OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 24 January 1990 *

Mr President,
Members of the Court,

1. The High Court of Justice has submitted to this Court a number of questions concerning the interpretation of Article 11 A of Title VIII ('Taxable amount') of the Sixth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes.[1] The questions concern in particular the following two provisions:

(i) Article 11 A 1(a) of the directive:

'A — *Within the territory of the country*

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) ...

(c) ...

(d) ...'

(ii) Article 11 A 3(b) of the directive:

'3. The taxable amount shall not include:

(a) ...

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

(c) ...'

Background

2. The questions submitted for a preliminary ruling arose in a case between the Boots Company plc ('Boots') and the Commissioners of Customs and Excise ('the Commissioners').

The Boots Group operates a chain of stores in which medicinal products, toilet articles and various other goods are sold. In order to promote sales, Boots regularly uses a form of promotion in which coupons are used. A customer who presents such a coupon when purchasing the goods specified on it is granted a reduction in the

* Original language: Dutch.

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 1977, L 145, p. 1).

cash price equal to the amount printed on the coupon. At times the costs of this promotion are borne entirely or partly by the manufacturer of the goods concerned, at others entirely or partly by Boots itself. The parties are agreed that turnover tax is payable on the amount that Boots charges the manufacturers for the proportion of the price reductions to be financed by them. The dispute therefore concerns only the price reductions granted upon the presentation of coupons which are borne by Boots.

3. The coupons accepted in Boots' stores are distributed amongst the public in various ways. In some cases they appear in the press or in leaflets distributed free of charge. The practice is accepted by the United Kingdom authorities in that when goods are purchased upon surrender of a coupon distributed in that way turnover tax is payable only on the sum of money which the customer pays to Boots and the value indicated on the coupon is not therefore included in the taxable amount, that is to say the amount on which tax is due. At the hearing the United Kingdom representative left open the question whether that practice is in accordance with the provisions of the directive.

In other cases the coupons are printed on, or added to, the packaging of the goods sold in Boots' stores (hereinafter referred to as 'coupon-bearing goods'). A customer who buys such goods obtains the coupon at the same time, without any extra payment. Upon the purchase of the goods specified on the coupon and the surrender of the coupon Boots accepts that such a coupon, like a coupon distributed in the press or in a leaflet, provides entitlement to a price reduction equal to the value printed on the coupon.

At the hearing Boots' representative explained that the amount shown on the coupon represents 5 to 31% of the sale price of the goods subsequently purchased, depending on the profit margin. It was further pointed out at the hearing that the coupon-bearing goods and the goods subsequently purchased are not necessarily of the same kind but when supplied are in fact subject to the same rate of turnover tax.

4. Boots takes the view that when a customer buys the goods specified on the coupon upon surrender of a coupon obtained upon an earlier purchase, turnover tax must be charged only on the sum of money actually paid by the purchaser. It therefore considers that the taxable amount must be determined in the same way as when goods are purchased upon surrender of a coupon distributed in the press or in a leaflet. The Commissioners, on the other hand, consider that the situations are different in view of the fact that in one case the customer must first purchase an article but not in the other. The Commissioners made and issued to Boots an assessment in the sum of UKL 10 727.03 for the calendar year 1984. The Value-Added Tax Tribunal upheld that assessment. Boots has appealed against that judgment to the High Court of Justice. It is in that appeal that the High Court has submitted the following questions to the Court:

'(1) Is Article 11 A 1(a) of the Sixth Council Directive to be interpreted so

that "everything which constitutes consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party" consists only of the payment of money by the customer?

(2) Does a retailer obtain consideration from a customer within the meaning of Article 11 A 1(a) of the Sixth Council Directive when he accepts from the customer a coupon entitling him to a price reduction on a purchase of the goods specified on the coupon, which coupon was given by the retailer to the customer at the time of purchase of other goods from the retailer at their normal retail selling price?

(3) Is the expression "price discounts and rebates allowed to the customer and accounted for at the time of supply" in Article 11 A 3(b) of the Sixth Council Directive to be interpreted to cover the difference between the normal retail selling price of the goods supplied and the sum of money actually received by the retailer for those goods where a coupon, obtained as above, is surrendered at the same time?

(4) Where a retailer supplies redemption goods to a customer for a sum of money which is less than the normal retail selling price of the goods because at the time of the supply the customer surrenders a coupon acquired at the time of purchase of other goods from the same retailer,

(a) is the taxable amount in Article 11 A 1(a) of the Sixth Council Directive the sum of money received by the retailer for the redemption goods, or

(b) the sum of money received by the retailer for the redemption goods together with the value of the coupon, and if that is the case, how is the value of the coupon to be determined, or

(c) if neither of the above applies, what is the taxable amount in these circumstances?

(5) If "consideration" may include not only the payment of money but also the surrender of the coupon to the supplier of the goods in question, do the provisions of Article 11 A 1(a) prevent a Member State from evaluating the taxable amount by reference to the price which the customer would have to pay to obtain the goods for a consideration wholly in money?

(6) Does a national rule, in existence on 1 January 1978, providing that "if the supply of a good 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", constitute a derogation from the provisions of Article 11 of the Sixth Council Directive which should, under Article 27 of the Sixth Council Directive, have been notified to the

Commission of the European Communities before 1 January 1978?'

5. I refer to the Report for the Hearing for a fuller account of the facts, the course of the procedure and the observations submitted to the Court, which are set forth hereinafter only in so far as is necessary for the reasoning.

The first question

6. By its first question the High Court inquires whether the only consideration envisaged by Article 11 A 1(a) of the Sixth Directive is the payment of money. All the parties are agreed that this question must be answered in the negative. I take the same view, for the following reasons.

Article 11 A 1(a) of the Sixth Directive expressly states that *everything* which has been or is to be obtained by the supplier from the purchaser is liable to constitute consideration. According to the Court's judgment of 23 November 1988 in the *Naturally Yours Cosmetics* case,[2] the provision concerned of the Sixth Directive may be interpreted by taking into account the corresponding provisions of the Second Council Directive of 11 April 1967.[3] In Annex A to the Second Directive it is expressly stated (in point 13 regarding Article 8(a)) that the expression 'consideration' means *inter alia* 'the value of the goods received in exchange'. It is accordingly quite clear that forms of consideration other than payments in money are envisaged by Article 11 A 1(a) of the Sixth Directive.

The second and third questions

7. Both the second question and the third question are intended to ascertain whether upon the purchase of goods in which a coupon obtained upon an earlier purchase is surrendered the amount printed on that coupon must be included in the taxable amount. The second question is more particularly concerned with ascertaining whether that amount falls *within* the taxable amount because the surrender of the coupon is to be regarded as consideration within the meaning of Article 11 A 1(a) of the directive. The point of the third question, on the other hand, is to ascertain whether that amount is *excluded* from the taxable amount on the ground that the coupon embodies a price discount or rebate allowed to the customer within the meaning of Article 11 A 3(b) of the directive.

In my view, the third question should be examined before the second. For if it is determined that the coupon embodies a right to a price discount and for that reason the amount printed thereon is excluded from the taxable amount, the second question no longer needs to be examined.

8. The first point to be made is that the terms 'price discount' and 'price rebate' used in Article 11 A 3(b) of the directive appear in a provision of Community law which does not refer to the law of the Member

2 — Judgment of 23 November 1988 in Case 230/87 *Naturally Yours Cosmetics Limited* v *Commissioners of Customs and Excise* [1988] ECR 6365, paragraph 10.

3 — 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).

States for the determination of its meaning and scope. The interpretation of those terms may not therefore be left to the discretion of each Member State. [4]

9. Article 11 A 3(b) lays down two conditions which must be fulfilled cumulatively: (a) there must be a price discount or price rebate allowed to the customer; (b) the price discount or rebate must be accounted for at the time of the purchase or the provision of the service.

The second condition does not present any particular difficulty in the present case once it is accepted that the first condition is fulfilled. On that hypothesis the customer then obtains a 'price discount' or 'price rebate' at the time of the purchase of the goods specified on the coupon: upon surrender of the coupon he must pay only the amount equal to the sale price less the amount printed on the coupon.

Whether the first condition is fulfilled is, however, a disputed question. Boots and the Commission take the view that a price discount or rebate is indeed involved here. The United Kingdom, however, takes the view that a price discount or rebate exists only when the sale price is actually reduced and that a price reduction which is dependent on the surrender of a coupon does not fall under the provision concerned. Even if a price discount or price rebate can be granted by means of a coupon, the United Kingdom still considers that there can be no question of such a price discount or rebate being allowed if the customer must first purchase coupon-bearing goods in order to be able to claim it.

10. I do not find the United Kingdom's arguments convincing. I share Boots' and the Commission's view that, in the circumstances of the case, a price discount or rebate within the meaning of Article 11 A 3(b) of the directive is involved. In order to demonstrate this, I shall (under points 11 and 12) first define more precisely both terms as well as the term 'coupon' (point 13). I shall then examine whether a discount or rebate can be granted by means of a coupon that has to be surrendered (point 14). Finally, I shall examine the importance to be attached to the fact that the customer obtains the coupon only upon the purchase of an article (point 15).

11. As far as I am aware, the terms 'price discount' and 'price rebate' have no clearly distinct meaning. In any case, a difference between the two terms does not seem to matter in this case. From the juxtaposition of two different terms it may in fact be concluded that a restrictive meaning may not be given to either of them and that for example both the case in which part of the price indicated is not paid and the case in which part of the price already paid is returned to the customer at the time of purchase [5] are meant. Thus, both terms together refer to price reductions in the narrow sense of the word (with the exception of 'price reductions by way of discount for early payment', which are expressly mentioned in Article 11 A 3(a)).

4 — See the judgment of 5 February 1981 in Case 154/80 *Staatssecretaris von Financiën* v *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445, at p. 453, paragraph 9.

5 — Article 11 C(1) of the directive deals with price reductions which are granted *after* the supply takes place and which are likewise excluded from the taxable amount.

The nature of the price reductions referred to in Article 11 A 3(b) can be defined more precisely by referring to the characteristics of the turnover tax system described below.

12. Turnover tax is a general tax on consumption which is intended to fall upon the spending of the final consumer.[6] In that regard Article 2 of the Sixth Directive defines which supplies are subjected to the tax:

'(1) the supply of goods or services effected *for consideration* within the territory of the country by a taxable person acting as such;

(2) . . . ' (my emphasis).

From the expression 'for consideration' as well as from the definition of taxable amount set out above (in paragraph 1) the Court has deduced that the consideration actually received by the person supplying the goods or the services, which, moreover, must be capable of being expressed in money, ranks as the basis of assessment.[7] The Court has further stated that there is no basis of assessment for supplies of goods or services without a direct link between the goods or service supplied and the consideration.[8]

It is clear from the foregoing why Article 11 A 3(b) excludes price reductions from the taxable amount: there is no (or at any rate no separate) consideration capable of being expressed in money given by the purchaser of the goods or the recipient of the service for the price reduction even if it is granted by the supplier of the goods or the service for commercial reasons (namely in order to increase his turnover).

13. How are 'coupons' to be viewed in this context? From the legal point of view, the coupons accepted in Boots stores may be described as follows. They are (transferable) certificates of entitlement incorporating for the holder thereof, upon the purchase from a particular retailer of goods which are specified on the coupons, a right to a price reduction equal to the amount printed on them. For the retailer who issues the coupons himself (which is the case here) the coupons represent the obligation to grant a price reduction when they are surrendered upon subsequent purchases of goods specified on them.

Having regard to the decisions of the Court mentioned above in paragraph 12, it must, however, be assumed that a coupon no longer incorporates a right to a price reduction if and to the extent to which the issuer, in return for the obligation he enters into in issuing the coupon, obtains consideration evaluable in monetary terms — and thus not only the expectation of increased turnover. Allow me to categorize the situation under consideration with reference to the foregoing description.

6 — See the first paragraph of Article 2 of the First Council Directive (67/227/EEC) of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (OJ, English Special Edition 1967, p. 14).

7 — See Case 154/80 (cited above in footnote 4), paragraph 13. See also Case 230/87 (cited above in footnote 2), paragraph 16.

8 — Case 154/80 (cited above in footnote 4), paragraph 12, and Case 230/87 (cited above in footnote 2), paragraph 12; see also the judgment of 1 April 1982 in Case 89/81 *Staatssecretaris van Financien* v *Hong Kong Trade Development Council* [1982] ECR 1277, paragraph 10

14. In the simplest case in which an issuer/supplier distributes the coupons free of charge in leaflets, he clearly receives no consideration for the coupons put into circulation. Therefore, there is indeed a price reduction. For I see no reason why a price reduction which, instead of being granted directly, is granted upon the surrender of a coupon put into circulation in that way should not equally well fall under Article 11 A 3(b): neither the aim nor the wording of that article present any bar. The fact that such a coupon distributed free of charge in a leaflet can be regarded as a certificate of entitlement to a price discount is indeed consistent with the practice of the United Kingdom authorities of not including the amount indicated on the coupon in the taxable amount where goods are purchased upon the surrender of a coupon distributed in that way. I accordingly consider that practice to be in accordance with Community law.

15. There remains the question whether a coupon given upon an earlier purchase may likewise be regarded as a price reduction certificate. The United Kingdom points out that in this case the customer must in fact spend money in order to acquire the coupon and that the issuer/supplier receives consideration in the form of an increase in turnover. In those circumstances, there is, in its view, no question of a price discount or rebate within the meaning of Article 11 A 3(b).

It is true that in those circumstances the customer spends money and that upon the sale of coupon-bearing goods the supplier receives a price. However, there is then, to use the words of the Court (see point 12 above), a direct link between the full price and the goods then sold and at that moment the full price should be included in the taxable amount. The coupon which the purchaser obtains at that moment is handed over to him by the supplier for possible use in a subsequent purchase and upon the making of that purchase it provides a right to a price reduction, just like a coupon distributed free of charge in a leaflet. The reduced price actually received by the supplier when the subsequent purchase is made upon the surrender of the coupon then constitutes the taxable amount. The coupon, which — and because it — in the given circumstances constitutes an *obligation* on the part of the supplier, 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 a price discount or rebate within the meaning of Article 11 A 3(b).

The other questions

16. The answer to the third question suggested above leads me to comment briefly on the other questions.

As already stated above (in point 7), an answer to the second question is unnecessary in view of the answer to the third question. From the relationship between Article 11 A 1(a) and Article 11 A 3(b) of the Sixth Directive it follows that the taxable amount for supplies of goods or services consists of the consideration actually received or to be received, *not including the price discount*

allowed. Once a coupon is recognized as being a price reduction certificate, it is therefore established that it does not constitute consideration for the purposes of Article 11 A.

17. From the answer to the third question it also follows that from the three possible answers set out in the fourth question the answer set out in (a) must be chosen.

18. I do not consider it necessary for me to go into the fifth question since it assumes that the previous questions are to be answered in a way which I do not propose.

19. Nor do I consider it necessary to examine the sixth question. To my mind the provision of national law in question does not appear applicable to a supply of goods involving a price discount.

Conclusion

20. To sum up, I propose that the Court should answer the preliminary questions as follows:

'(1) The taxable amount defined in Article 11 A 1(a) of the Sixth Directive on turnover taxes does not refer exclusively to the payment of a sum of money by the customer.

(2) A retailer grants a price discount or rebate as defined in Article 11 A 3(b) of the Sixth Directive when, upon the surrender of a coupon given upon the sale of a first article, he allows a price reduction upon the sale of a second article specified on the coupon. Only the price actually received by the retailer for the second article then falls within the taxable amount.'