as that at issue in the main proceedings, it must stated that, when 'Points Rights' are acquired, the customer does not know exactly which accommodation or other services are available in a given year or the value in points of a holiday in that accommodation or of those services. Moreover, it is MRL which determines the points classification of the available accommodation and services, so that the customer's choice is limited from the outset to accommodation or services which are accessible to him with the number of points he has available.

30 In those circumstances, the factors necessary for VAT to become chargeable are not established when rights such as 'Points Rights' are initially acquired, which excludes the application of the second subparagraph of Article 10(2) of the Sixth Directive.

31 As follows from the judgment in Case C-419/02 *BUPA Hospitals and Goldsborough Developments* [2006] ECR I-1685, in order for VAT to be chargeable, all the relevant information concerning the chargeable event, namely the future delivery of goods or future performance of services, must already be known and therefore, in particular, the goods or services must be precisely identified. Therefore, payments on account of supplies of goods or services that have not yet been clearly identified cannot be subject to VAT (*BUPA Hospitals and Goldsborough Developments*, paragraph 50).

32 Since the real service is obtained only when the customer converts the points attaching to the 'Points Rights' that he has previously acquired, the chargeable event occurs and the tax becomes chargeable only at that moment, in accordance with the first subparagraph of Article 10(2) of the Sixth Directive.

33 It follows that, under such a scheme, it is only when the points converts the points deriving from rights previously acquired into the temporary use of a property or hotel accommodation or another service that it is possible to determine the treatment for VAT purposes applicable to the transaction, according to the type of service supplied. Therefore, in particular, the place of supply is the place where the property or hotel is situated in which the customer obtains the right to stay after conversion of those points.

34 It is true, as the Advocate General points out in points 78 to 85 of her Opinion, that problems may arise from the application of that principle, such as the need, with respect to each conversion of points, to convert the points redeemed by the customer into a monetary value corresponding to the value of the 'Points Rights', the problems related to the lack of clarity with respect to the rate of conversion for 'Points Rights' into points, the non-taxation of revenue over potentially long periods of time, the problems related to the variability of VAT rates between the acquisition of 'Points Rights' and the redemption of the corresponding points, and the possibility that the customer does not convert his points.

35 However, such difficulties cannot justify the adoption of an approach, such as that suggested by MRL, by which the place of the supply of the service is determined by the application of an aggregate method of apportionment based on the portfolio of accommodation available when the 'Points Rights' were acquired.

36 The application of such a method would also give rise to difficulties of several kinds and would also involve a risk of abuse, in that it would be possible for a taxable person to include, in the portfolio, accommodation which is supposedly available but not used and is situated in States not subject to the fiscal supervision of the European Union.

37 Furthermore, such a method of apportionment has no express legal basis in the Sixth Directive. Its only justification would be to simplify the administrative tasks required of MRL in order to fulfil its obligations to the tax authorities.

38 In that context, it should be recalled that an undertaking such as MRL, as a person subject to VAT, has, in accordance with Chapter XIII of the Sixth Directive, a certain number of obligations, including that under Article 22(2) to 'keep accounts in sufficient detail to permit application of [VAT] and inspection by the tax authority'.

39 In order to fulfil that obligation, such an undertaking must submit accounts enabling the taxable amount to be identified in a manner which is sufficiently transparent, which is indispensable for the functioning of the common system of VAT.

40 It should be added that the Member States are not powerless if the taxable person fails to cooperate. The principle of a common system of VAT does not preclude the introduction of measures penalising irregularities committed when declarations are made as to the amount of VAT due. On the contrary, Article 22(8) of the Sixth Directive provides that Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax (Case C?502/07 *K-1* [2009] ECR I-161, paragraph 20).

41 Finally, it should be pointed out that, under Article 80(1) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1), in order to prevent tax evasion or avoidance, Member States may take measures to ensure that, in respect of the supply of services involving management, ownership, membership, financial or legal ties as defined by the Member State, the taxable amount is, in certain cases, to be the open market value.

42 In the light of all of those factors, it must be held that the supplies of services by an operator such as MRL under a system such as the 'Options Scheme' must be classified at the time the customer participating in such a system converts the rights he initially acquired into a service offered by that operator. When those rights are converted into accommodation in a hotel or into a right to temporary use of a property, those supplies are supplies of services connected with immovable property within the meaning of Article 9(2)(a) of the Sixth Directive which are performed at the place where that hotel or property is situated.

*The possibility of exemption under Article 13B(b) of the Sixth Directive*

43 As regards the transfer of rights such as the 'Points Rights' at issue in the main proceedings in so far as they may be used to obtain hotel accommodation, it must be observed that the exemption provided for in Article 13B(b) of the Sixth Directive is expressly excluded by Article 13B(b)(1) thereof as far as concerns the provision of accommodation in the hotel sector.

44 On the other hand, where such rights serve to obtain the temporary use of a property, it must be determined whether the transfer of those rights must be classified as the 'letting of immovable property' within the meaning of Article 13B(b) of the Sixth Directive, and whether the exclusions from the derogation scheme provided for by that provision are applicable.

45 As a preliminary point, it should be noted that the terms used to specify the exemptions provided for by Article 13 of the Sixth Directive are to be interpreted strictly, since they constitute exceptions to the general principle that VAT is to be levied on all services supplied for consideration by a taxable person (see, inter alia, Case C-472/03 *Arthur Andersen* [2005] ECR I?1719, paragraph 24; Case C?415/04 *Stichting Kinderopvang Enschede* [2006] ECR I?1385, paragraph 13; and Case C?89/05 *United Utilities* [2006] ECR I-6813, paragraph 21).

46 According to settled case-law, the fundamental characteristic of the concept of 'letting of immovable property' for the purposes of Article 13B(b) of the Sixth Directive lies in conferring on the other party to the contract, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right (see, to that effect, Case C-326/99 *'Goed Wonen'* [2001] ECR I-6831, paragraph 55; Case C?108/99 *Cantor Fitzgerald International* [2001] ECR I-7257, paragraph 21; and Case C?275/01 *Sinclair Collins* [2003] ECR I-5965, paragraph 25). In order to determine whether a contract falls within that definition, account should be taken of all the characteristics of the transaction and the circumstances in which it takes place. The decisive factor in this regard is the objective character of the transaction at issue, irrespective of how that transaction is classified by the parties (see, to that effect, *Cantor Fitzgerald International*, paragraph 33).

47 In a context such as that in the main proceedings, the right to temporary use of a property obtained in exchange for rights initially acquired fulfils the conditions for a letting, as it displays characteristics corresponding to the concept of 'letting' within the meaning of Article 13B(b) of the Sixth Directive. It is apparent from information supplied by the national court that once the member has converted his points into such a right, he is entitled to occupy a property as if he were the owner and to exclude any other person from its enjoyment for a specific period.

48 As the Advocate General noted, in point 105 of her Opinion, under a system such as that at issue in the main proceedings, a customer acquires 'Points Rights' ultimately in order to obtain the right to temporarily use a holiday property. Therefore, in order to classify the transfer of such a usage right as a 'letting' it is irrelevant that there is insufficient knowledge of the individual characteristics of the property concerned as, in any event, the conditions of use are known to the parties to the contract.

49 As regards the exclusion set out in Article 13B(b)(1), that provision concerns not only accommodation in the hotel sector but also the provision of accommodation in sectors with a similar function, it being understood that, under the second subparagraph of Article 13B(b), the Member States may apply further exclusions to the scope of the exemption set out in point (b) thereof.

50 As the Court stated in Case C-346/95 *Blasi* [1998] ECR I-481, paragraphs 20 to 22, the words 'sectors with a similar function' should be given a broad construction, since their purpose is to ensure that the provision of temporary accommodation similar to, and hence in potential competition with, that provided in the hotel sector is subject to tax. In defining the classes of provision of accommodation which are to be taxed by derogation from the exemption for the leasing or letting of immovable property, in accordance with Article 13B(b)(1) of the Sixth Directive, the Member States enjoy a margin of discretion. It is consequently a matter for the Member States, when transposing that provision, to introduce those criteria which seem to them appropriate in order to draw the distinction between taxable transactions and those which are not, that is the leasing and letting of immovable property.

51 It follows from the foregoing provisions that Article 13B(b) of the Sixth Directive does not preclude a Member State from imposing VAT on the transfer for consideration of rights held by third parties to the temporary use of a property.

52 In the light of the foregoing, it must be held that, under a scheme such as the 'Options Scheme', when the customer converts his initially acquired rights into a right to temporarily use a property, the supply of services concerned constitutes a letting of immovable property within the meaning of Article 13B(b) of the Sixth Directive (now Article 135(1)(l) of Directive 2006/112). However, that provision does not prevent Member States from excluding that supply from exemption.

53 Therefore, the answer to the questions referred is that supplies of services effected by an operator such as the applicant in the main proceedings under a scheme such as the 'Options Scheme' at issue in the main proceedings must be classified at the time when the customer participating in such a scheme converts the rights he initially acquired into a service offered by that operator. Where those rights are converted into hotel accommodation or into a right to temporarily use a property, those supplies are supplies of services connected with immovable property within the meaning of Article 9(2)(a) of the Sixth Directive which are performed at the place where the hotel or that property is situated.

54 Under a scheme such as the 'Options Scheme' at issue in the main proceedings, when the

customer converts the rights he initially acquired into a right to temporarily use a property, the supply of services concerned constitutes the letting of immovable property within the meaning of Article 13B(b) of the Sixth Directive. However, that provision does not prevent Member States from excluding that supply from exemption.

**Costs**

55 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:

1. **Supplies of services effected by an operator such as the applicant in the main proceedings under a scheme such as the 'Options Scheme' at issue in the main proceedings must be classified at the time when the customer participating in such a scheme converts the rights he initially acquired into a service offered by that operator. Where those rights are converted into hotel accommodation or into a right to temporarily use a property, those supplies are supplies of services connected with immovable property within the meaning 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, as amended by Council Directive 2001/115/EC of 20 December 2001, which are performed at the place where the hotel or that property is situated.**

2. **Under a scheme such as the 'Options Scheme' at issue in the main proceedings, when the customer converts the rights he initially acquired into a right to temporarily use a property, the supply of services concerned constitutes the letting of immovable property within the meaning of Article 13B(b) of Sixth Directive 77/388, as amended by Directive 2001/115 (now Article 135(1)(l) of Council Directive 2006/112/EC of 28 December 2006 on the common system of value added tax). However, that provision does not prevent Member States from excluding that supply from exemption.**

[Signatures]

* Language of the case: English.