OPINION OF ADVOCATE GENERAL

POIARES MADURO

delivered on 27 January 2005 (1)

Case C-452/03

RAL (Channel Islands) Ltd

RAL Ltd

RAL Services Ltd

RAL Machines Ltd

v

Commissioners of Customs & Excise

(Reference for a preliminary ruling from the High Court of Justice of England and Wales (Chancery Division))

(VAT – Sixth and Thirteenth Directives – Place of supply of services – Tax avoidance scheme – Company established outside the Community and other companies in the same group established in a Member State – Amusement arcades – Meaning of 'entertainment or similar activities' in Article 9(2)(c) of the Sixth Directive – Meaning of 'fixed establishment' in Article 9(1) of the Sixth Directive – Repayment of input VAT)

1. The High Court of Justice of England and Wales (Chancery Division) (hereinafter the 'High Court') seeks a preliminary ruling from the Court of Justice on several questions concerning the interpretation 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 (hereinafter 'the Sixth Directive'), as amended (2) and, on a secondary level, also 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 (hereinafter 'the Thirteenth Directive'). (3)

2. Those questions basically concern determination of the place of supply where, as in the case pending before the High Court, a company supplies slot gaming machine services to consumers in a Member State but has located its place of business outside the Community for the sole or main purpose of avoiding liability to VAT.

I – **The facts of the main proceedings, the relevant legislation and the questions referred to the Court**

3. RAL (Channel Islands) Ltd (hereinafter ‘CI’) is a company incorporated in Guernsey. RAL Ltd (hereinafter ‘RAL’), RAL Services Ltd (hereinafter ‘Services’) and RAL Machines Ltd (hereinafter ‘Machines’) are companies incorporated in the United Kingdom. All four companies are subsidiaries of RAL Holdings Ltd (hereinafter ‘Holdings’), which is also a company incorporated in the United Kingdom. CI, RAL, Services, Machines and Holdings are herein referred to collectively as ‘the RAL Group’. The RAL Group operates in the gaming industry. Its main business activity is the exploitation of slot gaming machines.

4. Until October 2000, RAL supplied the gaming machine services from premises which it owned or leased in the United Kingdom. RAL owned the machines used in its ‘amusement arcades’ and held the appropriate licences required for the exploitation of the machines and of the premises. It employed its own staff, even though some services were carried out by unconnected third parties and VAT was accounted for on the net takings from the gaming machine supplies.

5. The dispute in the main proceedings arises from a tax avoidance scheme prepared by the RAL Group’s external tax advisers in relation to gaming machines operated in the UK by RAL. The basis of the scheme was that the place of supply of the gaming machine services to customers would be located outside the territory of the Community for VAT purposes. The RAL Group would therefore escape liability for VAT on the gaming machine services and recover input VAT on supplies received. For that purpose a supplier was created, CI, as an offshore subsidiary of Holdings. CI was registered as a private limited company in Alderney. Its business establishment is situated in Guernsey with an office comprising three part-time directors and two full-time staff. As part of the same internal reorganisation scheme, two other subsidiaries of Holdings were set up and incorporated in the UK: Machines and Services. Concomitantly CI, Services, Machines, RAL and Holdings entered into a series of contractual arrangements.

6. Under those arrangements, RAL holds the leases to the premises in which the gaming machines are installed as well as the licences for the operation of the amusement arcades. RAL granted CI the right to install and operate gaming machines on the premises. Moreover it allows public access to the premises during opening hours and ensures that the premises are cleaned, heated, ventilated and lit. Machines owns all of the gaming machines, change machines, accessories and spare parts used by the RAL group and holds the licences required to operate those machines. According to a lease contract with CI, Machines is responsible for providing the machines and for keeping them in good working order.

7. CI’s activity is to permit the public to use the licensed gaming machines made available to it by Machines, on the premises made available to it by RAL. To carry out this activity CI subcontracted almost all of the day-to-day work to Services, one of the other subsidiaries of Holdings, as its exclusive contractor. As a result of the internal reorganisation of the RAL group, that company is the employer of all the staff of the RAL group assigned to the day-to-day work at the amusement arcades, about 600 employees. The functions left to be carried out directly by CI, with its staff of five working solely in CI’s office in Guernsey, are mainly confined to accounting and monitoring the cash flow from the machines.

8. Following the restructuring scheme described above, CI maintained, on the basis of Articles 2, 4 and 9 of the Sixth Directive, that the place of the supply of the slot gaming machine services was in Guernsey and for that reason it was not subject to VAT in the United Kingdom. Moreover, CI claimed repayment of input VAT on the services provided to it by the other members of the RAL group under Articles 1 and 2 of the Thirteenth Directive.

9. By a decision of 28 August 2001, the Commissioners of Customs & Excise (hereinafter 'the Commissioners') rejected CI's submissions, considering that CI was liable to VAT in the UK. In the alternative, they found that the structure set up by the RAL group should be disregarded as amounting to an abuse of rights. Accordingly, the supply of gaming machine services continued to be provided by Holdings in the United Kingdom.

10. CI, RAL, Machines and Services (hereinafter the 'appellants') appealed against the decision to the VAT and Duties Tribunal, London. The Tribunal held that the gaming machine services were provided by CI from fixed establishments in the United Kingdom within the meaning of Article 9(1) of the Sixth Directive. With regard to the Commissioners' alternative findings, the Tribunal allowed the appeal on the grounds that the supplies were made by CI and that the doctrine of abuse of rights was not applicable. CI appealed to the High Court against the decision of the VAT Tribunal and the Commissioners cross-appealed against those parts of the decision in which the Tribunal rejected their alternative contentions.

11. For a complete understanding of the arrangements described and of the questions referred to the Court of Justice, regard must be had to particular provisions of the Sixth and of the Thirteenth Directives.

12. Pursuant to Article 2(1) of the Sixth Directive, '[t]he supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is subject to value added tax.

13. Article 4 of the Sixth Directive defines a 'taxable person' as 'any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or result of that activity'.

14. Article 4(2) moreover provides that '[t]he economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services …'.

15. With respect to determination of the place where taxable transactions are effected, Article 9 of the Sixth Directive provides that:

'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 …'.

16. Furthermore, regard must be had to certain provisions of the Thirteenth Directive that are relevant to the case under analysis, namely Article 1, which provides that:

'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 Directive 77/388/EEC 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

…

2. "Territory of the Community" shall mean the territories of the Member States in which Directive 77/388/EEC is applicable.'

17. Article 2(1) of the Thirteenth Directive provides that:

'Without prejudice to Articles 3 and 4, 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 value added tax charged in respect of services rendered or movable property supplied to him in the territory [of] 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 Directive 77/388/EEC or of the provision of services referred to in point 1(b) of Article 1 of this Directive.'

18. In this context the High Court decided to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) In the circumstances of the present case and

(2) having regard to the 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, in particular Articles 2, 4, and 9, the 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, 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 a 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?'

19. In essence the High Court addresses three questions to the Court of Justice. The first concerns the problem of determining whether a company such as CI, with its place of business outside the VAT territory of the Community (4) but providing slot gaming machine services in one Member State, can be regarded as supplying those services from one or more 'fixed establishment[s]' in that Member State, within the meaning of Article 9(2) of the Sixth Directive. Should this question receive an affirmative answer, a second question arises, namely whether the relevant connecting factor to determine 'the place where a service is supplied' within the meaning of Article 9(2) should be the place where the supplier 'has a fixed establishment from which the service is supplied' or whether, on the contrary, the relevant connecting factor should be 'the place where the supplier has established his business'.

20. The last question arises merely in the alternative, in the event that the connecting factor of the place where the supplier has established its business is considered applicable in the present case. This subsidiary question, which will be examined in this Opinion only if the analysis of the preceding questions demands further inquiry, involves two different legal issues: on the one hand, the problem of determining whether transactions such as those between CI and RAL, Services and Machines respectively can be characterised as 'supplies' made in the course of 'economic activities' in the sense of the Sixth Directive, with the consequence that a supplier with an identity different from CI would be revealed; on the other hand, the problem of the application of the doctrine of abuse of rights in the field of VAT, which allegedly would preclude CI from claiming that it is not liable to VAT in the United Kingdom. (5)

II – **Assessment**

21. The answer to the questions referred to the Court requires a preliminary outline of the rules in Article 9 of the Sixth Directive governing determination of the place of the supply of services. This Article contains several conflict rules aimed at rationally allocating the powers of the Member States with regard to the imposition of VAT on the supply of services. Each of those rules determines the Member State with exclusive competence to tax a supply of services and must therefore be interpreted uniformly to avoid instances of double taxation or non-taxation which might result from conflicting interpretations. (6)

22. Although the national court has not raised the issue of the possible application of Article 9(2) of the Sixth Directive it may be important to address the relationship between paragraphs 1 and 2 of Article 9 in so far as '[i]t is the Court's duty to interpret all provisions of Community law which national courts need in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court of Justice by those courts'. (7)

23. In effect, with respect to the relationship between Article 9(1) and 9(2) the Court has held that 'Article 9(2) sets out a number of specific instances of places where certain services are deemed to be supplied, whereas Article 9(1) lays down the general rule on the matter. The object of those provisions is to avoid, first, conflicts of jurisdiction, which may result in double taxation, and, secondly, non-taxation, as Article 9(3) indicates, albeit only as regards specific situations'. (8)

24. Article 9(1) constitutes after all a 'residual category' (9) ? vis-à-vis the special rules laid down in Article 9(2) ? that uses connecting factors pointing to the place of the supplier ultimately for pragmatic reasons of simplification (10) and avoidance of the difficulties inherent in determination of the place of provision or exploitation of the services. (11) It should be noted that the general principle in VAT is that it should be charged at the place of consumption. In that light it is understandable that the Court held in *Dudda* that 'when Article 9 is interpreted, Article 9(1) in no way takes precedence over Article 9(2). In every situation the question that 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).' (12) Moreover, as Advocate General Fennelly affirmed in *Linthorst*, nothing justifies saying that 'the scope of Article 9(2) should be interpreted narrowly as an exception to a general rule'. (13)

25. In the light of the above, the Court must logically start by verifying whether the gaming machine services in the present case are covered by Article 9(2)(c). Only if they are not will the *residual* regime of Article 9(1) be applicable.

A – *The notion of 'entertainment or similar activities' within the meaning of Article 9(2)(c).*

26. Article 9(2)(c) determines that 'the place of the supply of services relating to … entertainment

or similar activities, including the activities of the organisers of such activities, … shall be the place where those services are physically carried out'. The Portuguese Government in its written observations maintains that the supply of the slot gaming machine services should be subject to that regime and therefore subject to VAT in the United Kingdom regardless of the residual rule of Article 9(1).

27. At the hearing, when asked to give their views on the suggestion made by the Portuguese Government in its written observations, the interveners focused essentially on the characterisation of slot gaming machines services as entertainment within the meaning of Article 9(2)(c). For the appellants slot gaming machines should be excluded from the concept of entertainment within the meaning of that article for two main reasons. First, because the provision of slot gaming machines does not involve any entertainment provided by an entertainer. In this sense, according to the appellants, the customer entertains himself by using the slot machine largely in the same way that a person uses a mobile telephone. Secondly, the expectation, on the part of the player, of winning money is not a normal feature of entertainment. I am of the view that those arguments cannot exclude slot gaming machine services such as those supplied by CI in the amusement arcades in the United Kingdom from the concept of 'entertainment or similar activities' within the meaning of Article 9(2)(c).

28. It will be recalled, as the Commission pointed out both in its written observations and at the hearing, that in *Berkholz*, a case involving gaming machine services provided on board ferry boats, the Court stated that the 'objective of the gaming machines was to entertain passengers'. (14) In the present case the gaming machines, also referred to as 'amusement with prizes machines' situated in 'amusement arcades', have the same purpose of providing entertainment to their users.

29. The essential purpose of the activity should, in my view, be the decisive factor to be taken into consideration in characterising a given activity as 'entertainment' within the meaning of Article 9(2)(c). (15) With respect to a slot gaming machine, what can be its purpose but to provide entertainment to the player, by giving to that person the chance of wining or losing at random? The appellants did not provide any clue in that regard. (16) The essential purpose of slot gaming machines is certainly not to enable players to earn a living. Moreover, a player's possible displeasure at losing rather than winning is precisely an essential component of that sort of entertainment. Winning or losing money is, in this case, an aspect of the form of entertainment embodied in gaming. (17) In the light of those considerations the appellants' argument that entertainment requires some form of physical individual performance by the entertainer is immaterial. Each slot gaming machine is an automatic device of the operator, programmed to be substituted for the physical performance of a natural person standing face to face with the customer and dealing cards at random for him. Such substitution does not impinge on the entertainment character of the activity performed by the machine for the customer. I also do not see how the fact that the prizes given by a gaming machine are not medals or the inclusion of the winner's name in the machine's hall of fame but, instead, money, can change the essential entertainment character of a slot gaming machine.

30. Apart from the appellants' arguments just discussed, no other arguments were put forward at the hearing in favour of the exclusion of the activity of the supply of slot gaming services from Article 9(2)(c). (18) Like the Commission, I am unable to discern any overriding policy reasons for the exclusion of the activities with which the present case is concerned from Article 9(2)(c). Moreover, and above all, I see clear advantages militating in favour of the application of Article 9(2)(c) to the present case. The services described in that article are subject to the connecting factor of the place where they are provided, precisely because that place can without difficulty be physically identified and will coincide with the place of consumption. (19) The application of the connecting factor of the place where the activities are carried out is, moreover, far more in

conformity with the general principle that VAT should be charged at the place of consumption. (20) To the extent to which the determination of the place where the activities are performed (and consumed) does not give rise to any difficulties, as in the present case, a return to the residual category of Article 9(1) is not justifiable. (21)

31. The application of Article 9(2)(c) provides a point of connection for the localisation of the supply in the present case that is far clearer and easier to use than that resulting from Article 9(1). That residual category, as we will see, requires a complex discussion (with an uncertain ending) as to whether a particular company has a fixed establishment in the place where it provides the services and, if it has, whether such fixed establishment should prevail over the place where it has established its business. Certainly, the requirements of legal certainty do not favour opting for the more tortuous way of determining the place of supply of gaming machine services, when a more straightforward and logical alternative is available and, furthermore, that alternative is more in conformity with the general principle that VAT should be charged at the place of consumption.

32. Additionally, the application to the present case of the rule of the place of the supplier would produce undesirable consequences in terms of distortion of competition and relocation of the place of business of those suppliers. (22) In reality, despite being provided for final consumers in a Member State and enjoyed there, such services would be subject to the VAT regime of the State of the supplier. That would amount to an incentive for suppliers of such services to move their place of business to low-tax locations. In reality either situations of non-taxation of suppliers located outside the VAT territory of the Community or of taxation, in the Community, of supplies executed and consumed outside that territory would arise.

33. I would mention, finally, that the application of Article 9(2)(c) in the present case does not collide with the judgment in *Dudda*. None of the interveners at the hearing perceived any such contradiction (23) and neither do I. At paragraph 23 of the judgment in *Dudda* the Court stated that '[t]he overall purpose of Article 9(2) of the Sixth Directive is, accordingly, to establish a special system for services provided *between taxable persons* where the cost of the services is included in the price of the goods'. (24) That statement by the Court should however be understood in the light of the particular facts of *Dudda,* which involved exclusively taxable persons. The supply under analysis there took place only between taxable persons, but neither a literal nor a teleological reading of the Sixth Directive gives support to the conclusion that Article 9(2)(c) is *not applicable* to supplies of services relating to entertainment activities occurring between a taxable person and a final consumer.

34. In conclusion, when a company such as CI provides slot gaming machine services to customers in a Member State, through gaming machines it leases and operates there, it should be regarded as physically carrying out the supply of entertainment services in that Member State within the meaning of Article 9(2)(c) of the Sixth Directive. Accordingly, the application of the residual category of Article 9(1) should be rejected in the present case.

B – *The applicability of Article 9(1)*

35. If the Court considers that Article 9(2)(c) is not applicable to the case in the main proceedings, it will be necessary to turn to the regime of Article 9(1), under which the place of supply is considered to be the place where the supplier has established his business or has a fixed establishment from which the service is supplied.

36. The text of Article 9(1) reveals the autonomy between those two points of reference, the 'fixed establishment' and the 'place where the supplier has established his business'. (25) In any case Article 9(1) does not provide any guidance as to how to reconcile the operation of those two connecting factors in those cases where they do not point to the same place, or in difficult cases

where one of those connecting factors, alone, points to a location outside the VAT territory of the Community, as in the present case.

37. The correlation between these two connecting factors which, according to the literal tenor of Article 9(1), seem to operate in a purely alternative way, has been clearly established in the case-law of the Court. After stating that the general purpose of Article 9 is 'to avoid, first, conflicts of jurisdiction, which may result in double taxation, and secondly, non taxation, as Article 9(3) indicates, albeit only as regards specific situations', (26) the Court affirmed in *Berkholz* that '[a]ccording to Article 9(1), the place where the supplier has established his business is a primary point of reference inasmuch as regard is to be had to another establishment from which the services are supplied only if the reference to the place where the supplier has established his business does not lead to a rational result for tax purposes or creates a conflict with another Member State'. (27)

38. That approach, according to which the 'fixed establishment' is regarded, under the conditions described, as a subsidiary point of reference in relation to the 'place of business' has been subsequently reaffirmed by the Court in *Faaborg-Gelting Linien*, (28)*ARO Lease*, (29) and *DFDS*. (30)

39. As regards the definition of the term 'the place where the supplier has established his business', it does not give rise to major difficulties. (31) The same is true of its application to the present case, in which no doubts arise regarding the actual location of CI's place of business in Guernsey, hence, outside the VAT territory of the Community.

C – *The concept of 'fixed establishment from which the service is supplied' within the meaning of Article 9(1) of the Sixth Directive*

40. Problems do arise regarding the interpretation of the notion of 'fixed establishment'. In *Berkholz,* the Court established the relevant criteria for the interpretation of this concept by stating that a service cannot be deemed to be supplied at a fixed establishment within the meaning of Article 9(1) unless it presents 'a certain minimum size and both the human and technical resources necessary for the provision of the service are permanently present'. (32) The Court concluded therefore in *Berkholz* that 'it does not appear that the installation on board of a sea-going ship of gaming machines, which are maintained intermittently, is capable of constituting such a [fixed] establishment'. (33) The complete absence of staff assigned on a permanent basis to the provision of the gaming machine service on board the vessels was a decisive element for the rejection of the presence of a 'fixed establishment' within the meaning of Article 9(1).

41. In any event the Court only required the presence of a 'minimum size' of establishment and *no more and no less* than the resources 'necessary' for the provision of the services of a permanent nature. The Court did not make the permanent presence of *all* possible human and technical resources, *possessed by the supplier himself*, in a certain place, a precondition for concluding that the supplier has a fixed establishment there. That amounts, in my view, to the adoption of a *minimum-requirements test* for characterising a given set of circumstances as constituting a 'fixed establishment' within the meaning of Article 9(1), which was subsequently followed and developed by the Court, in particular in *ARO Lease* and *DFDS*.

42. The *ARO Lease* case concerned the activity of car leasing to consumers located in Belgium by a Dutch company. The only human presence of the Dutch company in Belgium took the form of independent intermediaries who simply put customers in contact with ARO Lease. Those independent intermediaries had no further involvement in the conclusion or performance of the lease contracts, which were prepared and signed in the Netherlands where ARO Lease had established its business. Furthermore, as the Court noted, the Dutch leasing company did 'not

have an office or any premises on which to store the cars' in Belgium. (34) In that context the Court affirmed that 'when a leasing company does not possess in a Member State either its own staff *or* a structure which has a sufficient degree of permanence to provide a framework in which agreements may be drawn up *or* management decisions taken ..., it cannot be regarded as having a fixed establishment in that State'. (35)

43. The *DFDS* case follows the same jurisprudential line, although it goes into greater detail on certain points, which I shall consider shortly. In that case a UK subsidiary of a Danish company operated in the UK as a commercial agent for its parent company, selling package tours organised by the latter. The Court considered that the UK subsidiary constituted a fixed establishment of the Danish parent company. In arriving at that conclusion the Court took the view that the fact that 'the premises of the English subsidiary, which has its own legal personality, belong to it and not to DFDS is not sufficient in itself to establish that the subsidiary is in fact independent from DFDS. On the contrary, information in the order for reference, in particular the fact that DFDS's subsidiary is wholly owned by it and as to the various contractual obligations imposed on the subsidiary by its parent, shows that the company established in the United Kingdom merely acts as an auxiliary organ of its parent.' (36) The English subsidiary displayed the features of a 'fixed establishment', following the *Berkholz* test, to the extent to which it '[was] of the requisite minimum size in terms of necessary human and technical resources'. (37)

44. As the Court expressly affirmed in *DFDS*, 'consideration of the actual economic situation is a fundamental criterion for the application of the common VAT system'. (38) I am of the opinion that here it is necessary to undertake an analysis that is especially responsive to the factual economic and commercial reality of the case.

45. In that light, and in view of the line of cases mentioned above, it seems clear, as the Commission points out in its written observations, that in the present case the supply of gaming services from the slot machines installed at the 'amusement arcades' described above is made from fixed establishments in the UK. In that regard, I agree with the observation made by the Irish Government in its written submissions according to which the external perception of customers must play a decisive role. In effect, the gaming machines in the present case are permanently installed on premises exclusively dedicated, through the use of the commercial concept of the 'amusement arcade', to the creation of a unique congenial environment for players. Such premises have regular opening hours, like any other business establishment, and there are staff permanently attending to customers and looking after the premises and machines.

46. The presence of this human element, in particular, is important in distinguishing the present case from the situation in *Berkholz.* Such a permanent human presence on the premises lends stability to CI's supply of slot gaming services in the amusement arcades, supporting the conclusion that such supply takes place from 'fixed establishments' in the UK. In addition, and most importantly, these fixed establishments are not on board sea-going vessels moving from one country to another, a circumstance which could justify the option in favour of the place of business of the supplier located in the VAT territory of the Community.

47. The problem in the present case is not, therefore, whether the supply of slot gaming machine services takes place in fixed establishments in the United Kingdom. It is, instead, whether such fixed establishments should be considered *CI's fixed establishments* in the United Kingdom.

48. The United Kingdom and Irish Governments and the Commission consider that CI *has* fixed establishments in the UK. CI, however, argues that its only presence in the UK takes the form of the leased slot gaming machines actually operated at the premises where it has the permission to install them to provide the gaming machine services. According to that main argument, in order for CI to have a fixed establishment in the UK it would have to possess all the necessary human *and*

technical resources *itself* there. I disagree. With respect to this central issue of determining what resources CI must have in the UK in order to characterise the existing fixed establishments as being *its* establishments, the *ARO Lease* and *DFDS* cases are particularly enlightening.

49. It will be recalled that in *ARO Lease*, the Court ruled that, in order to conclude that a supplier of services has a 'fixed establishment' within the meaning of Article 9(1), it is sufficient that it possesses 'in a Member State either its own staff or a structure which has a sufficient degree of permanence to provide a framework in which agreements may be drawn up …'. It is not absolutely indispensable that the persons working in the amusement arcades be CI's own staff for it to be concluded that the existing fixed establishments belong to CI. Moreover, as the Commission rightly pointed out on its written observations and at the hearing, the necessary 'structure' will inevitably vary depending on the sector concerned.

50. In *DFDS*, the company operating in the UK, despite being a subsidiary, had its own legal personality distinct from that of its Danish parent company. CI's sister companies in the present case are also legal entities distinct from CI. Regardless of that circumstance, the Court considered, in *DFDS*, that the English subsidiary was tantamount to a fixed establishment of the Danish company in the United Kingdom. The Danish company *itself* did not have employees in the UK and did not own premises there. (39) However, the Danish company had obtained through contractual arrangements with the English subsidiary, acting as its agent, the human and technical resources to supply *its* tour services in the UK. The Court concluded that 'the company established in the United Kingdom merely acts as an auxiliary organ of its parent'. (40)

51. In my opinion the present case is even more straightforward, thus rendering it unnecessary to consider any relationship of dependence between CI and its sister companies. In effect, Services and its employees, as well as Machines and other independent suppliers, unlike the DFDS English subsidiary vis-à-vis its Danish parent company, perform for CI mere ancillary tasks in relation to the supply of the slot gaming machine services.

52. The present case calls for an essential distinction to be made between two sorts of resources: on the one hand, those which necessarily have to be under the direct dependence of the supplier in a certain place in order to allow the conclusion to be drawn that a fixed establishment there is *his*; and, on the other hand, those resources in relation to which, even though they confer a fixed character on an establishment, the fact that they are not under the direct dependence of the supplier will not detract from the conclusion that the existing fixed establishment actually belongs to the supplier. The first will be resources directly involved in the supply of the particular service in question, namely the conclusion and performance of the contracts with customers, necessary for the supply. Only these resources will have to be under the direct dependence of the supplier in order for it to be concluded that a fixed establishment from which the service is supplied is actually *his* in the sense of Article 9(1).

53. In reality, to demand, as CI contends in the present case, that the persons whose presence is an important factor in conferring a fixed character on an establishment within the meaning of Article 9(1), must *all* be employees or directly dependent upon the supplier would lead to absurd results. Suffice it to consider the example of an establishment where the security staff are the only people with keys to the establishment and are in charge of opening and closing the premises at regular hours. Such persons are certainly indispensable to ensure that the establishment does not operate merely intermittently. They deserve to be considered as human resources whose permanent presence is necessary for the provision of the services in the establishment to take place and, therefore, to confer a fixed character on the establishment. In any case, it would certainly be unacceptable that such an establishment would cease to be characterised as a fixed establishment *of the supplier* of the services by virtue of the fact that he had decided to outsource

the activities of security in the establishment to an independent security company.

54. According to the information provided by the national court, the staff in the amusement arcades execute mainly practical tasks there, such as the provision of music, refreshments and change to customers, emptying the machines' cash boxes, witnessing large payouts, providing security, carrying out maintenance and so forth. Such activities performed for CI by Services, Machines and other suppliers, are in my view ancillary with respect to the supply of the slot gaming machine services here under analysis.

55. It appears, in effect, that the staff in the amusement arcades do not have any direct involvement in the conclusion of the gaming contracts between CI and the customers. (41) Indeed, the supplies made in this specific sector of slot gaming services are based on discrete contractual arrangements made between each customer and CI directly through the slot machines themselves. Such contracts are concluded and performed entirely in the territory of the United Kingdom every time a customer inserts a coin in a slot gaming machine operated by CI. (42) If this analysis is correct, the machines leased and operated by CI themselves, as automatic devices, enable CI to supply the slot gaming services directly to each customer in the United Kingdom. (43) In this specific sector of activity the slot gaming machines are the crucial and sole structure in the 'amusement arcades' that has to be under the direct dependence of CI to allow the conclusion that each of those 'amusement arcades' where its slot machines are installed is a fixed establishment of CI.

56. Also, in the light of the foregoing, and contrary to the view taken by CI, the activities actually performed by CI in Guernsey do not seem to be a decisive feature of the supply of the relevant gaming machine services to each customer, which occurs automatically within the United Kingdom through each machine leased and operated by CI there. The appellants point out in their written observations that Article 9(1) is based upon the location of the supplier of the service. They disregard, however, the fact that in this sector of activity CI is a supplier of slot gaming machine services actually present in the territory of the United Kingdom, where it concludes and performs the gaming contracts directly with each customer, through the machines that it operates there, the services that are auxiliary to this supply being contractually arranged with other companies. In that sense, CI has a structure in the United Kingdom which 'enable[s] the services in question to be supplied on an independent basis'. (44)

57. To conclude, a company such as CI which, in circumstances such as those of the present case, supplies gaming machine services directly to its customers through the leased gaming machines it operates in premises in the United Kingdom, with the aid of auxiliary staff outsourced from third companies to perform ancillary activities necessary to confer a permanent character on the supply, should be regarded as having a commercial structure in the United Kingdom with the minimum resources required for it to be considered itself a 'fixed establishment' there within the meaning of Article 9(1) of the Sixth Directive.

D – *The choice between 'the place where the supplier has established his business' and the place where the supplier 'has a fixed establishment from which the service is supplied' within the meaning of Article 9(1) of the Sixth Directive*

58. It having been concluded that CI has fixed establishments in the UK, it has to be decided whether that connecting factor prevails over the place of business. In that respect the Court has held that '[a]ccording to Article 9(1), the place where the supplier has established his business is a primary point of reference inasmuch as regard is to be had to another establishment from which the services are supplied only if the reference to the place where the supplier has established his business does not lead to a rational result for tax purposes or creates a conflict with another Member State'. (45) In the present case there is no such conflict with another Member State. The

remaining issue is thus whether or not the results of the application of the connecting factor of the place of business would be ‘rational for tax purposes’.

59. Certainly it must be considered that ‘[i]t is for the tax authorities of each Member State to determine, from the range of options set forth in the Sixth Directive, which point of reference is most appropriate to determine tax jurisdiction in respect of a given service’. (46) Furthermore, in conformity with the above, Advocate General La Pergola stated that ‘[t]he Court, for its part, is called on to explain and oversee fulfilment of the requirements on which the choice of one criterion rather than the other should be based’. (47) Nothing, therefore, precludes the national authorities from applying the connecting factor of the fixed establishment when the option of the place of business would lead to irrational results. To the extent to which such an irrational result might ensue in the present case, the authorities should be entitled to apply the connecting factor of the place of the fixed establishment instead of the place where the supplier established his business.

60. When the Court set out the criteria for determining whether the reference to the place of business leads to an irrational result for tax purposes, it required a predetermined analysis to be made of the consequences, together with an examination of such consequences in relation to the purposes of VAT. In *Berkholz,* that criterion did not have to be applied because the gaming machines on board the ferry boats were not, in the first place, a fixed establishment within the meaning of Article 9(1).

61. In *DFDS*, on the contrary, such an examination of the rationality of the results for tax purposes was undertaken. The Court then considered that to treat the services supplied by a company through undertakings operating on its behalf in one country as being supplied from a different country where the tour operator had established its business would not be rational for tax purposes. In effect ‘systematic reliance on the place where the supplier has established his business could in fact lead to distortions of competition, in that it might encourage undertakings trading in one Member State to establish their businesses, in order to avoid taxation, in another Member State which has availed itself of the possibility of maintaining the VAT exemption for the services in question’. (48)

62. I would point out that, in any case, the Court had already ruled in *Berkholz* that the machines on board were not capable of constituting fixed establishments ‘especially if the tax may appropriately be charged at the place where the operator of the machines has his permanent business establishment’. (49) That approach was followed in *Faaborg-Gelting*, a case involving determination of the place of supply of restaurant services on a ferry boat sailing between Germany and Denmark. Despite the fact that the human and technical resources required in *Berkholz* were permanently present on board, the Court held that the place of business of the provider in Denmark was the relevant connecting factor, ‘especially where, as in this case, the permanent establishment of the operator of the ship affords an appropriate point of reference for the purposes of taxation’. (50) The Court took clearly into consideration the decisive aspect that the subjection to the VAT system of the slot gaming machine and restaurant services was not at risk in the particular circumstances of the two cases. If the place where the suppliers had decided to establish their place of business had in those cases been located outside the territory of the Community, the application of that connecting factor would certainly have raised many doubts.

63. As to the present case, in their written observations both the United Kingdom Government and the Commission consider that the result of the application of the connecting factor of the place of business would be that the slot-gaming machine services provided in the United Kingdom to consumers resident there would not be taxed at all, either in the United Kingdom or in any other Member State. The reasoning in *DFDS* should therefore be followed *a fortiori* in the present case because here VAT cannot be charged, purely and simply, at the place where the operator of the

machines (CI) has its place of business (Guernsey).

64. I agree. In the present case, in contrast to the position in *DFDS*, there is not merely a risk of prompting companies to establish their places of business in Member States that are able to maintain more favourable VAT regimes for the services in question. The risk in the present case is that of encouraging companies to relocate and establish their businesses outside the VAT territory of the Community, while continuing to supply their services in that territory in fixed establishments within the meaning of Article 9(1) to consumers residing there.

65. Contrary to the view taken by the appellants, I do not see how the approach suggested for the present case, setting aside application of the place of business, would amount to a breach of the principle of fiscal neutrality and provoke distortions of competition. The opposite would happen. A supplier such as CI, despite having in common with others the fact that it provides equivalent services to customers in a Member State from fixed establishments there, will not be subject to the payment of VAT to the extent to which its business was relocated to a place outside the territory of the Community for VAT purposes. The problem with the appellants' reasoning is that it, incorrectly, overlooks the circumstance that, as mentioned earlier, CI does have fixed establishments in the UK from which the slot gaming machine services are supplied to residents there.

66. I suggest, therefore, that the Court, in the alternative, in the event of Article 9(2)(c) being deemed to be inapplicable, should answer the questions referred to it to the effect that, where a company established outside the territory of a Member State supplies gaming machine services directly to its customers in that Member State, through gaming machines leased and operated in premises there, with the aid of auxiliary staff outsourced from third companies to perform ancillary activities necessary to confer a permanent character on the supply, that company should be regarded as having a commercial structure in that Member State with the minimum resources required for it to be considered itself to have a 'fixed establishment' there within the meaning of Article 9(1) of the Sixth Directive. In such circumstances, moreover, Article 9(1) of the Sixth Directive should be interpreted as meaning that such a company is liable to account for VAT in the Member State where the fixed establishment is located.

67. In the light of the preceding considerations it is not necessary for the Court to provide an answer to the alternative questions concerning the concepts of supplies, economic activity, the identity of suppliers, and the possible application of the abuse of rights doctrine in the present case.

III – **Conclusion**

68. I am therefore of the opinion that the Court should give the following answer to the questions referred to it:

Where a company established outside the territory of a Member State provides gaming machine services to customers in that Member State, through gaming machines it leases and operates there, it should be regarded as physically carrying out the supply of entertainment services in that Member State within the meaning of Article 9(2)(c) of the 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, and therefore as being liable to account for VAT in that Member State for the supply of those services.

1 – Original language: Portuguese.

2 – OJ 1977 L 145, p. 1.

3 – OJ 1986 L 326, p. 40.

4 – The Channel Islands are not part of the United Kingdom and thus the provisions of the Treaties not specifically mentioned in Protocol No 3 to the Act of Accession of the United Kingdom to the European Communities are inapplicable in the Channel Islands. See Article 299(6)(c) EC and 'Documents concerning the accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, Protocol No 3 on the Channel Islands and the Isle of Man' (OJ 1972 L 73, p. 164). The subject is considered at length in the Opinion of Advocate General La Pergola in Case C-171/96 *Pereira Roque* [1998] ECR I-4607, points 2 to 9.

5 – These problems are at the core of three cases currently pending at the Court of Justice (Case C-255/02 *Halifax*, Case C-419/02 *BUPA Hospitals*, and Case C?223/03 *University of Huddersfield*).

6 – See Case 168/84 *Berkholz* [1985] ECR 2251, paragraph 14, Case C-155/01 *Cookies World* [2003] ECR I-8785, paragraph 46. See also Case C-68/92 *Commission* v *France* [1993] ECR I-5881, paragraph 14, Case C-69/92 *Commission* v *Luxembourg* [1993] ECR I-5907, paragraph 15, and Case C-73/92 *Commission* v *Spain* [1993] ECR I-5997, paragraph 12.

7 – Case C-280/91 *Viessmann* [1993] ECR I-971, paragraph 17.

8 – *Berkholz*, paragraph 14, Case C-327/94 *Dudda* [1996] ECR I-4595, paragraph 20, and Case C-167/95 *Linthorst* [1997] ECR I-1195, paragraph 10.

9 – P. Farmer and R. Lyal, *EC Tax Law*, Clarendon Press, Oxford, 1994, p. 154

10 – See Case 51/88 *Hamann* [1989] ECR 767, paragraphs 17 and 18, and *Cookies World*, paragraph 47

11 – See B. Terra, *The Place of Supply in European VAT*, Kluwer Law International, London, 1998, p. 54, quoting the Explanatory memorandum to the proposal for the Sixth Directive. Despite its divergences from Article 9(1) as finally adopted, Article 9(1) basically followed, for pragmatic reasons, as a general connecting factor, the criterion of the place where the supplier established his business.

12 – *Dudda*, paragraph 21.

13 – Point 9 of the Opinion in Case C-167/95, cited above.

14 – *Berkholz*, paragraph 21.

15 – In that regard, an alternative criterion to determine the activities to be included in the notion of entertainment, based on the itinerant character of the activity, is much less convincing and practical. Not only does Article 9(2)(c) not give any guidance, in the sense that it envisages only itinerant performers, but also to make the notion of 'entertainment activity' dependent upon its itinerant character would introduce an additional element of uncertainty resulting from the difficulty of defining an 'itinerant' activity.

16 – Certainly a mobile telephone may be regarded by some as providing entertainment, but obviously it also serves a different purpose as a communication device. It seems to me to be beyond any doubt that that is the essential purpose of the service provided by a mobile telephone.

17 – In Spain Article 70(1)(3)(c) of Ley No 37/1992 of 28 December 1992 applies to games of chance (‘juegos de azar’) the connecting factor of the place where the services are physically carried out, in accordance with Article 9(2)(c) of the Sixth Directive. See also L. Pérez Herrero, *La Sexta Directiva Comunitaria del IVA*, Cedecs, Barcelona, 1997, p. 137.

18 – The United Kingdom Government and the Commission have not taken a clear position for or against such possibility. The Irish Government, on the other hand, supported the position of the Portuguese Government.

19 – See M. Hayat, ‘Discordances sur le lieu de fourniture des services en matière de TVA: le rôle de la CJCE et les conséquences de ses décisions pour l'évolution de la sixième directive’, *Gazette du Palais*, 2003, pp. 33-38, in particular, p. 33.

20 – See the Opinion of Advocate General Mancini in *Berkholz*, point 2, at page 2254 and the Opinion of Advocate General La Pergola in Case C-260/95 *DFDS* [1997] ECR I-1005, point 32.

21 – It is in that light that the absence of consideration of Article 9(2)(c) by the Court in *Berkholz* is perfectly understandable. Although the Court did not address the issue of a possible application of Article 9(2)(c), which in any event was not an issue raised in the questions submitted by the referring court in that case, Advocate General Mancini mentioned in his Opinion, at point 2, page 2254, that the slot gaming machine services provided on board sea-going vessels could not ‘be covered by the first indent of Article 9(2)(c) owing to their “itinerant” character’. It suffices to recall, in that regard, that the ferry boats concerned travelled between Germany and Denmark, crossing the high seas. In contrast to *Berkholz*, where application of the Article 9(2)(c) connecting factor would point to a varying and potentially fortuitous place where the entertainment activity was carried out, the gaming machines in the present case are installed in amusement arcades in the territory of the United Kingdom.

22 – See B. Terra, op. cit., p. 74 and M. Hayat, op. cit., p. 33.

23 – The Commission did hint superficially at a possible conflict in its written observations but did not pursue the point at the hearing.

24 – Emphasis added.

25 – As opposed to the subsidiary criterion of localisation at the end of paragraph 1 (the ‘permanent address’ or the place where the supplier ‘usually resides’), which will come into play when the other two main criteria do not apply.

26 – *Berkholz*, paragraph 14, following in part the seventh recital in the preamble to the Sixth Directive, which states that ‘the determination of the place where the taxable transactions are effected has been the subject of conflicts concerning jurisdiction as between Member States, in particular as regards the supply of goods for assembly and the supply of services’.

27 – *Berkholz*, paragraph 17.

28 – Case C-231/94 [1996] ECR I-2395, paragraph 16.

29 – Case C-190/95 [1997] ECR I-4383, at paragraph 15.

30 – Case C-260/95, cited above, at paragraph 19.

31 – See Opinion of Advocate General Mancini in *Berkholz*, point 2.

32 – *Berkholz*, paragraph 18.

33 – *Berkholz*, paragraph 18.

34 – See paragraph 27.

35 – See paragraph 19 (emphasis added). That approach was again followed in Case C?390/96 *Lease Plan Luxembourg* [1998] ECR I-2553, paragraphs 21 to 29, especially 26 and 27.

36 – See *DFDS*, paragraph 26.

37 – *DFDS*, at paragraph 27.

38 – See paragraph 23, which echoes the Opinion of Advocate General La Pergola at point 32.

39 – In the present case, even though CI does not have a right of exclusive possession or occupation of the premises owned by RAL, it has a licence to install the machines in the premises owned or leased by RAL. Even if that licence amounts to a gratuitous act of benevolence it certainly reveals a presence of CI itself in the premises which is not attributed to any other person whatsoever.

40 – *DFDS*, paragraph 26.

41 – In *DFDS*, the UK company took an active part in the negotiation, conclusion and performance of the travel contracts that constituted the relevant supply in that case. The Court nevertheless, mainly because of the sister-parent relationship between the two companies, considered that the UK Company had no independence when acting as agent of the Danish Company and, on behalf of the latter, making contracts with third parties. In the present case there is not even any such action taken on behalf of CI.

42 – That is so irrespective of the position adopted with regard to the question whether the customer's conduct amounts to a tacit acceptance of the contractual offer automatically made by the gaming machine *ad incertas personas* on behalf of CI, or whether, on the contrary, the machine makes an invitation to treat and subsequently automatically accepts the contractual offer made by the customer whenever a coin is inserted. In either case, it will follow that if, because of a malfunction, a particular machine fails to perform the task for which it was programmed and it does not return the coin or token inserted, a case of non-performance will arise for which CI, as operator of the machines and contractual party, will in principle be liable.

43 – It should be noted that in *DFDS* the fact that the contracts were concluded in the United Kingdom and the supply was executed there was a decisive element supporting the conclusion that the Danish company had a fixed establishment in the UK.

44 – See *ARO Lease*, paragraph 19.

45 – *Berkholz*, paragraph 17, and *DFDS*, paragraph 19.

46 – *Berkholz*, paragraph 17, and *DFDS*, paragraph 19.

47 – *DFDS*, point 29 of the Opinion.

48 – *DFDS*, paragraph 23. As two commentators recently put it, 'what at first seemed to be a

reluctance by the ECJ [in *Berkholz*] to refer to secondary establishments … was merely a means to avoid businesses escaping the Community's tax jurisdiction by creating national establishments outside Community territory; in the final analysis … rational results for tax purposes count, if the result is positive taxation rather than exemption' (B. Terra and J. Kajus, *A guide to the European VAT Directives*, Volume 1, 2004, p. 555).

49 – *Berkholz*, paragraph 18.

50 – *Faaborg-Gelting Linien*, paragraph 18.