

OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 16 March 1994 *

*Mr President,
Members of the Court,*

1. By a decision of 14 January 1993 the Manchester Tribunal Centre of the Value Added Tax Tribunals (hereinafter 'the national court') referred to the Court under Article 177 of the EC Treaty a question concerning the interpretation of the Sixth VAT Directive (hereinafter 'the directive'¹). The question has arisen in connection with two appeals by Empire Stores Ltd against VAT assessments issued by the Commissioners of Customs and Excise (hereinafter 'the Commissioners') in respect of the accounting periods from 1 February 1987 to 12 November 1988 and 13 November 1988 to 22 July 1989 respectively. Both appeals concern the VAT due on goods supplied as special offers to persons who introduce themselves or others as potential clients.

Background

2. Empire Stores carries on a mail order business and sells goods by means of a cata-

logue which it sends to its present and future customers. According to the national court, nearly all customers are women. The goods can be paid for immediately or by instalments. In practice very many of them are paid for by instalments. Whereas Empire Stores sells its goods to any person who pays for them immediately, it sells on credit only to persons whom it has approved as customers. According to the provisional judgment delivered by the national court on 17 August 1992, Empire Stores used two methods to attract customers during the period covered by the disputed assessments.

The first method was known as the 'self-introduction scheme'. Under that scheme Empire Stores advertised by means of leaflets or advertisements in periodicals and by leaflets sent by direct mail. It offered future customers a gift to be chosen by the customer if she filled in and sent to it a form giving personal details contained in the leaflet or advertisement. Using the information provided, Empire Stores examined the future customer's credit-worthiness and, if satisfactory, sent her the latest catalogue and other documents such as payment cards. The gift

* Original language: Dutch.

1 — 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 1977 L 145, p. 1.

chosen by the customer was sent to her as soon as, depending on the case, Empire Stores had received the order or the client had paid for the order or had made a first payment.² The national court mentions as gifts an automatic kettle and a push-button telephone.

3. Under both schemes Empire Stores accounted for the VAT element of the price which it had paid for the article. The Commissioners, on the other hand, considered that it ought to have accounted for VAT on the tax-exclusive cost price of the article plus 50%, being the Commissioners' estimate of the price which it would have charged for the article if it had been included in the catalogue. The Commissioners issued the disputed VAT assessments on that basis.

The second scheme was known as the 'introduce-a-friend scheme'. Under that scheme existing customers were induced by means of a gift of their choice to recommend one or more friends as future customers. They were required to fill in the relevant forms with their friends, indicate the gift of their choice and return the forms to Empire Stores. Under this scheme also the credit-worthiness of the prospective customer was first of all examined. If this was found to be satisfactory, and as soon as the new customer had made her first payment, Empire Stores sent the gift to the existing client. According to the provisional judgment a gift could be chosen from the following articles: an organizer bag (a cassette player in a first leaflet), a toaster, a jug kettle, a steam iron, a disk camera and a £15 voucher. The voucher gave the right to a £15 reduction on any item worth £15 or more in Empire Stores' catalogue. According to the national court, neither of the parties to the main proceedings suggested that the cost price of the free gifts to Empire Stores was more than £10 each.

4. Empire Stores appealed against the VAT assessments to the national court, which referred the following questions:

'For the purposes of Article 11A(1)(a) of the Sixth Council Directive on the harmonisation of the laws of the Member States relating to turnover taxes (Directive 77/388/EEC of 17 May 1977), where a supplier of goods ordered by mail order from a catalogue ("catalogue goods") operates schemes, full

2 — The national court states in its provisional judgment that (i) until 8 August 1988 the gift was sent to the customer when she had paid for the order or had made the first payment; (ii) from 8 August 1988 to 22 February 1989 the gift was sent to her when Empire Stores had received the order; and (iii) after 23 February 1989 the gift was sent to the customer after she had made her first payment.

details of which appear in the decision annexed, under which, in summary:

supplier and do not have a normal sale price attached to them, in relation to each scheme

(i) when a potential customer supplies satisfactory information about herself (in particular as to credit-worthiness), the supplier undertakes to supply to that person without extra charge, if and when she is approved and either orders catalogue goods or, as the case may be, orders catalogue goods and duly makes a payment for them, an article chosen by her from a range of goods offered by the supplier which may or may not also be available from his catalogue; and

(1) Is the supply of non-catalogue goods made for a consideration separate from the sum of money payable to the supplier for the catalogue goods ordered from him?

(2) If the answer to (1) is "yes", how is the taxable amount to be determined? Is the taxable amount

(ii) when an existing customer finds and introduces to the supplier a new potential customer who supplies satisfactory information about herself (in particular as to credit-worthiness), the supplier undertakes to supply to that existing customer without extra charge, if and when the person introduced is approved and either orders catalogue goods or, as the case may be, orders catalogue goods and duly makes a payment for them, an article chosen by the existing customer from a range of goods offered by the supplier which may or may not also be available from his catalogue,

(i) the purchase price paid by the supplier for the goods, or

(ii) the price at which the supplier would sell the goods if the goods were also offered in his catalogue (calculated consistently with the supplier's pricing procedures), or

and the articles not so available ("non-catalogue goods") supplied as aforesaid are not otherwise the subject of supplies by the

(iii) some other and if so what amount?'

The admissibility of the questions

5. The Commission has doubts concerning the admissibility of the questions. Under the second paragraph of Article 177 of the EC Treaty a national court has the right to refer to the Court for a preliminary ruling a question concerning the interpretation or validity of a Community rule only if it considers that a decision on the question is necessary to enable it to give judgment. The Commission points out that the national court in its judgment of 17 August 1992 had allowed both appeals by Empire Stores and discharged the assessments. The decision states that it will become definitive if neither of the parties has sought a direction within two months that a question be put to the Court. Accordingly, the Commission has doubts as to whether an answer by the Court is actually necessary to enable judgment to be given in the main proceedings. None the less it does not formally put forward any objection of inadmissibility.

6. In my view, the Commission's doubts are based on an incorrect reading of the judgment of 17 August 1992. The national court expressly stated in that judgment that it was merely a *provisional* decision. Although it was of the view that Empire Stores had accounted for VAT on the correct basis and that 'the appeals *ought* to be allowed and the assessments discharged' (my emphasis), it decided to give the parties two months to apply for a direction that one or more ques-

tions be put to the Court for a preliminary ruling. Empire Stores made such an application on 14 October 1992, and after a hearing on 14 January 1993 the national court proceeded to make a reference. In his order for reference of the same day the referring judge states expressly that 'the questions set forth in the Schedule hereto [are] questions on which this tribunal ... considers that a decision is necessary in order to enable it to give judgment in these appeals.' Since therefore the *final* decision of the national court depends on the answer to be given by the Court and since it has been consistently held that it is for the national court alone to decide whether a preliminary ruling is necessary in order for it to give judgment,³ I see no reason to declare the reference inadmissible.

Is there consideration within the meaning of the directive?

Provisions of the directive

7. Article 2(1) of the directive subjects to VAT

'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such'.

³ — See *inter alia* the judgment in Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 34.

Article 5 of the directive specifies which supplies are to be regarded as a supply of goods and hence as *taxable transactions* within the meaning of the directive. Article 5(6) provides:

party for such supplies including subsidies directly linked to the price of such supplies;

'The application by a taxable person of goods forming part of his business assets for his private use or that of his staff, or the disposal thereof free of charge or more generally their application for purposes other than those of his business, where the value added tax on the goods in question or the component parts thereof was wholly or partly deductible, shall be treated as supplies made for consideration. However, applications for the giving of samples or the making of gifts of small value for the purposes of the taxable person's business shall not be so treated.'

(b) in respect of supplies referred to in Article 5(6) and (7), the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of supply;

(c) (...)

(d) (...)

Finally, Article 11 of the directive governs the *taxable amount*. The following provisions of Article 11A, which concerns supplies of goods or services within the territory of the country, are relevant here:

2. (...)

3. The taxable amount shall not include:

'1. The taxable amount shall be:

(a) (...)

(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third

(b) price discounts and rebates allowed to the customer and accounted for at the time of the supply;

(c) (...)’

The views expressed by the interveners before the Court

8. Different reasoning has been put forward by each of the interveners.

Empire Stores submits primarily that the first question should be answered in the negative and that it is therefore unnecessary to consider the second question. It argues that, whichever scheme is used, the monetary payment received from the new customer constitutes the ‘consideration’ for the purposes of Article 11A(1)(a) of the directive both for the supply of the first order of goods and the supply of the gifts. It follows from the Court’s case-law, in particular the judgments in *Hong Kong Trade*⁴ and *Apple and Pear Development Council*,⁵ that there is a taxable transaction only if a direct link exists between the goods supplied and the consideration received. Such a direct link does exist between the supply of the free gift and the monetary payment since the gift is not supplied until the monetary payment is made.

According to *Empire Stores*, it follows further from the *Coöperatieve Aardappelenbe-*

waarplaats judgment⁶ that the consideration consists of everything which is received in return for the supply of goods or services. In the present case both the supply of the gift and the supply of the first catalogue goods are made for a single consideration, namely the monetary payment. Other than the monetary payment there is no separate or additional consideration given in return for the gift. There is no direct link between the supply of the gift and the personal information which the new customer gives concerning herself or the introduction of a new customer by an existing customer. The right to the gift arises only when the new customer places her first order and makes the payment relating thereto. For those reasons *Empire Stores* also considers that the present case must be distinguished from the *Naturally Yours Cosmetics* case.⁷

9. The *United Kingdom Government* considers that the question whether the consideration obtained by the supplier for the gift is separate from the price paid for the goods ordered is a question of fact which falls to be decided by the national court. However, if it falls to be decided by the Court of Justice, it should be answered in the affirmative. Both schemes give rise to two transactions, each with its own consideration: first, the supply of the gift, the consideration for which is a supply of services, namely the introduction of a new and acceptable customer (herself or someone else) together with personal information about that customer; secondly, the

4 — Judgment in Case 89/81 *Hong Kong Trade Development Council* [1982] ECR 1277.

5 — Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443.

6 — Case 154/80 *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445.

7 — Judgment in Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365.

supply of the ordered catalogue goods, the consideration for which is a monetary payment. It follows from the *Naturally Yours Cosmetics* judgment that the consideration for a supply of goods may consist in a supply of services if there is a direct link between the two and if the value of the service is capable of being expressed in monetary terms. According to the United Kingdom Government, both conditions are fulfilled.

10. The *Commission* considers that, in determining the taxable amount for an additional article offered by a trader in connection with the purchase of a main article, a distinction must be drawn according to whether the additional article is of the same nature as the main article. If the additional article is of the same nature, the consideration for the purposes of Article 11A(1)(a) of the directive is the sum paid by the consumer for all the articles supplied. If the additional article is not of the same nature, then the consumer receives two separate articles for which it is necessary to determine separately the taxable amount according to the rules of the directive.

The latter situation is the case here. The taxable amounts must be taken to be the total amount paid by the consumer. The supply of a free gift must be considered a separate transaction falling under Article 5(6) of the Sixth Directive, that is to say the disposal by a taxable person of goods forming part of his

business free of charge. By virtue of Article 11A(1)(b) the taxable amount must in principle be taken to be the purchase price of the goods concerned or, in the absence of a purchase price, the cost price, determined at the time of the supply.

According to the Commission, however, the gifts in the present case may be regarded as 'gifts of small value' within the meaning of the last sentence of Article 5(6), so that the supply of the gifts does not constitute a taxable transaction and there is therefore no taxable amount. If the national court takes the view that the additional article is not of small value, the taxable amount is the purchase price paid by the supplier of the goods, in other words, the taxable amount contemplated by the national court at point (i) of its second question.

11. Finally, the *Portuguese Government* distinguishes between the two schemes operated by Empire Stores.

In the case of the 'self-introduction scheme', it contends that the gift does not constitute a 'discount' for the purposes of Article 11A(3)(b) of the directive since a discount normally takes the form of a price reduction and not the supply of goods. Under this scheme Empire Stores does not receive a service from its customer which is rewarded with the gift in question; its

value should not therefore be regarded as consideration for the purposes of Article 11A(1)(a). The promotional advantage which Empire Stores obtains by means of the free gift is too vague to constitute the direct consideration for the supply of the gift. Moreover, the gift is directly linked to the purchase of the goods and not to the introduction of the customer which led to the purchase. Consequently, under this scheme the gift should be regarded as a free gift which, by virtue of Article 5(6) of the directive, is to be equated with a supply for consideration.

On the other hand, in the case of the 'introduce-a-friend' scheme there is, in the Portuguese Government's view, a direct and synallagmatic link between the search for, and recruitment of, a new customer and the supply of the free gift. What is provided is the service of an intermediary which is rewarded with a free gift, so that there is a transaction carried out for consideration taxable under Article 11A(1)(a) of the directive, as interpreted by the Court in *Naturally Yours Cosmetics*.

My view

12. I do not consider any of the foregoing views wholly convincing. I shall first of all consider whether under the schemes in question the new or existing customer provides a *consideration* within the meaning of the

directive for the article supplied to her. In other words, the central question is whether the supply of the article constitutes a *taxable transaction* within the meaning of the directive. If so, then the question arises as to how the precise *taxable amount* is to be determined.

13. By virtue of Article 2 of the directive, cited above at point 7, in order for there to be a taxable transaction a taxable person must supply the goods *for consideration*. In order to determine whether that is so in the case of the gifts in question here, reference may first be made to the judgment in *Hong Kong Trade*, which was delivered in relation to the Second VAT Directive.^{8 9} There the Court held that

'services provided free of charge are different in character from taxable transactions which,

8 — 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. 6).

9 — This does not detract from its value as a precedent for the present case: as the Court held in *Apple and Pear Development Council* (cited above, at point 10) and *Naturally Yours Cosmetics* (cited above, at point 10), the case-law concerning the Second VAT Directive may, in view of the Community aims which underlie both it and the Sixth Directive, provide guidance for the interpretation of the latter directive.

within the framework of the value added tax system, presuppose the stipulation of a price or consideration.’¹⁰

That supplies made free of charge fell outside the scope of the VAT system was inferred by the Court in that judgment also from the fact that they could not, according to Article 8 of the Second Directive, constitute a basis of assessment.¹¹ That provision, which was the predecessor to Article 11 of the directive, defined in paragraph (a) the taxable amount for supplies of goods and services as ‘everything which makes up the consideration for the supply of the goods or the provision of services ...’. In other words, if no consideration is received for a supply of goods or a service, there is no transaction for consideration and hence no taxable transaction.

14. Everything turns therefore on the precise arrangements of the gift schemes, as deter-

mined by the national court.¹² On a closer examination of both schemes I am first of all not convinced by Empire Stores’ argument that the consideration for the supply of the free gift consists in the payment which the customer makes for the goods which she orders. As the national court correctly states in its provisional judgment of 17 August 1992, the payment does not in any way constitute the consideration for the gifts.

The national court correctly points out that both schemes have a *contractual basis*. By means of advertisements, catalogues or leaflets Empire Stores makes an offer to potential or existing customers which, if accepted, gives rise to an agreement between both parties. By virtue of the agreement Empire Stores undertakes, in return for the *introduction* and *supply of information* concerning a potential customer — and on condition that the customer is found to be credit-worthy and orders catalogue goods and/or makes a payment —, to supply an article chosen by the person making the introduction. The gift is evidently intended as the *quid pro quo* for an advantage provided to Empire Stores by the person making the introduction, even if that advantage differs according to the scheme applied.

10 — Judgment in Case 89/81 *Hong Kong Trade* [1982] ECR 1277, paragraph 10. See also the recent judgment in *Tolsma* (judgment of 3 March 1994 in Case C-16/93 [1994] ECR I-743, paragraph 12), where the Court held, with respect to supplies of services, that they were only made for consideration ‘if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient’ (paragraph 14).

11 — *Hong Kong Trade* judgment, paragraph 11.

12 — The Court is necessarily obliged to base its answers to questions such as the present on the findings of fact made by the national court concerning the underlying transactions: see *inter alia* the judgment in Case C-126/88 *Boots Company* [1990] ECR I-1235, paragraph 11; judgment in Case C-19/92 *Bally* [1993] ECR I-2871, paragraph 8.

15. What is the advantage, and hence the consideration, received by Empire Stores? and payment for, catalogue goods by that person does not in my view detract from its character as a reward.

Under the 'self-introduction' scheme that advantage consists in two elements: (i) the obtaining of personal (and partly confidential) information concerning the customer introducing herself and the — at least implicit — permission to use the information in order to investigate credit-worthiness (which is essential in the case of credit sales), in relation to which the national court states that such information has an economic value having regard to the fact that Empire Stores could sell its lists of established customers for £65 per thousand names and addresses to third parties and did in fact do so; and (ii) the serious chance that the customer introducing herself, induced by the gift, will order catalogue goods from Empire Stores, thus enabling the latter to extend its clientele.

In the case of the 'introduce-a-friend' scheme Empire Stores receives the same advantages, except that the information given and also the chance of catalogue goods being ordered concern the person introduced and that it is not the latter who receives the gift but the existing client as a reward for acting as an 'intermediary'.

That the supply of the gift is dependent under both schemes on additional conditions, in particular the credit-worthiness of the person introduced and the ordering of,

16. Under both schemes there is therefore consideration. The question none the less arises whether it constitutes consideration for the purposes of Article 11A(1) of the directive. In that connection the Court has laid down the following criteria in its judgments in *Coöperatieve Aardappelenbewaarplaats*, *Apple and Pear Development Council* and *Naturally Yours Cosmetics*:

- a *direct link* must exist between the supply of the goods and the consideration obtained;¹³
- the consideration must be capable of being expressed *in money*;¹⁴
- the consideration must have a *subjective value* inasmuch as the taxable amount is the consideration actually received and

¹³ — Judgment in *Coöperatieve Aardappelenbewaarplaats*, cited above, at paragraph 12; judgment in *Apple and Pear Development Council*, cited above, at paragraph 11; judgment in *Naturally Yours Cosmetics*, cited above, at paragraphs 11 and 12. The latter judgment applied the case-law, which concerned services, to the supply of goods. The Court has recently confirmed that case-law in the judgment in *Tolsma*, cited above, paragraph 13.

¹⁴ — Judgment in *Coöperatieve Aardappelenbewaarplaats*, cited above, paragraph 12; judgment in *Naturally Yours Cosmetics*, cited above, paragraph 16.

not a value assessed according to objective criteria.¹⁵

17. Applying those criteria to the present case, I come to the following conclusions. As regards the requirement of a *direct link*, it seems to me from the information before the Court that such a link does exist in this case. The introduction and provision of information is under both schemes a *conditio sine qua non* for the supply of the gift. The national court also made that finding at the end of its provisional judgment: 'In our judgment the supply of the article under each scheme was directly linked with the introduction and with nothing else'.¹⁶

Moreover, it cannot be said that the value of the gift is unconnected with the economic value which the introduction has for Empire Stores. On that point this case differs considerably from the situations in the cases of *Coöperatieve Aardappelenbewaarpiaats*¹⁷

and *Apple and Pear Development*,¹⁸ where the facts of the case clearly showed that there was no direct link, and is closer to the situation in *Naturally Yours Cosmetics*.

That case concerned a cosmetics wholesaler (Naturally Yours Cosmetics, 'NYC') which resold through 'beauty consultants' who called on friends and acquaintances ('hostesses') to organize parties at their homes at which the products concerned were offered for sale. The beauty consultants sold the products at the parties, whereas the hostess was offered a pot of cream from NYC's range as a reward for organizing the party. If the pot of cream was used for that purpose, NYC merely charged the beauty consultants £1.50 instead of the normal wholesale price of £10.14. Asked what the precise taxable amount must be under Article 11A(1) of the directive, the Court held:

'It is apparent from the order for reference that a feature of the NYC sales method is

15 — Ibid.

16 — Page 58 of the provisional judgment.

17 — The case concerned an agricultural cooperative which stored potatoes for its members and for two years decided not to make a storage charge. According to the Netherlands tax authorities, the cooperative had none the less charged a consideration for its services consisting in the reduction in value of the shares of its members as a result of the failure to make a charge. The Court held that there was no direct link between the service supplied and the consideration received since an unascertained reduction in the value of shares could not be regarded as consideration received by the cooperative providing services: judgment in *Coöperatieve Aardappelenbewaarpiaats*, cited above, paragraph 12.

18 — This case concerned a public law body (the Apple and Pear Development Council) which was set up at the request of fruitgrowers and whose primary function was to advertise, promote and improve the quality of apples and pears produced in England and Wales. The Court gave a negative reply to the question whether that organization supplied services for consideration for the purposes of the Second VAT Directive since it imposed on its members a mandatory contribution dependent on the size of their apple and pear orchards: individual apple and pear growers received benefits from the activities of the organization only 'indirectly from those accruing generally to the industry as a whole'; moreover there was no relationship between the level of the benefits for individual growers and the amount of the mandatory charge: judgment in *Apple and Pear Development Council*, cited above, paragraph 15.

that beauty consultants operate at private parties which they organize through hostesses. That is why, it is said, NYC agrees to sell the pot of cream to be used as a gift at a very low price. Moreover, it became apparent at the hearing that where the beauty consultant, being unable to find a hostess to organize a party, does not provide the envisaged service, the pot of cream must be returned or paid for at the normal wholesale price. If that is the case — a matter to be decided by the national court — then there is a *direct link* between the supply of the pot of cream at a very low price and the service provided by the beauty consultant.¹⁹

18. In the present case the advantages which Empire Stores obtains from the potential or existing customer can undoubtedly be *expressed in money*, even if as the national court states the customer only knows the value of the gift approximately and has no idea of the value of the advantage received by Empire Stores. The essential point is that the advantage received by Empire Stores had an economic value for it. Consequently, Empire Stores' subsidiary argument that the consideration could not be expressed in monetary terms and had no subjective value for it is unconvincing. As the national court

observes in its provisional judgment, the value of the introduction unquestionably had a *subjective value* for Empire Stores, since it was prepared to give for it an article for which it had paid the cost price.

19. My conclusion is therefore that the supply of the gift by Empire Stores constitutes under both schemes a supply of goods for consideration within the meaning of the directive and that there is therefore a taxable transaction. Contrary to the view taken by the Commission, this is not a case in which a taxable person disposes of goods 'free of charge or more generally [applies them] for purposes other than those of his business' within the meaning of the first sentence of Article 5(6) of the directive. By that phrase is meant goods which a taxable person removes from his business in order to dispose of them free of charge for purposes other than those of his business — which is not the case here.²⁰ Such suppliers are moreover equated with a supply for consideration. Nor does this case concern 'the giving of samples or the making of gifts of small value for the purposes of the taxable person's

20 — I would recall here the aim of that provision, as made clear by the Court in its judgment in Case C-20/91 *De Jong* [1992] ECR I-2847, paragraph 15, namely 'to ensure equal treatment as between a taxable person who applies goods forming part of the assets of his business for private use and an ordinary consumer who buys goods of the same type. In pursuit of that objective, that provision prevents a taxable person who has been able to deduct VAT on the purchase of goods used for his business from escaping the payment of VAT when he removes those goods from his business for private purposes and from thereby enjoying advantages to which he is not entitled by comparison with an ordinary consumer who buys goods and pays VAT on them.'

19 — Judgment in *Naturally Yours Cosmetics*, cited above, at paragraph 14 (my emphasis).

business' within the meaning of the last sentence of Article 5(6). In my view that phrase covers complimentary gifts intended generally to foster goodwill or publicize the taxable person's name, without there being any direct consideration as is the case here.

A fortiori the gifts do not constitute 'price discounts and rebates' for the purposes of Article 11A(3)(b) of the directive. It follows from the foregoing that there is not, in this case, 'a reduction of the price at which an article is lawfully offered to the customer', whereby the seller, while not receiving consideration from the purchaser, 'agrees to forego the sum represented by the rebate in order precisely to induce the customer to buy the article.'²¹

The taxable amount

20. Consequently, the question arises as to what the precise taxable amount is. The views taken by the interveners differ on this point also. According to the United Kingdom and Portuguese Governments (the latter only with respect to the 'introduce-a-friend' scheme) the taxable amount is the *retail price*, that is to say, the price which would

have been charged for the goods concerned if they were included in Empire Stores' catalogue. At the hearing the United Kingdom stated that the essential feature of both schemes is that the customer has the illusion that she is receiving something free for which she would otherwise have to pay the catalogue price. The subjective value must therefore be the price which the customer would have had to pay in order to purchase the goods concerned by way of retail.

On the other hand, Empire Stores argues by way of subsidiary plea that, since the parties in the present situation have not agreed upon the value of the gifts, the subjective value is the price which Empire Stores paid for the goods concerned, since this was the cost which it was prepared to incur in order to obtain the information. This is also the view taken by the national court in its provisional judgment.

21. Article 11A(1) of the directive is drafted extremely widely: the taxable amount is *everything* which constitutes the consideration which has been or is to be obtained by the supplier of the goods or services for the transactions.²² As already mentioned (point 16), it is according to the Court the consideration *actually* received which constitutes

21 — Judgment in *Boots Company*, cited above, at paragraph 18; see also my Opinion on the case [1990] ECR I-1256 to 57, points 11-12.

22 — See the judgment in *Coöperatieve Aardappelenbewaarplaats*, paragraph 12, where the Court held that the taxable amount is everything which is received as consideration for a service.

the taxable amount. In other words, what is decisive is the subjective value which the parties have agreed is to accrue to the supplier of the goods or services, and not an objective value unconnected with the specific transaction.

What is the subjective value in the present case? It is the payment which Empire Stores

was actually prepared to make to the potential or existing client as consideration for the advantage which she provided. The consideration consists in the *article* which the customer indicated and wished to receive as a gift; it does not consist in a sum of *money* agreed between the parties. I conclude from that that the purchase price paid by Empire Stores for the gift and not the price charged by Empire Stores to third-party purchasers should be the taxable amount.

Conclusion

22. I propose that the Court reply as follows to the questions put by the national court:

- (1) in both schemes described by the national court the supply of a gift made by the supplier amounts to a supply of goods for consideration within the meaning of the Sixth VAT Directive, such consideration being of a sufficiently direct nature;
- (2) the taxable amount is the purchase price paid by the supplier for the goods supplied as a gift.