

**VAT treatment of conversion of timeshare points**  
**[Macdonald Resorts Limited \(C-270/09\)](#)**

The ECJ has ruled that the VAT time of supply of services acquired in return for 'Points Rights' is not when they are acquired, but the time at which they are converted into consideration for specific identifiable supplies. Consequently, the nature, place and value and VAT liability of the supply has to be determined at the point of conversion and any VAT due must be brought to account at that time.

Where the supply is occupation of timeshare property or a hotel, it takes place where the property is located. In the EU, hotel accommodation will be taxed but time share accommodation may be exempt unless the Member State has excluded it from exemption.

This judgment may be very significant for affected businesses.

**Background**

The Taxpayer operates two timeshare schemes involving holiday properties in the UK and Spain. It also operates a chain of hotels in the UK.

Members of the first timeshare scheme (the fixed scheme) purchase rights to occupy specific properties for specific weeks each year. The VAT treatment of the fixed scheme is not the subject of this case.

Members of the second scheme, the 'Options scheme' obtain 'Points Rights' from the Taxpayer. The Points Rights can be purchased from the Taxpayer for cash, or members of the fixed scheme can surrender their right to occupy the fixed scheme property in return for Points Rights, in which case the fixed scheme member has to pay an 'enhancement fee' in respect of the right to obtain and redeem Points Rights with the Taxpayer.

Points rights are redeemed for the right to occupy any of the Taxpayer's pool of available holiday properties at any time, provided that the member has sufficient points, as the number of points required for each week in each holiday property varies according to its standard, location, the holiday season and similar factors. The member pays a 'transaction fee' in order to reserve accommodation when redeeming Points Rights. Members also pay an annual 'management fee' based on their points holding.

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Points rights can also be redeemed with the Taxpayer for accommodation in hotels, and the Taxpayer has also negotiated the facility to obtain timeshare accommodation at other operators' timeshare locations through a third party exchange agency.

HMRC considered that the supply of Points Rights by the Taxpayer constituted the grant of rights and benefits of club membership, a taxable supply taking place in the UK. The Taxpayer considered that the supply constituted the letting or leasing of immovable property or, alternatively, a right to the letting of immovable property at a future date, with the place of supply being where the timeshare property was located, and appealed HMRC's decision to the VAT & Duties Tribunal. It concluded that members were not purchasing a letting or lease of immovable property. At the time of the purchase of the points, no specific property was allocated, and in any case, Points Rights were exchanged for occupation of holiday property which was excluded from the exemption for supplies of immovable property. The supply was a taxable supply of the right to be granted various facilities.

The Taxpayer appealed to the Scottish Court of Session which decided to refer the following questions to the ECJ:

"1. Where MRL, 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

- (a) as the leasing or letting of immovable property within the meaning of Article 13B(b) of the Sixth VAT Directive (now Article 135(1)(l) of Directive 2006/112); or
- (b) as membership of a club; or
- (c) 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 rights of occupation held by the customer in timeshare 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 scheme in any

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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 obligations of the scheme;

(e) the Taxpayer may from time to time arrange for persons holding Points Rights to have access to an external timeshare programme;

(f) the Taxpayer may from time to time make arrangements for persons holding Points Rights to exchange their Points for accommodation in hotels operated by the Taxpayer or for other benefits provided by the Taxpayer;

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 (now Article 45 of Directive 2006/112)?

(b) If the answer to question 3(a) is 'Yes': 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?"

At the ECJ hearing, the Commission supported the Taxpayer in its view that the services have a sufficient connection with immovable property to be treated as taking place where the property is situated. The Commission considered that, where the Taxpayer's customers pay for rights which may be redeemed against properties located in more than one Member State, the taxable amount should be apportioned between the Member States concerned, having regard to the extent to which the rights are redeemed.

On the issue of VAT liability, the Commission submitted that it was "difficult to maintain that the provision of timeshare accommodation falls within the exemption" in art 135(1)(l). It also noted that Member States enjoy a considerable discretion in determining the scope of that exemption,

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and that it would be open to Member States to exclude the grant of timeshare rights or the provision of timeshare accommodation from the exemption without falling foul of EU law.

## Held

The ECJ gave the following ruling:

"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 ..., 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 ...). However, that provision does not prevent Member States from excluding that supply from exemption."

In coming to that ruling, the ECJ first addressed the nature and time of the Taxpayer's supplies. It considered that, unlike in RCI Europe (C-37/08), where the member's initial intention was to acquire timeshare rights in a specific property and the scheme was a simple matter of the exchange of those rights for rights in a different property, the acquirer of Points Rights was acquiring rights to occupation of any of the Taxpayer's portfolio of properties and hotels (even if by surrendering timeshare rights under the separate fixed scheme, which severed the link between the customer and his own timeshare property). Points Rights were purchased with the intention of using those rights in order to convert them into the services available under the Options Scheme.

The acquirer of Points Rights intended to use them to obtain temporary accommodation or other services chosen at a later date and the acquisition of Points Rights was not an aim in itself. The acquisition of Points Rights and their conversion constituted only preliminary transactions in order to be able to exercise the right to occupy a property, stay in a hotel or use another service. Consequently, it was only when the conversion took place into specific supplies of

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accommodation or other services that the acquirer of Points Rights received a supply in return for his initial payment which had the necessary link between supply and consideration for any VAT to become chargeable.

Furthermore, the ECJ pointed out that, when Points Rights were acquired, the acquirer did not know exactly which accommodation or other services were available in a given year, or the value in points of a holiday in the accommodation or of the other available services, so he could not know which would be available to him for the number of Points Rights acquired. In order for VAT to be chargeable, all the relevant information concerning the chargeable event, i.e. the future delivery of goods or future performance of services, must already be known and, in particular, the goods or services must be precisely identified (BUPA Hospitals and Goldsborough Developments, C-419/02).

The time of supply was therefore the point of conversion, and the place of supply was then established as the place where the property or hotel was situated in which the acquirer obtained the right to stay after conversion of the Points Rights.

The ECJ recognised that there could be significant administrative issues as a result of its ruling, including the need to ascribe a monetary value to the converted Points Rights redeemed by the customer, problems of lack of clarity with respect to the rate of conversion for Points Rights, non-taxation of the revenue from Points Rights over potentially long periods of time, problems related to possible changes of VAT rates between the acquisition of Points Rights and redemption, and the possibility that the acquirer may never convert some or all of his Points Rights. Nonetheless, the ECJ did not consider that vires existed for some form of apportionment: the Taxpayer and the Member States were under an obligation to put measures in place for collection of the correct amounts of tax, failing which the EU law made provision for a 'market value' valuation where this was necessary.

The ECJ then moved on to consider the place of supply and VAT liability of the supplies of timeshare property and hotel accommodation. Hotel accommodation was specifically excluded from exemption (art 135(2)(a) Principal VAT Directive 2006/112/EC). However, the right to temporary use of a property obtained in exchange for Points Rights fulfilled the conditions for a letting of immovable property (art 135(1)(l)) as, once the member had converted his points into such a right, he was entitled to occupy a property as if he were the owner and to exclude any other person from its enjoyment for a specific period. However, it was open to the Member States to apply further restrictions to the scope of exemption, including the temporary use of property as holiday accommodation.

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## Implications

For the Taxpayer in this case, this ruling indicates that it will be necessary to defer accounting for VAT under the Options scheme until the acquirer of the Points Rights converts them into consideration for specific services. It will only be at that time that the place of supply will be established and, in the case of timeshare property, that will determine whether the supply will be exempt, depending on whether the property is in the EU and, if so, whether the Member State in question has excluded holiday accommodation from exemption. The Taxpayer may have VAT registration obligations in a number of Member States. Valuation may also be an issue, as it is possible that Points Rights may have been acquired and brought forward from previous years, or that some Member States will take differing approaches to valuation, and it is potentially more complicated where the acquisition is in return for surrender of existing timeshare rights under the fixed scheme. On the other hand, the Taxpayer may benefit from deferred taxation, and non-taxation may occur where Member States exempt the property supply or the Points Rights are never converted.

*It may be necessary to revisit other scenarios featuring the acquisition of a right to acquire future supplies of goods and/or services where there is no certainty, at the time when the right is acquired, as to the nature, time, place and liability of the future supply.*

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