OPINION OF MR ADVOCATE GENERAL CRUZ VILAÇA
delivered on 14 July 1988 *

Mr President
Members of the Court,

1. The question submitted to the Court for a preliminary ruling by the London value-added tax tribunal and, more so, the long and detailed order for reference provide a clear indication of the problems involved in the application of Article 11 A 1 (a) of the Sixth VAT Directive [1] in the circumstances to which the main proceedings relate.

2. The company Naturally Yours Cosmetics Ltd ('NYC') carries on business as a wholesaler of cosmetic products which are sold through retailers known as 'beauty consultants', who approach friends and acquaintances ('hostesses') to organize parties at which NYC's products are offered for sale to the ladies present.

3. The beauty consultants — who, it appears, operate independently — purchase the products from the company for a given price and sell them to the customers at the recommended retail price, the difference between the two prices being the profit to which they are entitled.

4. Thus, the beauty consultants come within the category of 'taxable persons', within the meaning of Article 4 (1) of the Sixth Directive, but are exempt from VAT under Article 24 of that directive since their turnover is lower than the threshold laid down by the United Kingdom legislation.

5. At each party, the beauty consultant gives the hostess, as a gift for organizing it, a pot of beauty cream. The pot is purchased by the consultant from NYC for UKL 1.50 instead of its normal selling price of UKL 10.14.

6. The Commissioners of Customs and Excise, however, assessed VAT for 1984 on the basis of the latter value, relying for that purpose on Section 10 (3) of the United Kingdom Value-Added Tax Act 1983, according to which 'if the supply is not for a consideration or is for a consideration not consisting or not wholly consisting of money, the value of the supply shall be taken to be its open market value'.

7. Considering that provision to be contrary to Article 11 A 1 (a) of the Sixth Directive, upon which it relies as being directly applicable, NYC appealed to the London value-added tax tribunal against the assessment, claiming that the tax was payable only on UKL 1.50, the price paid by the beauty consultant for the pot of cream intended to be used as a gift.

* Translated from the Portuguese.

1 — Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment — OJ L 145, 13.6.1977, p. 1.

8. The London tribunal considered that, in order to resolve the dispute, it was necessary to ask the Court of Justice what basis of assessment should be adopted in a case such as this.

9. The essential issue is to determine what, pursuant to Article 11 A 1 (a) of the Sixth Directive, is the 'consideration' received in exchange for the pot of cream supplied by the company to the beauty consultants — is it merely the price actually paid by the consultants or does it include something else, and if so, what does that 'something else' consist of?

10. The problem arises because the concept of 'consideration' in Article 11 A 1 (a) is not precisely defined and it is difficult to apply it to circumstances of the kind referred to in the question submitted for a ruling.

11. The Second VAT Directive[2] refers in Article 8 (a) to the concept of consideration, upon which the Court had occasion to express its views in its judgment of 5 February 1981.[3]

12. Since, in a later judgment,[4] the Court made clear that, having regard to the 'same legislative aim' of the two directives, account must be taken, in interpreting the Sixth Directive, of the decisions of the Court on the Second Directive, it is necessary, in order to clarify the concept of 'consideration', to take account of the principles already laid down in that judgment of 5 February 1981.

13. From that judgment (paragraphs 8 to 14) the following interpretative criteria can be deduced:

(a) The term to be interpreted ('consideration') appears in a provision of Community law which does not refer to the law of the Member States for determination of its meaning and scope, and therefore its interpretation cannot be left to the discretion of each Member State;

(b) As is stated explicitly under point 13 of Annex A to the Second Directive (of which it forms an integral part by virtue of Article 20), consideration should be understood as meaning 'everything received in return for the supply of goods or the provision of services, including incidental expenses (packing, transport, insurance, etc.) that is to say *not only the cash amounts charged* but also, for example, the *value of the goods received in exchange* ...' (emphasis added);

(c) As a result of the combined provisions of Article 8 (a) and 2 (a) of Second Directive (which correspond respectively to Articles 11 A 1 (a) and 2 (1) of the Sixth Directive), as a rule only supplies of goods and the provision of services *against payment* are subject to tax;

2 — Second Council Directive (67/228/EEC) of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax — OJ, English Special Edition 1967, p. 16.

3 — Judgment of 5 February 1981 in Case 154/80 *Staatssecretaris van Financiën* v *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445 *et seq.*

4 — Judgment of 8 March 1988 in Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, paragraph 10.

(d) For those conditions to be regarded as fulfilled, there must be a *direct link* between the goods supplied (or the service provided) and the consideration received;

(e) It is apparent from the use of the terms 'against payment' and 'everything received in return' — and from Article 9 of the Second Directive (Article 12 (3) of the Sixth Directive) concerning the standard rate of tax — that the consideration for the supply of goods (or the provision of services) must be capable of being expressed as an amount of money; it also follows that the consideration is a 'subjective value', since the basis of assessment is the consideration actually received and not a value assessed according to objective criteria.

14. How can those principles be applied to the present case?

15. Let us start by determining what the consideration comprises.

16. Article 11 A 1 (a) is very clear in specifying that the consideration is not limited to transfers of money but comprises '*everything*[5] which constitutes the consideration which has been or is to be obtained by the supplier . . . for such supplies' (supplies of goods or the provision of services) from the purchaser, the customer or a third party. The fact that the scope of that expression is not defined shows, of course, that it was intended that the term should be given the broadest possible meaning. This, moreover, reflects the objectives of the VAT system: a general system of tax on consumption, which is neutral as regards the structure of the transactions, thereby ensuring that it is applied as comprehensively as possible to transactions at all stages of production and distribution (see the fifth recital in the preamble to the First Directive).[6]

17. All transactions (supplies of goods, the provision of services and imports of goods) for which payment is made are therefore subject to the tax (Article 2 of the Sixth Directive).

18. The legislature's concern to levy VAT on the taxable amount in its entirety (and, moreover, in a uniform manner throughout the Community) is also reflected in the very way in which taxable transactions are defined (Articles 5 and 6), including the fact that certain operations are treated by those articles in the same way as supplies of goods or services for consideration.

19. If any form of payment — such as, for example, services provided in exchange for the goods supplied — were to be excluded from the consideration, the door would be left open to lawful tax avoidance, frustrating the objectives of the Sixth Directive and enabling part of the basis of assessment to escape taxation, and possibly creating distortions in the tax treatment of situations which are, from the economic or commercial standpoints, substantially identical.

5 — Emphasis added.

6 — First Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (67/222/EEC, OJ, English Special Edition 1967, p. 14).

20. At first sight, therefore, the provision of services is not excluded from the concept of consideration, otherwise it would not be difficult to avoid the tax.

21. It is true that, in explaining the concept of 'consideration', point 13 of Annex A to the Second Directive refers only to 'the value of the *goods* received in exchange' but does not mention the value of the *services* provided.

22. However, the expression is used merely by way of illustration and should not — for that very reason — be interpreted restrictively or literally.

23. *Goods* are referred to, no doubt, because it is goods that are most frequently involved; but in any event it might perhaps be conceded that the legislature's failure to mention services reflects the practical difficulties involved in taking services into account in certain cases.[7]

24. It should also be stated that, for the purpose of determining the taxable amount, any *advantage* which the supplier may obtain from the transaction is immaterial, except an advantage obtained by him *in return* for his part in the operation, which renders irrelevant the example put forward by NYC of the sale of products at a reduced price to dispose of old stocks.

7 — It is interesting to note that the Commission itself, in the document quoted by the Portuguese Government — COM(74) 795 final, of 26 July 1974, 'Modifications à la proposition de la sixième directive du Conseil' — expressly mentions, as forming part of the 'consideration' and thus necessarily part of the taxable amount, the value of the services obtained or to be obtained, as well as the goods received in exchange.

25. But — the second condition to be fulfilled — there must be a direct link between the service provided and the goods supplied before that service can be regarded as the consideration for the supply.

26. Everything depends upon the contract entered into.

27. In the present case, it is apparent from the documents before the Court — in particular the order for reference — that there is such a link.

28. The pot of rejuvenating cream is supplied for UKL 1.50 to the beauty consultant against her undertaking to use it as a gift to induce a hostess to organize a party to promote the sale of NYC products.

29. The pot of cream cannot be used for any other purpose, and in particular it cannot be sold to the public for a price greater than that at which it was supplied to the consultant.

30. That price may be regarded as only part of the payment for the pot of cream; if the company supplies it to the consultant for such a low price the reason is that, in return, it also receives from the beauty consultant the service of finding a hostess and arranging for a party to be held.

31. It might be said, on the other hand, that the task of finding a hostess to organize a party does not constitute a service provided to NYC but rather a service which the

consultant provides in her own interests. If the party is not held, the beauty consultant — who has paid the wholesaler for the products — is left with unsold items or, at least, falls behind schedule with her sales, whilst NYC has already received the payment from the consultant (the retailer), with the result that it is a matter of indifference to it whether or not she recovers the sums paid.

32. That is not the position.

33. NYC has an interest in the holding of the party because, since that method — it would appear — is its sole method of selling, the regular disposal of its products depends upon the holding of numerous parties and, therefore, upon the action taken by the consultants to organize them.

34. It is for that reason — and, without doubt, for that reason alone — that NYC agrees to supply the pot of cream intended as a gift for such a low price. If the only interest at stake were that of the beauty consultant, it would be logical for the wholesaler to charge her the normal price for the product, so that she would bear the total cost of the free gift (possibly with a discount) which would have to be recovered from the profit represented by the difference between the wholesale and retail prices.

35. As is apparent from the documents before the Court, if the beauty consultant does not provide the agreed service to the wholesaler — that is to say, if she fails to find a housewife to organize the party for her — the pot of cream has to be returned or paid for at its normal wholesale price, a fact which provides the required support for the statement that the consideration is not, therefore, merely the UKL 1.50.

36. To illustrate its contention that the position which I have just described is not correct, NYC gave the example of the sale of a particular item of goods for a price well below the normal price (possibly merely a token price), where the purchaser gives an undertaking to buy larger quantities of the goods concerned in the future. In NYC's view, that undertaking constitutes — as in the case at issue in these proceedings — merely one element in the overall agreement entered into between the two parties, which, notwithstanding the value which it might actually prove to have for the supplier, should not be included in the consideration for the purpose of determining the basis of assessment of VAT. At the hearing, the Agent for the Portuguese Government referred to that same example, and expressed the view that it was not comparable with the situation in the present proceedings since there was no direct relationship between the reduction in price and the promise to purchase additional quantities later at the normal price.

37. It seems to me that no decisive argument can be developed from that example.

38. Of the two possibilites, one must prevail: either the two situations compared are, as the Portuguese Government maintained, entirely different because, in the example given by NYC, the taxable operations are carried out under different conditions and at separate times without a sufficient relationship between them; or else there are objective factors which enable

them to be regarded as identical, possibly leading to the same result. An example of the latter case might be one where the parties agreed that the purchaser should reimburse the supplier for the difference between the normal price and the reduced price in the event of his failing to fulfil his undertaking subsequently to purchase further quantities of the goods. It would then perhaps be possible to perceive a direct link between the price reduction and the undertaking given, and to make a precise 'subjective' evaluation of the service promised, and not provided, in return for the goods supplied. But even in that case it would also be necessary to show that, in view of the size of the reduction, it was not merely a discount or rebate — which are not in principle included in the taxable amount (Article 11 A 3 (b) of the Sixth Directive) — to be rectified or cancelled subsequently.

39. In the case at issue in these proceedings, the existence of a specific link between the supply of the pot of cream to the beauty consultant (for less than the normal price) and her undertaking to arrange for a particular party to be organized enables this situation to be distinguished from one where one or more pots of cream are supplied for that price against an undertaking, *not given expressly*, to organize, *on a general basis*, parties for the sale of NYC products. In the latter case it would certainly be much more difficult to speak of a *specific* consideration for the supply of the product at less than the normal price.

40. In either case, the portion of the cost of the pots of cream not covered by a cash payment from the retailer will, naturally, be taken into account by the company as one of its general operating expenses and, as the case may be, will be deducted from profits or included in the price calculation for the goods normally sold by it. What is involved therefore are ordinary accounting practices associated with the financial or cash-flow policies adopted by the company, which in no way alter the nature of the transactions in question, regardless of the consideration involved.

41. The foregoing exposition also shows (together with the fact that, having regard to the wholesale price, the reduction is substantial: about 86%) that the tax treatment available for discounts and rebates under Article 11 A 3 (b) of the Sixth Directive is simply not applicable. In fact, the idea of a synallagmatic relationship, which is present in this case, is alien to those concepts.

42. As regards the service which the hostess, for her part, provides by making her house available and cooperating in organizing the party, it falls outside the scope of the relations between the beauty consultant and the wholesaler, NYC, and does not therefore have to be taken into account in defining the consideration in the sale by NYC to the consultant. The relations between the consultant and the hostess therefore represent another phase in the process of product distribution.

43. In that phase, in the event of the consultants' being subject to tax, the free gift of cream to the housewife would itself — regardless of the consideration given for the service provided by the hostess — in principle be taxable. As was pointed out at the hearing by the Agent for the Portuguese Government, Article 5 (6)

of the Sixth Directive treats the disposal of a company's goods free of charge as a supply for consideration, and the taxable amount is then determined in accordance with Article 11 A 1 (b).

44. The only circumstances in which that would not be the case would be where the supply might be regarded as a 'gift of small value' or a 'sample' which, under Article 5 (6), are not treated as supplies for consideration. In view of the cost of the product in question, however, it seems at least doubtful that that exception could be applicable in the present case.

45. The cost price, for the purposes of determining the taxable amount in accordance with Article 11 A 1 (b), would in fact be UKL 10.14, corresponding to the normal wholesale price of the product, the basis of assessment at the preceding stage of the distribution chain.

46. It is this fact which, in the final analysis, makes it possible to state that the hostess receives, for organizing the party, an article which is worth UKL 10.14 (or UKL 12.95, the retail sale price of the product) and not merely UKL 1.50, as it would be logical to conclude if the view were taken that that amount was the only consideration received by NYC, being subject as such to tax.

47. Before it can be said that the service provided must be regarded as part of the consideration for the goods supplied and must therefore be included in the basis of assessment for VAT, it must — and this is the third condition to be fulfilled — be capable of being evaluated and being expressed in pecuniary terms. As the Court also stated, this 'consideration' must be a 'subjective value' and not a value assessed in accordance with objective criteria.

48. In a case like the present one, the possibility that those requirements may be satisfied cannot be ruled out *ab initio*.

49. The parties to the contract (NYC and the beauty consultants) reduced the wholesale price of the goods delivered (the pot of cream) in return for the provision of a service consisting in the organization of a party.

50. The fact that the price is reduced only if the party actually takes place, whereupon the pot of cream will be given to the hostess, shows that the parties subjectively assigned to the service provided a value corresponding to that price reduction. Since the portion of the price of the goods which was not paid initially must be paid subsequently if the party is not in fact held, it is clear that, as regards that portion, the goods are paid for either by provision of the service or by a specific sum of money in lieu of that service.

51. It is therefore legitimate, in my opinion, to apply the tax to that value, in so far as it also forms part of the consideration in a bilateral contract under which one of the parties delivers goods and the other pays for them partially in money and partially by means of a service which it undertakes to provide.

52. Where the transaction is an exchange, the value of what is supplied by one party represents, in the final analysis, the consideration for what is supplied by the other.

53. What makes the question somewhat less clear is the fact that the United Kingdom legislation refers to the *open market value* of the goods delivered or the service provided as the basis of assessment.

54. The application of that concept to the present case is misconceived.

55. In fact, the aim in view is to determine the value actually assigned by the parties to the consideration, so that tax can be assessed upon it.

56. It is true that the calculation of that value involves, in the circumstances of this case, a reference to the wholesale price normally charged for goods of that kind when supplied for sale to the public.

57. But the way in which the Commissioners have applied the United Kingdom provision does not, strictly speaking, involve reliance, for the purpose of evaluating the consideration, upon the concept of *open market value* in the strict sense of that term, as a fictitious concept dissociated from the terms of the transaction in question and from the synallagmatic relationship established between the two parties to the contract.

58. In a case such as this one, the relationship between the consideration given by one contracting party and that given by the other is such that it is possible to discover what value they attributed to the service which constituted part of the consideration. That value is calculated, indirectly, by reference to the normal wholesale price of the product; there too, however, it is not a question of an abstract value but rather of a specific price, applied by the same contracting parties in 'normal' transactions, and moreover that price will be charged for the goods in question if the promised service is not provided.

59. I should not in any event like it to be concluded from the foregoing reasoning — a conclusion that would be preferred by NYC and, as is evident from its written observations, by the Commission — that it is completely impossible to determine the consideration, for the purposes of Article 11 A 1 (a) of the Sixth Directive, by reference to the concept of normal value or open market value.

60. In fact, in certain circumstances, that will be the only effective way of calculating the value of the consideration and levying tax on it, so as to prevent fiscal distortions or avoidance of tax which would necessarily occur if the part of the consideration not represented by the transfer of a given sum of money had to be disregarded.

61. As I emphasized at the hearing, it would not be appropriate to accord different tax treatment to two contracts for the sale of a particular product under which payment is made partly in money and partly in the form of goods or services merely because, in one of the contracts, the parties fixed the value of the items supplied or the service provided in exchange and, in the other, did not do so. Only reference to the normal value or open market value can avoid the distortion which would derive from different treatment being accorded to transactions which were virtually identical from the economic point of view.

62. That conclusion is not undermined by the fact that Article 11 A 1 (a) of the Sixth Directive — by contrast with the position in the special cases referred to in subparagraph (d) of that provision or Article 11 B 1 (b) (imports) — does not provide in general for reference to the 'open market value'.

63. Nor is it undermined by the fact that the reference to that concept contained in the first draft was eliminated from the final version of the directive.[8] If the elimination of that reference has any meaning (and it certainly does), it is that, in the part with which we are concerned, it was intended to replace — as the taxable amount for this type of transaction — the reference to the normal value *of the transaction in question* (taken as the normal value of the goods or services supplied) by a reference to the *consideration*, the value of which must be determined in a manner which the directive left unclear.

64. In fact — by providing that, in the general case of supplies of goods and the provision of services, the basis of assessment comprises 'everything which constitutes the consideration which has been or is to be obtained by the supplier' — the legislature left open the method of determination or evaluation of that consideration in those cases where it did not consist of a monetary payment.[9]

65. That 'method' must be the one which proves most direct and least distorting and which is most in conformity with the general scheme of the Sixth Directive, as interpreted by the Court (in particular in the judgment of 5 February 1981 in *Staatssecretaris van Financiën* v *Coöperatieve Aardappelenbewaarplaats*, cited earlier).

66. In certain cases, reliance upon the concept of open market value will, as stated earlier, be the only way of evaluating the consideration and avoiding the unjustified tax distortions or advantages which would otherwise result.

67. This appears to have been accepted by the Commission in its observations in Case 154/80[10] and was conceded at the hearing in this case by Counsel for NYC and by the Agent for the Commission.

68. But, as I observed in my Opinion in *Direct Cosmetics*,[11] the normal value will only have to be taken into account where no price has been paid by the purchaser and where it is impossible (or at least,

8 — See Commission proposal for a Sixth Council Directive on the harmonization of legislation of Member States concerning turnover taxes — Common system of value-added tax: uniform basis of assessment, submitted to the Council on 29 June 1973 (OJ C 80, 5.10.1973, p. 1; Minutes of Proceedings of the Sitting of the European Parliament of 14 March 1974, OJ C 40, 8.4.1974, p. 34 *et seq.*

9 — This conclusion must be compared with that reached by the Court in its judgment of 1 February 1977 in Case 51/76 *Nederlandse Ondernemingen* v *Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113, at pp. 125 and 126, paragraphs 14 to 18, concerning the correct interpretation of the term 'capital goods' appearing in the third indent of the first paragraph of Article 17 of the Second Directive. The Court ruled in that case that, since the directive did not contain explicit guidance for defining uniformly and precisely the requirements which had to be satisfied (concerning durability and value, together with the rules applicable for writing off) for an object to be classified as capital goods, the Member States had a certain margin of discretion as regards those requirements.

10 — [1981] ECR 449 and 450.

11 — Opinion in Joined Cases 138 and 139/86 *Direct Cosmetics and Laughtons Photographs* [1988] ECR 3937, at p. 3949.

excessively difficult) to attribute to the consideration, by some other means, its true value for the purposes of the transaction, or, at least, its real market value. At this point it must be stated that the expression used in the United Kingdom legislation and in the English version of the Sixth Directive — 'open market value', which we could assimilate to 'ordinary market value' — seems to me to be more felicitous than the expression 'normal value' used in the Romance-language versions of the directive. It is only where there is no *market* that it is necessary to have recourse to a value other than the real value, or to a deemed value.

69. In any event, being a tax on consumption, VAT must be levied as precisely as possible upon the actual amount spent by the consumer and accordingly reference to open market values rather than to real values should be permitted only (otherwise than in cases where that approach is expressly provided for) where it is impossible to follow some other procedure which comes closer to determination of what the Court has called the 'subjective value' of the consideration.

70. The Court has confirmed this in the judgment which it gave very recently (on 12 July 1988) in the *Direct Cosmetics* case to which I referred, in which it held (paragraph 53) that 'the open market value for the purposes of the system established by the derogating measure in question must be understood as meaning the value that is closest to the commercial value on a sale by retail, that is to say the actual price paid by the final consumer'.

71. In the present case an approximation of that kind is possible in so far as a value can be accurately (although indirectly) attributed, within the relationship between the parties, to the service provided as consideration for the goods supplied, without its even being necessary — contrary to what might be suggested by the terms of the domestic provision (and particularly by the normal translation thereof into the various Romance languages) pursuant to which the Commissioners took their decision — to refer to the concept of normal value or open market value.

72. Since the compatibility of that provision with Community law is not at issue here, it is pointless to make judgments of a general nature concerning the terms in which it is drafted. Accordingly in the reply which I shall suggest shortly I shall confine myself to indicating what seem to me to be the principles to be followed in interpreting Article 11 A 1 (a) of the Sixth Directive, for the purpose of deciding the present case.

73. I would merely add that the value of the service incorporated in the consideration must not be determined by reference to what it produces but rather to the subjective value attributed to it by the parties, with the result that the value is not dependent upon the greater or lesser success, or in other words the greater or lesser profit, of the parties held. In the same way, an architect's plan has a price, regardless of whether it is the one selected, as does the opinion given by a university professor, regardless of whether or not the person who consulted him wins his case.

74. On the basis of the foregoing considerations, I propose that the Court should rule that, in circumstances like those described by the London value-added tax tribunal — where a supplier (wholesaler) supplies certain goods (gifts) to another (retailer) for a price considerably lower than that at which it supplies identical goods to the same retailer for resale to the public, against an undertaking given by the retailer to use that gift as a reward to another person for organizing a party during which the wholesaler's products are offered for sale to the public by the retailer, failing which the gift is returned to the supplier or must be paid for at its wholesale price — the taxable amount comprises, pursuant to Article 11 A 1 (a) of the Sixth Directive, the sum of the price paid to the wholesaler and the value of the service provided by the retailer, consisting in the procuring of another person to organize the party, and the value of that service may be regarded as being equal to the difference between the price paid by the retailer for resale to the public and the price which the retailer actually paid.