OPINION OF ADVOCATE GENERAL JÄÄSKINEN
delivered on 15 April 2010 [1]

I — Introduction

1. *Essai sur le don*, first published in 1925 by Marcel Mauss, a famous French anthropologist, aimed at showing that in archaic societies exchanges and contracts take place in the form of presents. In theory they are voluntary; in reality they are given and reciprocated obligatorily. [2]

2. Human nature not having changed, it is no wonder that the European Union legislature, which defines value added tax ('VAT') as a general tax on consumption on all transactions amounting to supplies of goods or services for consideration, [3] has not taken gratuitous transactions at their face value. [4] As we shall see, in most cases gratuitous transactions are subjected to VAT by applying provisions on self-supply. [5] As for gifts given in the context of representation or entertainment, the same effect is achieved by excluding acquisitions of these goods from the rules on deduction. [6]

3. However, applications consisting of giving samples or making gifts of small value

1 — Original language: English.

2 — Mauss, M., *Essai sur le don*, Presses universitaires de France Paris, 2007 (reprint 2008), p. 65; Mauss, M., *The Gift. The Form and Reason for Exchange in Archaic Societies*, W.W. Norton, New York – London 1990 (reprint 2000), p. 3 (English translation). Richard Hyland concludes that the difficulties of many legal systems concerning the treatment of gift exchanges seem to validate Mauss's hypothesis according to which gift exchange in one of the bedrock structures of human societies. See Hyland, R., *Gifts – A Study in Comparative Law*, Oxford University Press, 2009, p. 114. However, ethnographers have found much to criticise in Mauss's methodology (ibid., p. 14).

3 — Article 2 of 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 ('Sixth VAT Directive'), OJ 1977 L 145, p. 1.

4 — The European Union legislature seems to be inspired by the old maxim 'donatio non praesumitur' – there is a legal presumption against the gift. See on this presumption in civil law and common law jurisdictions Kangas, U., *Lahja* ('The Gift'), Lakimiesliiton Kustannus, Helsinki, 1993, pp. 56 to 58.

5 — By virtue of the first sentence of Article 5(6) of the Sixth VAT Directive. It is important to highlight however that, after Case C-48/97 *Kuwait Petroleum (GB)* [1999] ECR I-2323, the first sentence may also cover gratuitous disposals for business purposes where input VAT has been deducted on the goods disposed of gratuitously.

6 — By virtue of Article 17(6) of the Sixth VAT Directive no deductions are allowed on expenditure not strictly for business purposes such as expenditure on luxuries, amusements and entertainment.

are exempted from VAT.[7] Bearing in mind the advantageous fiscal treatment of such transfers, taxable persons have an important economic interest in knowing the exact scope of these notions. Their apparent simplicity proves to be illusory when applied in the complex context of the distribution of goods representing copyright protected works as in the present case.

4. This reference for a preliminary ruling from the London VAT and Duties Tribunal concerns the interpretation of the second sentence of Article 5(6) of the Sixth VAT Directive which excludes applications for the giving of samples and the making of gifts of small value from VAT.[8] While the first sentence of Article 5(6) has been considered in several cases before the Court of Justice,[9] this is the first time that the Court is called upon to interpret the second sentence of that provision.

7 — By virtue of the second sentence of Article 5(6) of the Sixth VAT Directive.

8 — Article 5(6) of the Sixth VAT Directive is now Article 16 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive'), which replaces the Sixth VAT Directive with effect from 1 January 2007 (see the Correlation Table in Annex XII to the VAT Directive). The aim of the VAT Directive is to present the applicable provisions in a clear and rational manner, consistent with the principle of better regulation (recital 3 in the preamble).

9 — Case C-20/91 *de Jong* [1992] ECR I-2847; *Kuwait Petroleum*, cited in footnote 5; Case C-412/03 *Hotel Scandic Gåsabäck* [2005] ECR I-743; Case C-415/98 *Bakcsi* [2001] ECR I-1831; Joined Cases C-322/99 and C-323/99 *Fischer and Brandenstein* [2001] ECR I-4049.

II — Legal context

A — *European Union law*[10]

5. Article 5(6) of the Sixth VAT Directive provides:

'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.'

10 — Since the reference in the present case was made prior to the entry into force of the Treaty on the Functioning of the European Union (OJ 2008 C 115, p. 47), references to articles of the Treaty establishing the European Community (OJ 2002 C 325, p. 33) are retained throughout.

B — *National law*

6. The applicable national provisions are in section 5(1) of the Value Added Tax Act 1994 and paragraph 5(1), (2), (2ZA) and (3) of Schedule 4 to that act and have been amended on a number of occasions during the course of the material period (from April 1987 to date).

7. In their current version, in summary, the transfer or disposal, for consideration or otherwise, of goods forming part of the business assets of a taxable person is treated as a supply. An exception is made in respect of business gifts and the provision of samples. In respect of business gifts, the value per person and per year may not exceed GBP 50 in costs to the donor. As regards samples, only the first sample is exempted where a number of identical samples are given to the same person. Before July 1993, that exemption applied only to industrial samples presented in a form not ordinarily sold to the public.

III — Factual background and questions referred

8. EMI Group Limited ('EMI'), a company engaged in music publishing and in the production and sale of recorded music, distributes free copies of music recordings on vinyl records, cassette tape and compact discs ('CDs') to various persons in order to promote newly released music. According to EMI such distribution is necessary for EMI's business, enabling EMI to assess the commercial quality of a recording as well as its viability in the marketplace.

9. As part of such a promotion strategy CDs are distributed to individuals who are in a position to influence consumer behaviour (such as individuals working in the press, radio stations, television programmes, advertising agencies, retail outlets and cinemas), and to music promoters called 'pluggers' who distribute CDs to their own contacts. EMI hires both internal pluggers and external pluggers possessing particular expertise or having shown particular success in promoting recordings.

10. For those purposes, EMI supplies recorded music in different forms: 'watermarked' compact disc recordables ('CDRs') [11] bearing the name of the recipient and allowing

11 — CDRs are a variation of the conventional CD. They are recorded by one of EMI's record labels, Virgin Record Label, at its offices and on its own computers.

any copies made to be traced back to the recipient; un-watermarked CDRs supplied in a white cardboard sleeve; 'sampler' CDs supplied in a cardboard sleeve bearing the same artwork as on the finished album; or 'finished stock' CDs in their definitive form ready for sale to the public. The latter bear a sticker stating 'Promotional Copy Not For Resale'; the others state that ownership and title remain vested in Virgin Records Limited, a subsidiary recording label of EMI. It should be noted that the 'finished stock' is given to artists, their management and publishers, agents and any other media contacts EMI feels need to have the finished product.

11. According to the order for reference around 90 per cent of promotional CDs are sent to named individuals. It appears from the file that recordings may also be sent individually to more than one person working for a single organisation. For a single release approximately 2500 free copies are distributed, and between 3000 and 3750 for albums. A single plugger may receive up to 600 free recordings for onward distribution. To put these figures in perspective it should be added that according to EMI a top-selling CD album may sell millions of copies.

12. From April 1987 until early 2003 EMI accounted for VAT on the recordings provided by it in the circumstances described above. Taking the view that the national legislation is incompatible with Article 5(6) of the Sixth Directive and that, as a consequence, no VAT was payable, EMI requested the Commissioners for Her Majesty's Revenue and Customs to make repayment of the amounts paid by EMI in respect of VAT on those recordings. Since the Commissioners adopted a decision refusing reimbursement, EMI brought an action before the referring court.

13. From July 2003 EMI ceased to declare VAT on the supply of the free CDs. The Commissioners sent it an assessment covering the period from July 2003 to December 2004, against which EMI brought proceedings before the referring court.

14. In those circumstances the referring court asked the Court of Justice to make a preliminary ruling on the following questions:

'(a) How is the last sentence of Article 5(6) of the Sixth Directive to be interpreted in the context of the circumstances of the present case?

(b) In particular, what are the essential characteristics of a "sample" within the meaning of the last sentence of Article 5(6) of the Sixth Directive?

(c) Is a Member State permitted to limit the interpretation of "sample" in the last sentence of Article 5.6 of the Sixth Directive to

(i) an industrial sample in a form not ordinarily available for sale to the public given to an actual or potential customer of the business (until 1993),

(ii) only one, or only the first of a number of samples given by the same person to the same recipient where those samples are identical or do not differ in any material respect from each other (from 1993)?

(d) Is a Member State permitted to limit the interpretation of "gifts of small value" in the last sentence of Article 5.6 of the Sixth Directive in such a way as to exclude

(i) a gift of goods forming part of a series or succession of gifts made to the same person from time to time (to October 2003),

(ii) any business gifts made to the same person in any [twelve] month period where the total cost exceeds £50 (October 2003 onwards)?

(e) If the answer to question (c)(ii) above or any part of question (d) above is "yes", where a taxable person gives a similar or identical gift of recorded music to two or more different individuals because of their personal qualities in being able to influence the level of exposure the artist in question receives, is the Member State permitted to treat those items as given to the same person solely because those individuals are employed by the same person?

(f) Would the answers to questions (a) to (e) above be affected by the recipient being, or being employed by, a fully taxable person, who would be (or would have been) able to deduct any input tax payable on

the provision of the goods consisting of the sample?'

IV — Preliminary observations

A — *The specific nature of the case*

15. The referring court asks a series of questions which can be grouped into three larger questions: (i) what is the meaning of 'applications for the giving of samples' (questions (b) and (c)); (ii) what is the meaning of 'applications for the making of gifts of small value' (question (d)); (iii) does the status of the recipients of the gifts or samples affect the interpretation of the second sentence of Article 5(6) of the Sixth VAT Directive (questions (e) and (f)). Question (a) is a general question and the answer to it will be included in this section as well as in the analysis of questions (b), (c) and (d).

16. Despite the detailed nature of the questions posed by the referring court, the task of the Court in the present preliminary reference is to interpret the second sentence of Article 5(6), and not to apply it to the rather unusual facts of the case of EMI.

17. CDs are a material format in which the real product of a record company – the recording – can be marketed. In some cases there are several alternative 'hard copy' formats used for marketing the same recordings such as MiniDiscs, cassettes or vinyl records. In addition, the recordings can be distributed electronically through the internet. With the exception of such modern forms of distribution such as online streaming, possession of a recording in some of the formats mentioned above enables its consumption for several, practically unlimited, number of times.

18. It should also be noted that, in addition to potential licences or transfers of copyrights for the music or lyrics it might have acquired from the original rights-holders, a record company enjoys immaterial property rights protection for the records as a result of its copyright related 'neighbouring right' as a phonogram producer. This means that the income derived from a recording does not come exclusively from CD record sales but also from other sources such as royalties paid, for example, by broadcasting corporations through the relevant collecting societies.

19. Such special features of a record company's business may explain the peculiarities of EMI's promotion strategy – the seemingly liberal policy as to the distribution of free copies of CDs, on the one hand, and the practice of giving them, with minor exceptions, only to named recipients, on the other.

20. However, it should be borne in mind that the interpretation given by the Court of Article 5(6) of the Sixth VAT Directive in this preliminary reference will be applicable throughout the EU to many different kinds of taxable persons. We need to bear this larger context in mind, while at the same time being aware of the peculiarities of the EMI case and other businesses dealing with immaterial property rights.

21. Furthermore, the present case only refers to the free provision of goods since, at the time when the proceedings commenced, free copies of the music recordings were mostly provided in CD format. Today, musical tracks are often distributed via the internet, thus questions might arise in the future as to whether such distribution would amount to the provision of services and what the likely consequences might be. [12] Such analysis does not, however, come within the ambit of this case.

22. When analysing this case it is also important to keep in mind that the interpretation given to provisions of the Sixth VAT Directive has to be practicable, taking into account the nature of VAT as an indirect tax collected primarily by the taxable persons themselves in the course of their everyday running of business. Ideally the VAT treatment of a transaction forming part of the usual commercially-legitimate activities of a taxable person should be apparent to him at first glance without a need for detailed enquiries or an additional administrative burden such as record keeping going beyond the usual requirements of invoicing and accounting applicable to him. [13]

12 — The corresponding provision for services can be found in Article 6(2) of the Sixth VAT Directive.

13 — According to the OECD, data collected by revenue bodies has clearly demonstrated that in most countries VAT poses the highest burden in absolute terms than any other tax. (OECD Forum on Tax Administration: Taxpayer Services Sub Group Information Note, Programs to Reduce the Administrative Burden of Tax Regulations in Selected Countries, 22 January 2008, see http://www.oecd.org/dataoecd/39/6/39947998.pdf). Since 2007 the European Commission has been focussing on reducing the administrative burden in 13 priority areas including VAT through its 'Action Programme for Reducing Administrative Burdens in the EU'. For further information and progress of these proposals see the 'Better Regulation' section on DG Enterprise and Industry's website: http://ec.europa.eu/enterprise/policies/better regulation/administrative burdens/.

B — *The relationship between samples and gifts*

23. A sample does not need to be a gift in the private law sense, even though in most cases it will be since the taxable person giving the sample usually intends to transfer full ownership of the sample gratuitously to the recipient. [14] In some cases, however – as in the present case – a taxable person may retain ownership and title to items given as samples and thereby ensure, legally, that the conditions and limitations concerning use and further transfers formally bind the recipient. Making gifts, on the other hand, implies that the recipients acquire full ownership of the goods and, in many legal systems, the capacity of the donor to impose conditions limiting the recipients' powers to freely dispose over the object received as a gift may be limited or inexistent.

24. I do not find, however, that the potential private law difference between samples and gifts that may occur in individual cases is pertinent for VAT purposes since 'supply of goods' does not refer to the transfer of ownership in the private-law sense, but covers any transfer of tangible property which empowers the recipient to dispose of it as if he were the owner of the property. [15]

25. Furthermore, there is an overlap of the two concepts in the sense that samples are usually given as gifts, that is, without the caveat that ownership remains with the taxable person disposing of the gift. On the other hand, in most cases the gifts referred to in the second sentence of Article 5(6) of the Sixth VAT Directive cannot be considered as samples as they are not given for that purpose and they don't possess the necessary characteristics of a sample. Thus we may occasionally have samples that are not gifts, gifts that are not samples (in most cases), or samples that are gifts as well (in many cases).

26. Thus, even if the fact that all samples are not gifts theoretically invalidates the submission according to which all samples of small value are automatically gifts of small value, I do not find that this has any relevance in the application of the second sentence or Article 5(6) of the Sixth VAT Directive. That

14 — For the definitions of a gift in various legal systems see Hyland, cited in footnote 2, pp. 127 to 217). In his view a 'gift' as an object of comparative law is defined by gratuitousness, the subjective element (donative intent), its nature as an *inter vivos* transfer and gift object as the factor that separates it from other gratuitous transfers of rights. It is interesting to note that according to Hyland (p. 132) gifts are generally given outside the self-interested realm of the marketplace even if he also discusses the issue of the donations given by business associations (pp. 233 to 237).

15 — See most recently Case C-111/05 *Aktiebolaget NN* [2007] ECR I-2697, paragraph 32; Case C-223/03 *University of Huddersfield* [2006] ECR I-1751, paragraph 43; Case C-320/88 *Shipping & Forwarding Enterprise Safe* [1990] ECR I-285, paragraphs 7 and 8.

provision catches all samples of any value regardless of whether they are formally donated to the recipient, and all gifts of small value regardless of whether they can simultaneously be regarded as samples.

28. The second sentence of Article 5(6) of the Sixth VAT Directive is distinct, however, as indicated by its wording. [17] The *travaux préparatoires* show that the idea behind the second sentence is that samples and gifts of small value were not, contrary to the general rule, to be considered as taxable transactions. [18]

C — Objectives of the second sentence of Article 5(6) of the Sixth VAT Directive

29. In light of that, the aim of ensuring that goods on which input VAT is deducted do not escape VAT cannot be the same for the second sentence of Article 5(6) of the Sixth VAT Directive because that would render the exception of 'applications for the giving of samples or the making of gifts of small value' meaningless.

27. The objectives of the first sentence of Article 5(6) of the Sixth VAT Directive have been considered on numerous occasions by the Court, which has repeatedly held that the aim of that provision is to ensure equal treatment between various final consumers of the goods in question by ensuring that the final use of goods is subject to VAT when input tax has been deducted. [16]

30. In my view, the purpose of the second sentence must be to reflect the commercial reality that samples and gifts of small value may be necessary in order to promote a business and its products. There can be no other reason why the legislature would have sought to exclude them from the scope of the fundamental VAT rule according to which the consumption of goods by final consumers is subject to VAT. In relation to samples, their primary purpose is not to satisfy a need of a final consumer, but to lead to an increase in

16 — A lot of the case-law deals with private use of goods initially bought for business purposes: *Hotel Scandic*, cited in footnote 9, paragraph 23; *Bakcsi*, cited in footnote 9, paragraph 45; *Fischer*, cited in footnote 9, paragraphs 56; *De Jong*, cited in footnote 9, paragraphs 15 and 18. In support of the objective of ensuring that the final use is subject to VAT, the first sentence however equally applies to disposals for business purposes where input VAT has been deducted: *Kuwait Petroleum*, cited in footnote 5, paragraphs 20 to 22. Advocate General Fennelly in *Kuwait Petroleum* observed that the legislative history of Article 5(6) of the Sixth VAT Directive shows that the purpose of the provision was to ensure that goods on which input tax was not paid did not escape payment of tax if they were subsequently disposed of free of charge for reasons other than for private use.

17 — As Advocate General Fennelly pointed out in his Opinion in *Kuwait Petroleum*, cited in footnote 5, the word 'however' highlights the distinction between the first and second sentence of Article 5(6) of the Sixth VAT Directive. This is a useful observation even though not all the language versions contain that word.

18 — *Kuwait Petroleum*, cited in footnote 5, paragraph 23; see also Advocate General Fennelly's Opinion in that case, point 26.

transactions of the taxable person in question. [19] As regards 'applications for the making of gifts of small value' given for business purposes, the legislature has consciously decided to tolerate that they enter into final consumption without VAT being accounted for.

31. The applications referred to in the second sentence of Article 5(6) of the Sixth VAT Directive must take place for business purposes. Therefore, I do not see any danger of untaxed final consumption in that taxable persons would start to deliver goods free of charge in the form of samples or gifts to persons not having a special non-business relationship to them. Such gratuitous transactions for business purposes can be presumed to take place only if justified by strong promotional or marketing considerations.

32. Therefore, in the context of the second sentence of Article 5(6) of the Sixth VAT Directive I do not see any major risk of VAT evasions, in contrast to the first sentence which addresses an obvious problem of confusion between goods bought for business purposes and private use. In the context of the first sentence, there are strong economic incentives for both natural persons who also are taxable persons themselves, and for those who might be in the position to take advantage of such confusion.

D — *Context*

33. As regards the context, EMI and the United Kingdom seem to disagree about the place of the second sentence of Article 5(6) of the Sixth VAT Directive in the VAT scheme.

34. EMI submits that the second sentence confirms the general rule that consideration is required for VAT to arise, [20] whereas the United Kingdom submits that the second sentence is an exception to the general rule found in the first sentence that VAT is applied in a manner which is fiscally neutral. What they mean by this, and this is gleaned from the fact that the United Kingdom makes reference to point 27 of Advocate General Fennelly's Opinion in *Kuwait Petroleum*, is that where input VAT was deducted output

19 — This is so notwithstanding the fact that in some cases samples may be consumed. For a further discussion on this see points 60 to 70 below.

20 — Resonant with the well-known rule that VAT should not be levied on any amount greater than that paid by the final consumer (Case C-317/94 *Elida Gibbs* [1996] ECR I-5339, paragraph 19).

tax must also fall due. Thus, since the second sentence does not follow this logic, it is to be seen as an exception to that general rule.

35. Both of them are in a way correct. The problem is that the parties use two different general rules as their starting point: EMI uses consideration as the 'general rule', whereas the United Kingdom uses the concept of taxation of final use as the 'general rule'.

36. In my opinion the United Kingdom's reading of the second sentence fits better with the Court's case-law interpreting Article 5(6) of the Sixth VAT Directive.

37. As can be seen from the objectives of Article 5(6) of the Sixth VAT Directive, described in points 27 to 32 above, the aim of taxing the free disposal of goods is to ensure the neutrality of the VAT system, so that goods for which input VAT has been deducted are subject to output tax. As such, the exclusion of 'applications for the giving of samples or the making of gifts of small value' must be seen as an exception to that rule since input VAT is deductible despite the corresponding output VAT being waived.

38. Indeed, the Court, following Advocate General Fennelly, indicated in *Kuwait Petroleum* that the *travaux préparatoires* for the Sixth VAT Directive show that the idea behind the second sentence of Article 5(6) is that samples and gifts of small value were not, contrary to the general rule, to be considered as taxable transactions. [21]

39. The second sentence must therefore be seen as an exception to the general rule contained in the first sentence of Article 5(6) of the Sixth VAT Directive, which is a confirmation of the fundamental VAT principle that VAT shall be applied to supplies leading to final consumption even in cases where supply has taken place free of charge. [22]

40. According to the Court's well-established case-law an exception must be interpreted strictly. [23] However, the fact that provisions providing for an exemption have to be interpreted strictly does not mean that the terms used to specify the exemptions should be

21 — See *Kuwait Petroleum*, cited in footnote 5, paragraph 23, and the Opinion of Advocate General Fennelly in that case, point 26.

22 — Article 2 of 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 1967(I), p. 14) sets out the central VAT idea of charging tax on the final consumption of products.

23 — Case 348/87 *Stichting Uitvoering Financiële Acties* [1989] ECR 1737, paragraph 13; Case C-434/05 *Horizon College* [2007] ECR I-4793, paragraph 16.

construed in such a way as to deprive the exemptions of their intended effect. [24]

This is supported by the general aim set out in the preamble to the Sixth VAT Directive which states that the uniform application of the provisions of the directive should be ensured. [25] Furthermore, according to the well-established jurisprudence of the Court, it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which make no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union. [26]

V — The meaning of 'applications for the giving of samples'

41. By questions (a), (b), and (c) the referring court essentially asks what meaning is to be given to the notion 'applications for the giving of samples' in Article 5(6) of the Sixth VAT Directive, and whether that provision of the directive precludes the restrictions found in the national legislation. Can the notion of 'applications for the giving of samples' be limited to (i) an industrial sample in a form not ordinarily available to an actual or potential customer, or to (ii) the first of a number of samples given to the same recipient?

42. The Commission submits, correctly, that the notion should have a uniform meaning.

43. The German Government proposes that the definition of samples in Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty ('the Customs Duty Regulation') be used as a starting point. [27] In that regulation samples are defined as goods that are of negligible value and can be used to solicit orders for goods of the type they represent with a view to them being imported into the customs territory. [28] For those purposes 'samples of goods' is defined as any article representing a type of goods whose manner of presentation and quantity for goods of the

24 — Case C-284/03 *Temco Europe* [2004] ECR I-11237, paragraph 17, and Opinion of Advocate General Ruiz-Jarabo Colomer in the same case, point 37.

25 — Sixteenth recital in the preamble to the Sixth VAT Directive.

26 — See, most recently, Case C-98/07 *Nordania Finans and BG Factoring* [2008] ECR I-1281, paragraph 17 and cases cited therein.

27 — OJ 1983 L 105 p. 1.

28 — Customs Duty Regulation, ibid., Article 91.

same type or quality, rule out its use for any purpose other than that of seeking orders. [29]

44. I do not find the approach of the Customs Duty Regulation, which aims at uniform customs treatment of samples passing the EU customs border, especially helpful in the VAT context, which requires taking into account legitimate commercial practices while avoiding the danger of goods allegedly given as samples unduly passing into final consumption.

45. The Customs Duty Regulation is aimed at a specific purpose, namely the relief from import or export duties. [30] In a specific context like that one the focus is more on the physical characteristics of goods, unlike the situation as in the present case where the role of the recipient is central in the analysis.

46. When considering whether something amounts to an 'application for the giving of samples' in the context of the Sixth VAT Directive, regard must be had to all the relevant circumstances. When carrying out such an analysis it is, in my view, important to analyse the different types of recipients who receive the goods as samples, as well as the physical properties of the goods in question.

A — *Recipients of samples*

47. The relevance of the recipient's point of view is important to the debate concerning the relationship between a sample and the final product, quantities in which samples may be given, the value of a single sample, and the danger of samples leaking to final consumption in a significant manner. This leads me to the conclusion that the notion 'applications for the giving of samples' must be analysed with the different recipients of samples in mind.

48. In my view there are three different types of recipients of samples. A correct interpretation of the second sentence of Article 5(6) of the Sixth VAT Directive must include them all. A failure to do so would mean that certain applications would qualify as applications for the giving of samples whilst others would not, depending on who the samples were given to, despite the fact that in the latter case the applications played the same commercial function as the former ones. A legislative restriction concerning the number of samples

29 — A similar definition of samples can be found in Article III of the International Convention to facilitate the importation of commercial samples and advertising material (http://images.io.gov.mo/bo/i/99/50/dlar-40539-56-eng.pdf).

30 — Article 1(1) of the Customs Duty Regulation, cited in footnote 27.

that may be given to a single recipient, for example, may have different effects depending on whether the recipient is a business or a consumer.

49. The first category of recipients are final consumers who receive samples directly from the business in question. A typical example would be a sample of food given to a customer visiting a local supermarket.

50. The second category of recipients are companies who themselves receive samples for their own industrial or commercial purposes. This includes the use of samples for quality assurance purposes. Enterprises may also receive samples in order to distribute them to the final consumers, or in order to display such samples so that the final consumer can test the item in question. [31]

51. The third category of recipients are persons acting as intermediaries between businesses and the public, such as those who, owing to their particular position, are capable of heightening the product's level of exposure in the market or influencing consumer decisions. This does not only include radio disc jockeys as in the present case but also other groups of recipients such as university teachers or book critics who receive copies of books to review.

52. Such recipients can be both natural persons who are employees or self-employed freelancers, as well as companies.

53. It seems to me that the recipients in the present case mostly fall into the third category. Individuals working for the press receive samples of CDs so that they can communicate their opinions of the product to the general public. The same is true for disc jockeys at radio stations. In relation to television programmes, advertising agencies, retail outlets, and cinemas, the distribution of CDs obviously targets a wider public receiving information through these channels rather than potential buyers of those products.

54. So far as the external pluggers are concerned, it does not seem to me that they should be evaluated differently from other persons acting in intermediary positions because their function is also to express and convey their qualified expert assessment of

31 — The United Kingdom appears to recognise such a category of recipients as being exempt in certain situations. As was revealed at the hearing, Her Majesty's Revenue and Customs guidelines appear to exclude (i) samples given for quality assurance testing purposes, and (ii) samples given to retailers for distribution to customers, from the general rule that limits the quantity of samples that can be given to any one retailer (see http://www.hmrc.gov.uk/vat/managing/special-situations/samples.htm#2).

the products and thus contribute to its promotion in the marketplace. [32]

B — *Characteristics of a sample*

(i) A sample promotes the product in question as an example

55. EMI and the Commission agree that samples are given for the promotion of products. In my view, it cannot be questioned that a promotional or marketing objective characterises 'applications for the giving of samples', particularly since there is a requirement that such applications take place for business purposes. However, this overall objective is also shared by gifts given for business purposes regardless of whether they are of small value or gifts given for entertainment purposes. Therefore, the meaning of 'applications for the giving of samples' cannot be construed solely on the basis of this general objective of the taxable person in question.

56. There also seems to be a broad agreement that the essential function of a sample is its role as an example of a product classified as goods for VAT purposes. In my view this is correct. The basic purpose of a sample is to serve as an example of a product that the taxable person promotes on the market, in his capacity as a manufacturer, distributor, merchant, agent or other intermediary or auxiliary. This entails that a sample – unlike a gift – must be produced, distributed or marketed by the taxable person concerned or have another commercially-relevant link to the future sales of the product. [33]

57. However, not all applications consisting of distribution for free and for promotional purposes of products with a link to the taxable person's business can be treated as 'applications for the giving of samples'.

58. For example, if the remaining stocks of products no longer in production are distributed to customers as free giveaways these goods cannot be considered as 'applications

32 — For the application of the second sentence of Article 5(6) of the Sixth VAT Directive it is irrelevant if the giving of a sample is counterproductive from the promotional point view, which may be the case if it leads to a negative appraisal of the product by the recipient of the sample.

33 — For example, a test sample of a product not yet in production may be manufactured by a company other than the taxable person who intends to market that product and therefore distributes samples of it for quality assessment purposes.

for the giving of samples', even if they may foster goodwill, promote or publicise the taxable person's name and business. [34] Such an application does not, however, serve as an example of those products whose sales they intend to promote.

59. Another example which would not amount to an 'application for the giving of samples' is where a merchant, for promotional purposes, promises to give every one-hundredth customer a certain product available for sale in his shop. Such a marketing measure would not fulfil the requirement of a necessary connection between the giving of samples and promotion of future sales of the same goods of which the sample serves as an example. [35]

(ii) A sample represents the properties of the final product

60. Particularly in the case of the 'finished stock' CDs, the question arises whether a sample always needs to be given in a form not normally available to the final consumer or whether distribution of the 'finished stock' can count as 'applications for the giving of samples'. Tied in with this is the concern that if a product is given in a finished form there is a risk of samples substituting consumption and thus creating a risk of being contrary to the principle of fiscal neutrality.

61. In order to be able to serve as an example a sample must retain all the essential properties of the substance or goods to which it relates. In the written observations and at the hearing several examples were given to illustrate this point. [36] In many cases no problems will arise in relation to the distribution of a sample containing all the essential properties of the final product, since smaller amounts of the finished product may be distributed as samples. A sample may also be a modified or simplified version of the final product, if such a version is able to retain all the essential properties of the product.

62. In the case of the third type of recipient particularly, it will often be necessary to give the whole product in its final form so that the product can be fully appreciated and the intermediary's impressions of it can

34 — This has been proposed by EMI as an essential element of the notion of a sample.

35 — In the example of the merchant giving free gifts to the one-hundredth customer we are, of course, speaking of gifts rather than samples, which are used to promote a business. In the case of gifts there is a wider aim than simply promoting future sales of specified products which are given as gifts. In the cases of gifts, the aim is to foster goodwill generally so that future sales of all products associated with the company are promoted.

36 — For example, a packet of washing powder given as a sample has to be big enough for a machine load. A piece of croissant may not be sufficient as a sample of a baker's product but it may be necessary to eat the croissant in its entirety in order to be able to ascertain all its qualities.

be accurately conveyed. This applies to artistic and literary products such as books and CDs, but also to many other products such as computer games, design items in the fields of fashion and interior design or even alimentary products.

63. In my view, as a general rule, an item that is able to satisfy the needs of a consumer for the product in question in its entirety cannot be considered a sample. For example, a book, CD, or garment received as a sample usually makes it unnecessary for a consumer to buy a new example of exactly that product.

64. In some cases, however, a product given as a sample may serve promotional purposes by creating a new habit amongst purchasers. In addition, a single product like a book, periodical or CD may be a sample if it is given with the aim of promoting a series, collection, membership of a book club or a subscription to the periodical.

65. It is important to highlight that the second and third categories of recipients do not receive the samples for their own consumption but for professional purposes.

66. It cannot, however, be excluded that a sample may end up in final consumption in the sense that it acts as a substitute for products that a consumer would otherwise have needed to buy in order to satisfy his specific needs. For example: pens delivered for quality testing to a department store may prove so good that the 'tester' starts to use one of the pens for both professional and personal use, or the husband of a literary critic may read a new novel his spouse had received to review but had only paged through. Obviously the husband can be regarded as having consumed the novel whereas the critic cannot. The latter conclusion would not change even if the critic had read the book, as that act was not an act of consumption if it took place in the context of her profession. [37]

67. In my opinion, such examples of unintended final consumption are 'collateral damage', unavoidable in the context of a commercially justified 'application for the giving of samples'. They relate to circumstances a taxable person cannot completely foresee or prevent by measures available to him when giving samples.

37 — To avoid any misunderstandings, the distinction between consumption and professional activities does not imply that goods could be bought for professional purposes without paying the input VAT. However, insofar as this takes place under the cover of a taxable person's activity, such input VAT is deductible.

68. To serve as samples the goods in question must be given in appropriate forms and quantities according to ordinary commercial usage. This requires that samples are not given in forms likely to be substitutes for products intended for final consumption, unless the nature of the product promoted by the sample necessitates otherwise. In the case of samples of products that have to be assessed in their final form, it can often be required that special packages, stickers, stamp markings or other similar devices are used to indicate that they are samples not intended for usual trade.

(iii) A sample is given in appropriate quantities

69. The samples must be given in a quantity that is sufficient for them to achieve their purpose as samples, but without more. This does not necessarily mean that only one sample can be given per recipient since different recipients using samples for different purposes will require different amounts of the good for a sample.

70. Concerning the second type of recipient, for example any interpretation limiting the notion of 'applications for the giving of samples' to a single example per recipient or in a form other than that of the final product may contradict commercial realities. Recipients in this category will often need more than one sample. For example a retail store may need thousands of pouches of a new washing powder to give to its customers, and in industry and commerce quality testing of a new product may require dozens of samples. The third type of recipient, however, will not normally require more than one copy of the work.

C — *Concluding remarks on 'applications for the giving of samples'*

71. In view of the above, the second sentence of Article 5(6) of the Sixth VAT Directive cannot be interpreted as allowing Member States to impose a priori quantitative or qualitative restrictions on the notion of 'applications for the giving of samples'.

72. Furthermore, general rules and principles concerning abuse of law, fiscal control, and tax evasion also apply in the context of giving samples. It may appear, in light of the quantity or quality of the goods given, or from other circumstances of the case, that

the transfer of the goods in question cannot be considered as having taken place as an 'application for the giving of samples' in the context of legitimate commercial practices, by reasonable taxable persons, acting in good faith, for business purposes. [38]

73. Being fully aware that it is up to the national court to apply the analysis to the facts, it might be helpful to make some comments about the four different types of CDs that are distributed in the present case.

74. To my mind all four types of CDs given to intermediaries aim to promote the product and can be said to be an example of the product. In relation to the first three forms of CDs (the watermarked CDRs bearing the name of the recipient, the un-watermarked CDRs in white cardboard sleeves, and the 'sampler' CDs), it seems to me that their nature as samples might be justified with reference to the fact that they are given in a form that is different to that of the finished product, but appropriate for a sample. In relation to the 'finished stock', the only thing that differentiates them from final products is the sticker indicating that they are not intended for usual trade. Even though such a sticker can of course easily be removed, I do not think that this alone should deprive it of the character of a sample, if other pertinent facts would support such classification.

75. In my opinion, the real difficulties relate to the large quantities of CDs given to external pluggers for redistribution to persons unknown to EMI. An appreciation of whether this kind of promotional strategy amount to 'applications for the giving of samples' requires a concrete factual evaluation of the question whether the persons receiving these CDs from the pluggers perform a role of an intermediary or whether they should be regarded as usual consumers.

VI — Applications for the making of gifts of small value

76. By question (d) the referring court essentially asks whether the notion 'applications for the making of gifts of small value' in Article 5(6) of the Sixth VAT Directive can be subject to quantitative limits on the number or value of gifts that can be received from time to time or in any one year period.

38 — As the Court has concluded in the context of direct taxation, a Member State may not act on the basis of a general presumption of tax evasion (see Case C-451/05 *ELISA* [2007] ECR I-8251, paragraph 91 and the cases cited therein). In my view this is also true in the VAT context.

77. In respect of 'applications for the making of gifts of small value' all the parties are of the view that Member States have a certain amount of discretion as to the interpretation of 'small value'. EMI observes in particular that that term should be interpreted according to the specific economic circumstances prevalent in the Member State in question. This necessitates that a margin of appreciation be left to Member States in implementing this notion.

78. As a starting point, as Article 5(6) of the Sixth VAT Directive makes no express reference to the law of the Member States, the notion 'applications for the making of gifts of small value' should, for the reasons explained in relation to 'applications for the giving of samples', have an EU law meaning. [39]

79. There are no legal reasons why the notion of 'making of gifts' could not have an EU law meaning. This implies that the question of whether more than one transfer of goods may be included in the appreciation of 'gift of small value' should also be answered in a uniform way. 'Small value' may, however, require a certain margin of appreciation because the meaning of that notion implies comparisons that cannot be independent from the economic situations of the Member States.

A — *Gifts*

80. What is a gift? This notion is paramount for anthropology and sociology, and legally it is well anchored in all developed systems of private law. [40] In the context of the Sixth VAT Directive, and Article 5(6) thereof in particular, this notion has been considered in passing by Advocate General Van Gerven in *Empire Stores*. [41] He considered that the second sentence of Article 5(6) covers 'complimentary gifts intended generally to foster goodwill or publicise the taxable person's name, without there being any consideration'. [42] This point was not considered by the Court, however, as it was not material to that case.

81. The explanation given by the Advocate General indicates that his understanding was that 'gifts of small value' was intended

39 — See point 10 above.

40 — Kangas (cited in footnote 4, p. VII and pp. 31 to 59), echoing the great German legal scholar Friedrich Carl von Savigny, has pointed out that, despite its apparent simplicity, a 'gift' is a complex legal institution.

41 — Case C-33/93 [1994] ECR I-2329.

42 — The Advocate General's Opinion in *Empire Stores*, ibid., point 19.

primarily to mean gifts given for marketing, advertising or similar promotional purposes.

82. My view is that the preferential VAT treatment of 'applications for the making of gifts of small value' makes sense only if it is understood as primarily targeting gifts given for such purposes.

83. As I have already mentioned in relation to 'applications for the giving of samples', gifts for business purposes can take several forms: advertising or promotion gifts if they are of small value; gifts to personnel; gifts in the form of business entertainment. It is only the first of those that is subject to the rule in the second sentence of Article 5(6) of the Sixth VAT Directive. In most cases gifts to personnel may be subject to VAT under the first sentence of Article 5(6) of the Sixth VAT Directive, while gifts for business entertainment are dealt with in Article 17(6) of the Sixth VAT Directive.

84. Gifts that advertise or promote the business will usually be of a mass nature, and will not be selected individually for named recipients. They will be given on an ad hoc basis without the taxable person or his agent necessarily always being aware of the identity of the recipient. Examples of such gifts may include pens, T-shirts, notepads, scarves and ties which are branded with the company's logo.

85. Taxable persons may also, however, give for business purposes individually selected gifts such as flowers, boxes of chocolate, wine bottles or small design items like vases or ornaments. In respect of such gifts it will be crucial that they are of 'small value' or they will risk falling to be considered as (i) entertainment gifts under Article 17(6) of the directive and thus not be entitled to a deduction or, (ii) pursuant to *Kuwait Petroleum*, as disposals for free under the first sentence of Article 5(6) of the Sixth VAT Directive. [43]

86. The difference between 'disposal of goods free of charge' in the first sentence of Article 5(6) of the Sixth VAT Directive, and the 'making of gifts of small value' in the second sentence is their value and their purpose. [44]

43 — Under Article 17(6) of the Sixth VAT Directive no deduction is allowed for input tax whereas under the first sentence of Article 5(6) of the Sixth VAT Directive the deduction made for input tax is compensated by the payment of output VAT on the basis of self-supply.

44 — *Kuwait Petroleum*, cited in footnote 5, paragraph 23, and Opinion of Advocate General Fennelly in that case, point 26.

B — '*Small value*'

87. It appears to me that if the term 'small value' is understood purely as a quantitative criterion, the Member States inevitably need some margin of discretion in relation to it. If, on the other hand, 'small value' is interpreted more as a qualitative notion not entirely reducible to economic worth, such a margin of discretion might be unnecessary.

88. It would be tempting to suggest that the criterion of 'small value' should be interpreted qualitatively as referring to the absence of any greater subjective importance of the gift for the recipient.

89. Thus, 'gifts of small value' referred to in the second sentence of Article 5(6) of the Sixth VAT Directive would be mass gifts of a promotional nature, often branded with a logo, name, or other piece of information making a link to the taxable person issuing them, and distributed to clients, potential customers and business contacts, without any attention paid to the identity of the recipient. However, even a gift fulfilling these criteria, like a silk tie or a fleece jacket with a company logo, may, in economic terms, not be of small value.

90. Therefore, and bearing in mind that the interpretation of the term has to be practicable, it would not be consistent to propose such an interpretation. A qualitative reading of 'small value' would be difficult to combine with the need for uniform interpretation of that notion. Hence, a quantitative interpretation is preferable.

C — *A fixed monetary ceiling for 'applications for the making of gifts of small value'*

91. In relation to the monetary value to be regarded as the ceiling for the meaning of 'small value', Member States' approaches vary. In some countries such as Spain, Italy and Luxembourg there appears to be no specific monetary limitation for defining gifts of small value.[45] Other countries, such as the United Kingdom and France find it appropriate to fix specific monetary amounts in the interest of legal certainty. In Finland the threshold is not set in legally binding provisions but in

45 — Question No. 617/89 asked in the European Parliament by F. Herman to the Commission (OJ 1990 C 39, p. 24). Even though this question dates from 1990, I find it useful to have some information of the situation in other Member States.

administrative guidelines applied by the fiscal authorities, so as to ensure uniform practice regarding this issue. [46]

92. In my view, such decisions are up to individual Member States, who may set ceilings on the basis of their economic prosperity, average prices and average income levels. However, the threshold must not be so low as to make Article 5(6) of the Sixth VAT Directive meaningless or inapplicable, or so high so as to deviate from what 'small value' might be understood to mean in common language.

93. Can the quantitative limits set by the Member States for 'applications for the making of gifts of small value' be absolute or should there be some flexibility of application in individual cases?

94. There appears to be at least one national judicial decision that has concluded from the absence of any referral to national legislation in the second sentence of Article 5(6) of the Sixth VAT Directive that national thresholds must be rebuttable in individual cases even if uniform fiscal practice may require that tax authorities apply certain quantitatively set prima facie limits. [47]

95. Admittedly, as the Commission pointed out at the hearing, it would be difficult to justify that a quantitatively fixed condition for the application of a certain fiscal rule should be rebuttable in individual cases, as this would contradict the very essence of such a condition, namely the uniform treatment of all taxable persons. Nonetheless, this case concerns an EU provision which should, according to the normal principles of interpretation, have a uniform meaning and should therefore not leave a margin of appreciation to Member States. Bearing that in mind I think that the implementation measures undertaken by Member States should allow for some flexibility, in exceptional cases, in relation to the application of quantitative limits set. For example, a company present in several Member States might want to use a single set of advertising gifts with uniform design and logos in all of them. Keeping in mind the rules of the internal market, I should not want to accept that a Member State with a particularly low national limit for 'small value' could refuse exemption from VAT if the gift would in the other relevant Member States be of small value.

46 — See Kallio, M. et al., *Arvonlisäverotus 2009*, Edita Helsinki 2009, p.512.

47 — Judgment of the Finnish Supreme Administrative Court of 3 October 2006, KHO 2006:70.

D — *Cumulative gifts and 'applications for the making of gifts of small value'*

96. The practice in Member States also seems to differ in relation to whether cumulative gifts can be accounted for together. Some systems, such as Germany, the Netherlands and France, take into account gifts made to the same person in one year. [48]

97. The United Kingdom submits that the cumulative ceilings imposed by the national legislation are necessary in order to prevent abuse of the VAT system and to ensure that taxable persons may not circumvent the first sentence of Article 5(6) of the Sixth VAT Directive by making a series of gifts which, taken individually, are of small value, but are more than that when taken together.

98. While the prevention of tax evasion is an objective recognised and encouraged by the Sixth VAT Directive, [49] and while Member States have legitimate interests in taking steps to prevent possible tax evasion, the United Kingdom has not provided any evidence to suggest that there is a real risk of tax evasion here.

99. For my part, I do not think that such a risk seriously arises in relation to 'applications for the making of gifts of small value' for business purposes, unlike the obvious risk of tax evasion in situations covered by the first sentence of Article 5(6) of the Sixth VAT Directive.

100. In the context of cumulative gifts in progressive inheritance taxation or progressive stamp duties applicable to transfers of real property, for example, it is important to take into account all transactions during a defined period, since there is an incentive to circumvent the progressive effect of tax by dividing a large transaction into a series of smaller ones. In the VAT context, however, such a cumulative approach has no support in the text of the second sentence of Article 5(6) of the Sixth VAT Directive. It would also make the VAT status of an application dependent on other earlier or later applications as, for example, the VAT status of a gift under the set limit would change afterwards if the recipient received another gift from the same taxable person, raising the combined value of the two gifts over this threshold. This would be

48 — Question asked to the Commission, cited in footnote 44.

49 — Case C-132/06 *Commission* v *Italy* [2008] ECR I-5457, paragraph 46; Case C-25/07 *Sosnowska* [2008] ECR I-5129, paragraph 22, and the references contained therein; see also Article 22(8) and Article 27(1) of the Sixth VAT Directive.

contrary to the idea that each VAT transaction should be treated on its own merits and not altered by earlier or subsequent events. [50]

VII — The tax status of the recipients of samples and gifts of small value

101. I do not see any danger of taxable persons making gifts in unjustified amounts if they genuinely act for business purposes. The general rules and principles concerning fiscal control, abuse of law and tax evasion are sufficient to overcome attempts to circumvent the requirement of 'small value' for VAT exempt gifts.

102. A literal application of cumulative ceilings would require that taxable persons keep records of who they give gifts to. In my view, this goes beyond the invoicing and accounting requirements set out in the Sixth VAT Directive. [51] In addition, it would be too burdensome if taxable persons were required to remember the person to whom they gave calendars, pens with logos, or other similar gifts. [52]

103. Questions (e) and (f) relate to the fact that the applicable national legislation in the United Kingdom has limited application of the VAT exemption only in relation to the first item given as a sample, and that the United Kingdom legislation provides for the cumulative application of the value limit concerning 'gifts of small value'. The answers that I have proposed to questions (b) to (d) mean that such restrictions imposed by national provisions to the application of the second sentence of Article 5(6) of the Sixth VAT directive are excluded.

104. In that respect, according to the Court's case-law, the supply of goods does not refer to the transfer of ownership in the private law sense but covers any transfer of tangible property which empowers the recipient to dispose of it as he were the owner of the property. [53] Hence, samples or gifts of small value may be given to both employees and their employers. Which of them is to be considered as recipient is a question of fact to be answered on basis of the relevant circumstances, the legal test for VAT purposes being the existence of real power by a person to dispose of the goods as owner.

50 — Joined Cases C-354/03, C-355/03 and C-484/03 *Optigen and Others* [2006] ECR I-483, paragraph 47.

51 — Article 22 of the Sixth VAT Directive.

52 — On the other hand, it can be expected that a taxable person keeps records of the recipients of business entertainment gifts, and other gifts of greater value, in order to avoid giving the same gift twice to a certain recipient.

53 — See point 24 and footnote 15 above.

105. In many cases this test reveals that the sample or gift is given to the employer. For example, the employees are clearly not the recipients of samples given to a taxable person for testing or redistribution of products. On the other hand, a review copy of a book sent to a critic to his home address is obviously given to him personally even if he is hired by a newspaper. Similarly, gifts of small value may be given to individual employees (such as calendars forwarded to them individually), or to the employer (such as a box of chocolates sent by a business client to the offices of a small firm).

106. Question (f) essentially asks whether the answers given would be affected if the recipient were able to deduct input tax payable on the provision of the goods.

107. The Commission submits that the interpretation of Article 5(6) of the Sixth VAT Directive is not dependent on the status of the recipient or his ability to deduct input tax. It also states that, as a practical matter, it may be that a company which receives samples or gifts is able to deduct input tax. In order for it to do so, however, it must have borne that tax – that is, the donor must have charged it the VAT on the samples or gifts.

108. I agree with this logic. In addition, it is difficult to see the point of the question. The assumption mentioned by the Commission – that is, charging VAT on samples or gifts of small value – seem rather far from commercial realities.

VIII — Conclusion

109. In light of the above I propose that the Court answer the questions posed by the referring court in the following way:

‘(1) “Applications for the giving of samples” in the second sentence of Article 5(6) of 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 means:

— any supply by a taxable person;

— for the purpose of promoting future sales of a product (being goods for VAT purposes);

— to an actual or potential customer or a person who, owing to his particular position, is able to influence the exposure to market of that product;

— of one or several items of goods that serve as examples of that product by retaining all the essential properties of the product as to its quality and characteristics, and thus enabling the recipient, his customers, or others receiving communications from the recipient to assess or test the nature, properties, and quality of the product.

(2) Member States may fix a ceiling for the monetary value of a "gift of small value" referred to in the second sentence of Article 5(6) of Sixth Council Directive 77/388, taking into account the general price and income level and other economic circumstances of that Member State, provided that the ceiling is not so low as to make Article 5(6) meaningless or inapplicable, or so high as to deviate from what "small value" might be understood to mean in common language, and if individual exceptions to the ceiling may be allowed in circumstances where that is justified by objective reasons. Applications for the making of gifts of small value in that provision means individual supplies by a taxable person. The Member States may not apply the ceilings referred to above cumulatively to several gifts made during a defined period of time.

(3) It is for the national court to determine who the recipient of an application within the meaning of the second sentence of Article 5(6) of the Sixth Council Directive 77/388 is, having regard to all the circumstances of the specific case. With regard to the VAT treatment of an application under the second sentence of Article 5(6) of this directive it is irrelevant whether or not the recipient of the application is entitled to deduct input tax.'