# OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 9 July 1998 *

1. This case concerns whether 'free gifts', supplied as part of a scheme, using 'stamps', for the promotion of sales of fuel at petrol stations, come, for VAT purposes, within the consideration of the price paid at the pump or, if not supplied for that consideration, whether they are, in any event, covered by Article 5(6) of the Sixth Directive. [1]

## I — The factual and legal context

### A — *The promotion at issue*

2. The appellant in the main proceedings, Kuwait Petroleum (GB) Ltd ('Kuwait'), sells 'Q8' brand of fuel (the 'premium goods') as a retailer at 110 sites and as a wholesale supplier to independent retailers (hereinafter 'the dealers') at 500 other sites. The livery at both types of site is the same. On termination in 1991 of an earlier stamp promotion, Kuwait suffered a 15% fall in its market share. It then devised its own 'Q8 Sails Collection' scheme (hereinafter 'the sails scheme'), which was initially applied only at Kuwait sites but soon extended to dealers who so desired. [2] Dealers who opted to apply the scheme agreed to pay UK 0.22 pence (later, UK 0.33 pence) per litre (plus VAT) in addition to the normal wholesale petrol price. In return Kuwait supplied all of the required promotional literature and other necessities. [3]

3. The sails scheme operated from 1991 to 1996. One Q8 sails stamp was supplied for each 12 litres of fuel purchased. Credit for partial stamp entitlement was facilitated in some cases, towards the end of the promotion, by the use of electronic swipe cards. To fill a 'Collector Card' required 30 such stamps. The number of complete cards needed to obtain a particular gift (the 'redemption goods') was set out in a gift catalogue. A high

* Original language: English.

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

2 — The Court has been informed that, of the 500 independent sites, about 220 were operated by major dealers, of whom 160 agreed to participate in the sails scheme.

3 — Payment was effected by means of a reduction off-invoice in the dealers' trading margin during the promotion period.

proportion, but not all, of the purchasers of fuel collected stamps. [4]

4. To claim a gift, the customer had to complete an order form, verifying fulfilment of the conditions of the offer. Although stamps were stated to be non-transferable, Kuwait tolerated a certain amount of 'private pooling' of stamps (for example by work colleagues), but excluded secondary trading in stamps. The stamps were stated to have a face value of UK 0.001 pence, but would be redeemed for cash only when their total cash value exceeded UK 25 pence, implying purchase of an extremely large amount of petrol. Though other figures have been suggested, Kuwait puts the redemption rate as being 'well over 50%'.

5. The sails scheme was discontinued due to changes in the market, particularly as a result of price competition from the hypermarket petrol-retail sector. Although Q8 retail petrol prices fell by some UK 4 pence per litre, not all was necessarily directly attributable to the termination of the promotion. The Court is informed that the cost of gifts redeemed under the scheme had, by February 1995 alone, already reached UK £3 355 000, or UK 0.36 pence per litre of fuel sold at participating sites. [5]

B — *The legal context*

6. It will be helpful to mention the principal provisions of Community law which have been debated in the observations submitted to the Court. Article 2 of the First Directive [6] provides that value added tax involves 'a general tax on consumption' of goods and services.

7. In general, under Article 2(1) of the Sixth Directive, only supplies of goods and services effected for consideration are subject to VAT. Article 5 defines the 'supply of goods' as 'the transfer of the right to dispose of tangible movable property as owner'. However, Article 5(6) provides that certain supplies of goods,

4 — The order for reference refers to a rate of 79%, which is based on the theoretical maximum number of stamps which *could* have been issued having regard to the total amount of fuel sold.

5 — If point of sale and other related costs, as well as the contingent liability for the cost of future redemptions, were excluded, the figure would be UK 0.27 pence per litre.

6 — First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes; OJ, English Special Edition, First Series 1967 (I), p. 14.

even in the absence of consideration, will be subject to VAT:

'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.'

8. The corresponding provision in respect of the supply of services, contained in Article 6(2), however, provides, in relevant part:

'The following shall be treated as supplies of services for consideration:

...

(b) supplies of services carried out free of charge by the taxable person for his own private use or that of his staff or more generally for purposes other than those of his business.

... .'

9. Article 11 of the Sixth Directive is concerned with the taxable amount for VAT purposes. Article 11A(1), in so far as is relevant, states:

'1. The taxable amount shall be:

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

(b) in respect of supplies referred to in Article 5(6) ..., 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;

... .'

Article 11A(3)(b) provides that the taxable amount shall not include 'price discounts and rebates allowed to the customer and accounted for at the time of the supply ...', while Article 11C(1) provides, *inter alia*, that 'where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States'.

10. The abovementioned Community rules are now implemented in the United Kingdom by the Value Added Tax Act 1994 (hereinafter the '1994 Act'). It is important to note that, during the currency of the sails scheme, the supply of business gifts whose cost on acquisition exceeded UK £10 (UK £15 with effect from 29 November 1995) was treated as a taxable supply, for the purposes of the national rules implementing the second sentence of Article 5(6) of the Sixth Directive.

C — *The dispute and national proceedings*

11. The Commissioners of Customs & Excise ('the Commissioners'), by a letter of 16 June 1995, ruled that, where the cost of an item supplied under the sails scheme exceeds UK £10, Kuwait was liable, pursuant to paragraph 6 of Schedule 6 of the 1994 Act, to account for VAT on the goods supplied. In the opinion of the Commissioners those goods were supplied 'otherwise than for consideration'. Kuwait appealed against that decision to the VAT and Duties Tribunal, London (hereinafter 'the Tribunal').

12. Kuwait submitted that the redemption goods were not supplied 'free of charge' within the meaning of Article 5(6) of the Sixth Directive, whose purpose was to prevent the consumption of goods without the payment of VAT by taxable persons, who, if they had purchased as consumers, would have paid VAT. [7] Kuwait asserted that it did not consume the goods itself but, on the contrary, supplied them to motorists pursuant to a collateral contract which could be regarded as forming a single economic transaction along with the supply of fuel. Moreover, it was contended that consideration was provided for the supply of the redemption goods. [8] The supply of fuel and the supply of the redemption goods constituted two interdependent contracts. The payment made for the fuel under the first contract included payment for the later supply of the redemption goods. Where Kuwait was not the retailer of the fuel,

7 — Reliance was placed upon Advocate General Van Gerven's Opinion in Case C-33/93 *Empire Stores* v *Commissioners of Customs & Excise* [1994] ECR I-2329 (hereinafter '*Empire Stores*'), paragraph 19, and the speech of Lord Slynn in *Customs & Excise Commissioners* v *PFA (Enterprises) Ltd* [1993] STC 86 (HL), where, in respect of what was then paragraph 5(2) of Schedule 4 of the Value Added Tax Act 1983 (now paragraph 6 of Schedule 6 of the 1994 Act), he held that it was 'directed to cases where the taxable person has obtained a credit for input tax on the purchase of a business asset and then merely gives it away without payment of output tax'.

8 — Particular reliance was placed on Case 230/87 *Naturally Yours Cosmetics* v *Commissioners of Customs & Excise* [1988] ECR 6365 (hereinafter '*Naturally Yours Cosmetics*').

it was contended that the part of the payment for fuel to the dealer made in return for obtaining rights against Kuwait was the additional UK 0.22 pence/UK 0.33 pence per litre (plus VAT) which the participating dealers paid Kuwait for that fuel. [9]

13. The Commissioners submitted that the two stages by which the customer obtained the gifts had to be analysed separately. Relying upon *Boots* v *Commissioners of Customs & Excise*, [10] they submitted that the notion of 'consideration' requires the grant of some advantage or economic benefit which cannot consist merely of increased turnover. In this case the customer had no choice but to pay the price demanded for the petrol; he could not demand a better price on condition that the right to receive stamps would be waived. Thus, if any consideration had been paid, it was of a non-monetary kind. The Commissioners contended that, under Article 5(6) of the Sixth Directive, the giving of gifts, even for business purposes, is subject to VAT, unless the gifts concerned are 'of small value'. Furthermore, the amount paid by the dealers to Kuwait in respect of the redemption goods was paid in order to participate in the sails scheme and, *ergo*, not as a contribution towards the goods supplied to their customers.

14. The Tribunal has decided, as a matter of national law, that the promotion involves the provision of the stamps pursuant to a unilateral offer separate from the principal transaction, namely the supply of petrol. That unilateral offer was transformed into a binding contract when the motorist handed in the requisite number of completed cards to obtain a gift item and complied with the other conditions of the scheme. However, referring, in particular, to the *Boots* case, it recognises that the concept of consideration for the purposes of Community VAT law differs from that applied in English contract law. The Tribunal takes the provisional view that the stamps were 'obtained "free of charge"', since the motorist, in paying the pump price, did not make 'a part payment towards the possible ultimate acquisition of a gift item'. Nevertheless, conscious that this view might be incompatible with the Sixth Directive, it decided to refer the following questions to the Court:

'Where a supplier of goods operates a business promotion scheme, under which, in outline:

(i) the promoter provided redemption goods for business purposes in accordance with the terms of the scheme;

9 — It was conceded that extra output VAT on the amount of UK 0.33 pence (or UK 0.22 pence) per litre would, on this analysis, be due from Kuwait. In the alternative, the self-introduction of the customer as a customer of the dealer who sold Q8 fuel was advanced as a possible consideration. However, this contention was flatly rejected by the Tribunal, which found it to be 'far-fetched'.

10 — Case C-126/88 [1990] ECR I-1235 (hereinafter '*Boots*').

(ii) for no payment in money at the point of redemption;

(iii) against the redemption of vouchers to which a purchaser of premium goods became entitled by paying the full retail price of those goods without making any identifiable monetary payment for the vouchers;

(1) Is the expression "price discounts and rebates allowed to the customer and accounted for at the time of supply" in Article 11A(3)(b) of the Sixth Council Directive to be interpreted to cover the whole cost of the redemption goods?

(2) Are the redemption goods to be treated as "supplies made for consideration" for the purposes of Article 5(6) of that Directive?

(3) If the redemption goods are provided otherwise than for consideration or "free of charge", is Article 5(6) to be interpreted as requiring that the provision of the redemption goods be treated as a supply for consideration notwithstanding that such provision is for business purposes?

(4) Do any of the foregoing questions require a different answer:

(a) where all the vouchers redeemed for any item of redemption goods were obtained on purchases of premium goods from the promoter of the scheme;

(b) where those vouchers were all obtained on purchases of premium goods from a trader who was a participating dealer in the scheme; or

(c) where the vouchers redeemed were obtained partly on purchases of premium goods from the promoter and partly on purchases of premium goods from one or more participating dealers?

(5) If the answer to Question 3 is "No", is the United Kingdom entitled pursuant to

Article 27 of the Sixth Council Directive and under the derogation obtained by it in 1977 to impose an output tax charge on the promoter which is based on the cost to the promoter of the redemption goods in addition to the output tax included in the full retail price of the premium goods?'

## II — Observations submitted to the Court

15. Written observations have been submitted by Kuwait, the United Kingdom of Great Britain and Northern Ireland, the French and Portuguese Republics and the Commission, all of whom, with the exception of Portugal, also submitted oral observations. They may be summarised as follows.

16. Kuwait, supported by the Commission, submits that Article 5(6) cannot apply because the redemption goods at issue were supplied for consideration. Furthermore, they both contend that the United Kingdom may not rely on a derogation under Article 27(1) to subject such supplies to a charge to VAT. The intervening Member States are unanimous as to the absence of consideration for the supply of the redemption goods. They contend that their supply should be subject to VAT calculated on the taxable amount prescribed by Article 11A(1)(b), to wit the costs of purchasing the redemption goods. If consideration were given for the redemption goods, the United Kingdom maintains that it could, none the less, subject their supply to VAT on the basis of a derogation which it enjoys under Article 27(5) of the Sixth Directive.

## III — Analysis

### A — *Question 1 and discounts under Article 11A(3)(b)*

17. It emerges, as much from the order for reference as from the observations submitted to the Court, that the first question, by which the Court is asked whether a price discount for the purposes of Article 11A(3)(b) of the Sixth Directive can be said to arise when the 'discount' covers the whole cost of supplying redemption goods, does not actually arise to be considered in the present case. As Kuwait, the United Kingdom, France and Portugal point out, no purchase price for the redemption goods at issue existed and, thus,

no discount or rebate was allowed. The interpretation of Article 5(6) is more pertinent to the facts of this case. Consequently, I suggest that the first question be answered to the effect that there is no discount for the purposes of Article 11A(3)(b) in a scheme such as the sails promotion scheme.

B — *Outline of Questions 2 to 5*

18. The remaining questions essentially raise three issues. Firstly, are the supplies by Kuwait of the redemption goods to be 'treated as supplies made for consideration' by virtue of Article 5(6) of the Sixth Directive? Secondly, should Kuwait be treated as having received consideration in the form of the purchase of fuel by motorists at Kuwait-owned or dealer-owned stations? Thirdly, in the event that the answers to the first two questions result in these supplies not being taxed, is the United Kingdom none the less entitled, by virtue of Article 27 of the Sixth Directive, to tax them on the cost price of the redemption goods? I propose to deal with the questions in that order.

C — *Question 3 and the scope of Article 5(6)*

19. The Tribunal has found that 'the purposes of the promotion, both for [Kuwait] and the participating dealers' were 'to restore and maintain the volume of sales of Q8 fuel in a very competitive market by being able to offer a loyalty bonus'. It is therefore clear that, for the purposes of Article 5(6) of the Sixth Directive, the supply of the redemption goods was made for business purposes. The question that arises is whether, notwithstanding that purpose, the gratuitous nature of the supply renders Article 5(6) applicable. [11]

20. The finding that the supplies were made for business purposes by no means concludes the matter. There is profound disagreement as to whether Article 5(6) of the Sixth Directive is designed to tax so-called 'free gift' promotions where the purchase of those gifts was subjected to VAT and the taxpayer proposes to deduct the inputs while wishing not to pay tax on the supplies.

11 — Thus, Case C-20/91 *De Jong* v *Staatssecretaris van Financiën* [1992] ECR I-2847, which is the only case in which the Court has, to date, considered Article 5(6), and which concerned the application to private use of what had previously been a business asset, in that case a dwelling, is not in point.

21. Kuwait invokes Article 2 of the First Directive, claiming that VAT is a tax on final consumption. Article 5(6) of the Sixth Directive is designed to ensure that taxable persons do not take unfair advantage by avoiding tax on self-consumption. Article 6(2)(b) clearly would not tax equivalent supplies of services.

22. This last point is, however, cited *a contrario* by the United Kingdom as showing the intent of the Sixth Directive to treat goods differently from services. Furthermore, with the support of France and, in this respect, of the Commission, it makes two points about the wording of Article 5(6). Firstly, that provision applies to any 'disposal ... free of charge'; i. e., that expression is clearly to be read disjunctively and is not governed by the ensuing phrase, 'more generally for purposes other than his business ...'. Secondly, the exclusion by the second sentence of 'the making of gifts of small value for the purposes of the taxable person's business' strongly implies that gifts not of 'small value' are not excluded.

23. I confess that the interpretation of Article 5(6) of the Sixth Directive cannot be entirely free from doubt. It is necessary to have regard both to the wording and the general content of that provision. The first sentence is, on the one hand, principally designed, as Kuwait says, to tax the self-supply of business goods — for instance, the retailer who supplies his household from his shop. None the less, the expression 'disposal thereof free of charge ...' is, in grammatical terms, capable of a disjunctive reading. Taken alone, the first sentence is ambiguous. However, two other textual considerations seem to me to tilt the balance decisively in favour of the disjunctive treatment.

24. Firstly, the provision in the second sentence that 'the making of gifts of small value' even for business purposes should not be treated as supplies made for consideration would make no sense if those gifts were to be so treated in any event. The word 'however' highlights the distinction between first and second sentences.

25. Secondly, it is difficult to avoid the conclusion that the contrasting treatment of services by Article 6(2)(b) of the Sixth Directive is deliberate. Without wishing to speculate, I suggest that among the obvious differences between goods and services is that services do not lend themselves, at least not so readily, to

free promotion schemes. The more significant labour content would presumably reduce capacity for mass supply of free services. Thus, it seems likely that the disparity in the wording of the two provisions was deliberate. [12]

26. I would draw further support for this view from the legislative history of Article 5(6) of the Sixth Directive cited by the United Kingdom in its written observations. Article 5(6) of the Sixth Directive replaced Article 5(3)(a) of the Second Directive, under which 'the appropriation by a taxable person, from his undertaking, of goods which he applies to his own private use or transfers free of charge' were to be 'treated as a supply against payment' and, *ergo*, taxable. It should be noted that under point 6 of Annex A to the Second Directive, Member States were permitted, as an alternative to taxing such supplies, to 'forbid' the exercise of the right of deduction or, if a deduction had already been effected, to 'adjust it'. It is, thus, clear that the authors of the Second Directive were concerned that goods obtained by taxable persons in circumstances giving rise to a right to claim a deduction should not be capable of being supplied free of charge without the imposition of a corresponding charge to VAT. This objective was maintained in the Commission's proposal for the Sixth Directive. [13] Under the first sentence of Article 5(3)(a) of that proposal, '... the application by a taxable person of goods forming part of his business assets to his own personal use or that of his staff or the disposal thereof free of charge, where the value added tax on the goods in question or the component parts thereof is wholly or partly deductible' were to be treated as supplies made for consideration. Thus, apart from the absence of any reference to cases where a disposal free of charge is made for business purposes, the proposal was very similar to the final text (quoted in paragraph 7 above). Moreover, the second sentence of the proposed provision was also almost identical to the text finally adopted. Accordingly, 'applications for the purpose of ... making gifts of small value, eligible for classification as general expenses giving tax relief, [were] not to be considered as taxable transactions'.

27. I think that the imposition of tax on 'free gift' promotions, where the sails scheme at issue is not so structured that the 'gift' is so closely linked with another supply as to be made for the same consideration as that supply, is consistent with the purpose of the VAT system as a tax on the final consumer. No doubt Article 5(6) of the Sixth Directive is most obviously aimed at cases of self-supply of goods by taxable persons. A brief reflection shows why. The goods will have been

12 — It should be noted that, in so far as some of the gifts supplied by Kuwait took the form of holiday vouchers, they may be subject not to Article 5(6) but, as a supply of intangible property rights, constitute a provision of services for the purposes of Article 6(1) and, pursuant to Article 6(2)(b), be subject to no additional charge to VAT. Since no question regarding this aspect of the sails scheme has been referred to the Court, this is a matter for the national court alone.

13 — Proposal for a sixth Council Directive on the harmonisation of legislation of Member States concerning turnover taxes — Common system of value added tax: uniform basis of assessment; OJ 1973 C 80, p. 1.

supplied to the taxable person as part of his business and he will be able to deduct the input VAT. If he did not pay tax on his personal or household consumption of them, he, though acting as a consumer, would not pay any VAT. In the same way, where an undertaking like Kuwait supplies goods free of charge, *having deducted the input VAT*, the same result is achieved. It is not wrong or contrary to the logic of the VAT system, in that situation, to treat Kuwait as the consumer of the goods.

28. That a taxable person may pursue through a discount scheme the same business purpose as that pursued by promotion schemes such as that at issue in the present case, viz. the promotion of sales, but without being subject to an additional charge to VAT based on the full cost price of acquiring redemption goods, cannot affect the above interpretation of Article 5(6) of the Sixth Directive. The authors of the Sixth Directive, through Article 11A(3)(b), clearly excluded 'price discounts and rebates allowed to the customer' from the calculation of the taxable amount for VAT purposes, subject only to the condition that they be 'accounted for at the time of supply'. Although it is arguable that 'discounts' of 100% would fall outside the scope of Article 11A(3)(b) and, furthermore, that very large discounts of the type envisaged by the Tribunal in explaining the reference of its first question, whereby the customer is merely required to pay a token amount for goods supplied to him, should, having regard to the provisions of Article 5(6), be treated as potential tax-avoidance devices, no such discount is at issue in the present case. Kuwait has not sought to structure its scheme so as to give discounts to its customers on the supply of redemption goods. On the contrary, its principal argument is that consideration is provided for those supplies as part of the price paid at the pump.

29. Accordingly, I recommend that the third question be answered to the effect that Article 5(6) of the Sixth Directive requires that a provision, free of charge, of redemption goods under a sales promotion scheme such as that at issue in the present case be treated as a supply for consideration, notwithstanding that such a provision is for business purposes.

D — *Question 2 and consideration for the redemption goods*

(i) Synopsis of the observations

30. Kuwait contests the approach of the Tribunal in divorcing the previous supply of the

premium goods (fuel) from the later supply of the redemption goods. [14] Supported by the Commission, it contends that, in the case of redemption goods provided in exchange for stamps obtained from its own sites, the consideration for supply of the goods constitutes an unascertained part of the VAT-inclusive price paid by the motorist for the stamps and the fuel. If the consumer chose not to accept the stamps, he was opting not to avail of a right that he had paid for. In support of this contention, it relies, in particular, on the Court's judgment in *Gibbs* [15] while asserting that the Commissioners' reliance on *Boots* is misconceived. Kuwait repeats its argument before the Tribunal that the sale of the fuel with the stamps forms part of the same single economic transaction as the supply of the redemption goods.

31. Kuwait submits that this analysis also applies with respect to stamps supplied by dealers. In its view, the involvement of dealers should not affect the application of the Community VAT law principle of neutrality. It refers particularly to paragraph 28 of the judgment in *Gibbs* and contends that the operation of the scheme imposed no additional burden on independent participating dealers; they, in effect, paid Kuwait an extra UK 0.22 pence/UK 0.33 pence per litre, plus VAT, for supplies of fuel in return for which they received a supply of stamps. Since the dealers may deduct that additional VAT-input component from the VAT tax due on the subsequent supply of the fuel and stamps to their customers, the economic effect on the dealers is neutral. Alternatively, Kuwait submits that independent dealers acted as its agents in respect of the supply of the stamps. On this analysis, part of the retail price constitutes consideration for the supply by the participating dealer, acting on its own behalf, of fuel while the remainder (UK 0.22 pence or UK 0.33 pence per litre) is consideration for the supply by it, as agent of Kuwait, of the stamps.

32. The United Kingdom disagrees, saying that there was but one pump price for each grade of fuel. The stamps were issued, like the coupons in *Boots*, for no consideration; however, the subsequent supply of the redemption goods was free of charge, whereas the coupons issued by Boots served directly as discounts off the price of the goods subsequently purchased. At the hearing, it was claimed that the very rationale of promotions such as that at issue in the present case is that the customer should receive something without being required to pay anything in return. The simple fact that Kuwait incurred costs in operating the scheme does not affect

14 — It contends that the Tribunal's reasoning is inconsistent with the approach adopted by a differently constituted VAT and Duties Tribunal, London in *Gallaher* v *Commissioners of Customs and Excise*, in which an application to make a reference has been stood over pending the outcome of the reference in the present case; direction of 3 April 1997. *Gallaher* also concerns a redemption scheme whereby vouchers were included with the sale of the premium goods (cigarettes) and could, together with the packaging from the cigarettes, later be exchanged for redemption goods. In a letter to the Registrar of the Court of 1 May 1997, the President of the VAT and Duties Tribunals enclosed a copy of his provisional decision in *Gallaher* for the benefit of the Court in the present case and explained that, as he saw no material difference between the *Gallaher* and *Kuwait Petroleum* cases, he had deferred making a reference pending the Court's ruling in the latter.

15 — Case C-317/94 *Gibbs* v *Commissioners of Customs & Excise* [1996] ECR I-5339 (hereinafter '*Gibbs*').

the question whether consideration was provided. Consideration is what is received by the taxable person for the supply. In this case, it cannot be viewed as an unascertained part of the purchase price paid by motorists; the motorist merely paid for the fuel while also receiving stamps, without, as in *Empire Stores*, providing any additional consideration to Kuwait for those stamps. The United Kingdom, thus, does not accept that the supply of fuel and the later supply of redemption goods constituted a single economic transaction. It submits that the additional UK 0.22 pence/UK 0.33 pence per litre was paid to Kuwait by the dealers for fuel in return for the right to participate in the promotion and the resulting opportunity of increasing their own turnover. It did not constitute third-party consideration provided by dealers to Kuwait in respect of the supply of redemption goods, since the payment had no 'direct link' with the delivery of redemption goods by Kuwait. These arguments are essentially supported by France and Portugal.

(ii) Analysis

33. The divergent views concerning whether Kuwait received consideration for the redemption goods depend essentially on whether the sale of fuel with stamps and the subsequent supply of redemption goods for the surrender of stamps constitute a single economic transaction, as claimed by Kuwait, or whether, as alleged in particular by the United Kingdom and France, no discernible distinct consideration can be identified.

34. This issue has to be resolved by reference to the autonomous Community-law notion of consideration, as explained in '*Dutch Potatoes*' and applied in the later case-law. [16] The Court held that there must be 'a direct link between the service provided and the consideration received', that 'consideration for the provision of a service must be capable of being expressed in money' and that 'such consideration is a subjective value since the basis of assessment for the provision of services is the consideration actually received and not a value assessed according to objective criteria'. [17] In the present case, then, the question is whether there was a 'direct link' between the supply of the redemption goods and the purchase of fuel by motorists who received stamps.

35. No direct link was held to exist in '*Dutch Potatoes*' itself, between the gratuitous storage by an agricultural co-operative of potatoes for its members and the reduced value of the members' shares in the co-operative. Simi-

16 — See Case 154/80 *Staatssecretaris van Financiën* v *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445 (hereinafter '*Dutch Potatoes*'), where the Court held that the meaning of 'consideration ... is part of a provision of Community law which does not refer to the law of the Member States for the determining of its meaning and its scope'.

17 — Ibid., paragraphs 12 and 13.

larly, when the Apple and Pear Development Council, a statutory body, imposed an annual charge upon growers, there was no direct link between the Council's activities and that charge. [18]

36. In *Tolsma* v *Inspecteur der Omzetbelasting*, which concerned whether the receipts from passers-by by a musician who performed on public highways could be viewed as consideration for services provided to them, the Court ruled that a supply of services is effected 'for consideration' within the meaning of Article 2(1) of the Sixth Directive, and hence is taxable, only if there is 'a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient'. [19] The Court, motivated largely by the voluntary nature of the donations made to such musicians, found that there was 'no necessary link between the musical service and the payments to which it gives rise'. [20]

37. In *Naturally Yours Cosmetics*, on the other hand, the issue for the Court was whether there was a direct link between the supply of goods by a wholesaler (Naturally Yours Cosmetics Ltd) for a price lower than their normal price and the value of a service provided to it in respect of such transactions; i. e., between the supply of low-cost 'dating gifts' to private hostesses and the party-organisation service provided by beauty consultants through the hostesses for the purposes of promoting sales of the wholesaler's cosmetics. [21] The Court held that such a link was possible since the monetary value which the wholesaler and the beauty consultants to the contract attributed to the service was ascertainable, namely the difference between the price actually paid for the dating gift by beauty consultants and its normal wholesale price. Similarly, in *Empire Stores*, the issue was whether private individuals, who introduced themselves or third parties as new customers to Empire Stores, a mail order firm, under, respectively, a 'self-introduction scheme' and an 'introduce-a-friend scheme', provided non-monetary consideration for the supply of certain additional goods (the 'non-catalogue goods') to them without charge by Empire Stores. The Court held, without distinguishing between the schemes, that 'the supply of the article without extra charge is made in consideration of the introduction of a potential new customer'. [22] The Court held, in respect of both schemes, that the link between 'the supply of the article without extra charge and the introduction of a potential customer must be regarded as direct, since if the service is not provided no

18 — Case 102/86 *Apple and Pear Development Council* v *Commissioners of Customs & Excise* [1988] ECR 1443.

19 — Case C-16/93 [1994] ECR I-743 (hereinafter '*Tolsma*'), paragraph 14.

20 — Ibid., paragraph 17.

21 — Loc. cit., footnote 8 above.

22 — *Empire Stores*, loc. cit., paragraph 13. According to Advocate General Van Gerven, 'the gift is evidently intended as the *quid pro quo* for an advantage supplied to Empire Stores by the person making the introduction, even if that advantage differs according to the scheme applied'; paragraph 14 of the Opinion.

article is due from or supplied by Empire Stores'. [23]

38. It appears to me that the most useful point of reference for the resolution of the present case is *Boots*. Money-off coupons were distributed as part of promotions absolutely free, viz. either by means of cut-out coupons in newspapers or magazines, or by the free distribution of leaflets, or as coupons printed on the packaging of 'premium goods' purchased in Boots outlets, which created an entitlement to a price reduction equal to their face value on later purchases of 'redemption goods'. Only the latter aspect of the case was in dispute. Boots had been assessed for VAT on the face value of the coupons. Although the case was formally concerned with an alleged discount, the core issue was whether, as the United Kingdom asserted, the reduction on purchases of redemption goods was allowed 'in exchange for the coupon which has a value'; [24] in other words, did the purchaser in the second transaction by surrendering coupons provide consideration equal to the face value of the coupon? *Boots* was, thus, in effect a price-reduction case. The Court stated that the coupons at issue 'represent[ed] for Boots only an obligation to grant a reduction, which is allowed with the aim of attracting the customer'; the coupons were 'not obtained by the purchaser for consideration' and constituted 'nothing other than a document incorporating the obligation assumed by Boots to allow the bearer of the coupon, in exchange for it, a reduction at the time of the purchase of the redemption goods'. [25]

39. The supply of redemption goods under the sails scheme is not, in my view, made for consideration as explained in the abovementioned cases.

40. I do not think that it is possible to establish the necessary direct link between the supply of redemption goods and any identifiable element in the price paid for fuel at the pumps, even acknowledging that each motorist is entitled to demand stamps in proportion to his purchases, or at least every 12-litre unit of fuel purchased. It is apparent from cases such as *Naturally Yours Cosmetics*, *Empire Stores* and *Boots* that the scheme at issue created its own identifiable link, both qualitatively and quantitatively. If the sails scheme had entitled the motorist to a given reduction or even, for

23 — Ibid., paragraph 16. The fact that the extra goods under the 'introduce-a-friend scheme' were only supplied when the new customer placed an order and complied with certain other conditions did not preclude the finding of a direct link.

24 — Loc. cit., footnote 10 above, paragraph 20.

25 — See paragraphs 13 and 21 of the judgment. Advocate General Van Gerven viewed the coupons as price-reduction certificates. He saw no distinction between those given away free and those acquired on purchasing premium goods. Regarding the latter, he felt that there was a direct link between the full price and the supply of the premium goods. In respect of the supply of the redemption goods, the acceptance of the coupon 'constitutes an *obligation* on the part of the supplier [and] cannot be regarded as consideration, that is to say an *advantage* for the supplier capable of being expressed in money. It is therefore to be regarded as price discount or rebate within the meaning of Article 11A(3)(b)' (emphasis in original); paragraph 15 of the Opinion.

example, the supply of a litre of fuel free for every 50 litres purchased, there would have been a straightforward reduction in the price of the fuel supplied, akin to that in *Boots*. No link of the kind which arose in *Naturally Yours Cosmetics* and *Empire Stores* arises in this case.

41. However, there are two other decisive considerations. Firstly, it is acknowledged that a significant proportion of the stamps to which motorists are entitled are not claimed or, if they are, that they are not always used to claim redemption goods. Kuwait's claim is that the price, ostensibly paid for fuel both at Kuwait-owned and independent sites, is actually paid in part only for fuel, the remaining part being paid for redemption goods. Thus, the motorists who do not claim stamps or goods are paying, *pro tanto*, for nothing. On that view, Kuwait, or the independent retailers, should pay VAT, calculated by reference to the amount received for the sale of the fuel, but reduced by the amount of the stamps not claimed or used. That result, though logical, is too theoretical and unreal. The Commission refers, in support of Kuwait's analysis, by analogy to the purchase of a theatre ticket that is subsequently not used. To my mind, when someone purchases a theatre ticket he manifestly provides consideration for the reservation of a seat in respect of an artistic performance service to be provided later. That he may, for one reason or another, be unable to attend the subsequent performance is irrelevant.

42. Secondly and more seriously, it seems to me impossible to adapt Kuwait's theory of the single economic transaction to take account of the proportion of the sales of fuel which took place through the dealers. The proposed allocation of the contribution paid by the dealers to Kuwait (UK 0.22 pence or UK 0.33 pence per litre) to the price paid by the motorist at the pumps is entirely arbitrary. It bears no relationship either to the actual price paid by the consumer — who has no interest in the cost of the sails scheme — or even to the price of the redemption goods. This, of course, is the result of the impossibility of fitting the intermediate transaction between Kuwait and the dealer into the framework of a supposed *single* economic transaction between Kuwait and the consumer. In fact, it exposes the weakness of the argument. Moreover, as is implied by paragraph (c) of the fourth question, it is not even possible to segregate the two types of transactions. There was no way of distinguishing those stamps received at dealer-operated sites from those supplied directly by Kuwait.

43. In reality, it is not possible to treat as a single economic transaction a series of events

consisting of two distinct transactions; sale of fuel coupled with the supply of stamps and the subsequent supply of redemption goods for those stamps. This applies *a fortiori* when, in addition to the above events, the sale of fuel to an independent dealer and the latter's participation in the sails scheme must also be considered. Although it may sometimes be necessary to determine whether a number of distinct transactions may, for VAT purposes, be treated as constituting one single transaction, [26] I agree with the United Kingdom that the approach in cases like *Skatteministeriet* v *Henriksen* is not of general application. [27] In the present case, as Kuwait accepted at the hearing, a number of transactions are involved. At a minimum, the sale of fuel and the supply of the redemption goods were separable not only in time but as to subject-matter. Where the sails scheme is operated by a dealer, yet another transaction occurs.

44. I cannot pretend that it is easy to extract from the case-law a completely coherent set of rules which it is possible to apply with total confidence to every promotion scheme devised by the ingenuity of commerce. The Court has been asked to give rulings of principle on a wide variety of schemes which, in reality, it has had to judge on an ad hoc basis. In particular, there are elements in some recent decisions which tend to support at least some aspects of Kuwait's case. Kuwait has placed considerable reliance on *Gibbs*. [28] It concerned a manufacturer's (Elida Gibbs) sales promotion scheme for the distribution of two types of coupons; money-off coupons distributed both generally to the public, via newspapers and the like, and via retailers, and cash-back coupons, distributed by simply printing them on the packaging of its products. Redemption of the money-off coupons occurred through the customer, on buying one of the products specified on the coupon, presenting it to the retailer, who subtracted the face value of the coupon from the shelf price of the article in question and who would normally later be reimbursed by Elida Gibbs. Conversely, the cash-back coupons were to be sent directly to Elida Gibbs by the consumers and the former would then make a direct cash refund for the same value to the consumer, a procedure which did not involve either wholesalers or retailers at all and these traders were as unaware of which of their customers made these claims as Elida Gibbs was of which retailer had sold the product. Thus, the cash refund could never be accounted for as between Elida Gibbs and the rest of the distribution chain. However, Elida Gibbs claimed that it was due a refund of the VAT paid on the part of its sales that was represented by the face value of the coupons, since they represented 'a retroactive discount' on the consideration originally received by it. [29] The Court identified the basic principle of the VAT system as being that VAT should only affect the final consumer and, consequently, that the taxable amount 'cannot exceed the consideration actually paid by the

26 — See, in this respect, paragraph 42 of my Opinion of 11 June 1998 in Case C-349/96 *Card Protection Plan* v *Commissioners of Customs & Excise*.

27 — Case 173/88 [1989] ECR 2763.

28 — Loc. cit., footnote 15 above.

29 — *Gibbs*, paragraph 12.

final consumer'. [30] In respect of a manufacturer who, like Elida Gibbs, refunds the value of money-off or cash-back coupons to final consumers, the significance of this principle is that the consideration received is 'a sum corresponding to the sale price paid by the wholesalers or retailers for his goods, less the value of those coupons'; in other words, his taxable amount cannot 'exceed the sum finally received by him'. [31] The Court held in *Gibbs* that the absence of a 'contractual relationship with the final consumer' could not affect the application of the neutrality principle. [32]

45. *Argos* [33] concerned a well-known United Kingdom catalogue retailer which typically supplies goods at its various outlets for cash or in return for face-value vouchers sold previously by it, though often at a discount on their face value. [34] The issue in the *Argos* case was whether Argos was entitled to reduce its taxable amount, in respect of retail sales at its outlets, by reference to the bulk-purchase or other discounts allowed by it on the earlier sale of its vouchers in different transactions and (normally) to different parties from those subsequently presenting the vouchers at its outlets. The Court held that it was even though the purchaser was typically completely unaware of any such discount. It explained that '[s]ince Argos regards the voucher as representing such part of the catalogue price as is equal to its face value, the only question is as to the actual money equivalent of the voucher taken in payment by Argos', [35] an amount which had to be ascertained by having regard 'only to the transaction which is relevant in that regard, namely the initial transaction comprising the sale of the voucher, at a discount or otherwise'. [36] The buyer's ignorance in the second transaction of this amount was treated as being irrelevant.

46. The common element in these cases is the willingness of the Court to take a broad and flexible approach to the ascertainment of the 'subjective value' of the consideration actually received, namely the amount actually received by the supplier. The disposition to disregard the contractual relationship between supplier and purchaser extended only to that

30 — Ibid., paragraph 19.

31 — Paragraph 28.

32 — Paragraph 31. The Court took the view (paragraphs 32 and 33) that the functioning of the VAT system at the intermediate stages in the chain of distribution would be unaffected; thus, intervening suppliers could, in effect, continue to use the input and output VAT figures which applied in respect of the initial (pre-redemption of the coupons) supplies to them of Elida Gibbs goods.

33 — Case C-288/94 *Argos Distributors* v *Commissioners of Customs & Excise* [1996] ECR I-5311 (hereinafter '*Argos*').

34 — In the present case, Argos supplied Kuwait, for part of the duration of the sails scheme, with the redemption goods.

35 — *Argos*, paragraph 18.

36 — Ibid., paragraph 20.

purpose. In each case, it was the *subjective value* and not *the fact of* consideration that was at issue. Neither of these cases resorts to the device of a 'single economic transaction' invoked by Kuwait in the present case. In *Argos*, in particular, the Court was at pains to distinguish two transactions. [37]

47. Similarly, in *Empire Stores*, which has some elements in common with the present case (see paragraph 37 above), the Court was asked whether the supply, in that case, of the non-catalogue goods was made for a consideration separate from the money payable to the supplier for the catalogue goods ordered from him. The Court identified the services involved in the introduction of a new customer as constituting a separate consideration for the supply of the non-catalogue goods. It was satisfied the value of those services provided to Empire Stores could 'unquestionably be expressed in monetary terms', which, since it was of a non-monetary nature, should be regarded as 'the value which the recipient of the services ... attributes to the services which he is seeking to obtain and must correspond to the amount which he is prepared to spend for that purpose'. [38] Where that amount involves the supply of goods, as in *Empire Stores*, the Court held that 'that value can only be the price which the supplier has paid for the article which he is supplying without extra charge in consideration of the services in question'. [39] In the present case, Kuwait receives no services or other advantages of any kind from motorists filling their vehicles with Q8 fuel apart from the price paid at the pump which, as far as its customers are concerned, is paid only in respect of the stated price of the fuel.

48. Finally, I do not think that the neutrality principle, as construed by the Court in *Gibbs*, assists Kuwait in identifying a consideration in the present case. That principle is concerned with ensuring that VAT, as a tax on consumption, is paid only by the final consumer. In *Gibbs*, the Court was concerned that the reduction in the consideration paid by the final consumer, which it regarded as occurring as a result of the use by that consumer of the coupons issued by Elida Gibbs, should be reflected in the latter's VAT return, since, otherwise, it would bear the burden of the VAT included in the portion of the final retail price effectively not paid by the final consumer as a result of the redemption of the coupons. In the instant case, apart from the fact that under the interpretation of Article 5(6) which I propose (see paragraphs 23 to 29 above), it is Kuwait which should be deemed to be the final consumer of the redemption goods, I do not accept that the neutrality principle is infringed by requiring a taxable person, who has been permitted to deduct the VAT included in the purchase price of certain goods, to account for that VAT, by way of a VAT output, when those goods are

37 — Paragraph 15.
38 — *Empire Stores*, paragraphs 17 and 19.
39 — Ibid., paragraph 19.

subsequently supplied free of charge, or in circumstances where it is impossible to identify with sufficient clarity a separate consideration.

49. Accordingly, I believe that the second question posed by the national court should be answered to the effect that, in a case where the supplier of fuel, both at its own retail outlets and at those operated by independent retailers, operates a promotion scheme consisting of stamps which can be collected by consumers at both types of retail outlets and used in order to claim goods from catalogues published by the supplier, the price paid by the consumer for fuel does not include consideration for the supply of those goods.

E — *Question 5*

50. In the light of the three answers which I propose in respect of the first four questions, I do not consider it necessary to address the fifth question.

## IV — Conclusion

51. Accordingly, I recommend that the Court answer the first three questions referred by the VAT and Duties Tribunal, London as follows:

For the purposes 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; where a supplier of goods operates a business promotion scheme, under which, in outline:

(i) the promoter provided redemption goods for business purposes in accordance with the terms of the scheme;

(ii) for no payment in money at the point of redemption;

(iii) against the redemption of vouchers to which a purchaser of premium goods became entitled by paying the full retail price of those goods without making any identifiable monetary payment for the vouchers;

(1) There is no price discount allowed to the customer for the purposes of Article 11A(3)(b) of the Sixth Directive;

(2) Article 5(6) of the Sixth Directive is to be interpreted as requiring that a provision, free of charge, of redemption goods under a sales promotion scheme such as that at issue in the present case be treated as a supply for consideration, notwithstanding that such a provision is for business purposes;

(3) In a case where the supplier of fuel, both at its own retail outlets and at those operated by independent retailers, operates a promotion scheme consisting of stamps which can be collected by consumers at both types of retail outlets and used in order to claim goods from catalogues published by the supplier, the price paid by the consumer for fuel does not include consideration for the supply of those goods.