OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN delivered on 28 October 1987

My Lords,

This reference under Article 177 of the EEC Treaty is made in proceedings between the Apple and Pear Development Council ('the Council') and the Commissioners of Customs and Excise ('the Commissioners').

The Commissioners are responsible for the assessment of liability for, and the collecting of, VAT in the United Kingdom pursuant to the Finance Act 1972, as amended in particular by the Finance Act 1977.

The Council was established pursuant to the Industrial Organization and Development Act 1947 by the Apple and Pear Development Council Order 1966 (SI 1966, No 1579) and continued in being by the Apple and Pear Development Council Order 1980 (SI 1980, No 623). The latter, as subsequently amended, defined the Council's powers and functions at the times material to this reference. Those functions include promoting the production in England and Wales and the marketing of standard apples and pears, the definition of trade descriptions and research into many aspects of the growing and marketing of apples and pears; they are to be exercised 'in such manner as appears to them (the Council) to be likely to increase efficiency and productivity in the industry, to improve and develop the service that it renders or could render to the community and to enable it to render that service more economically' (Article 3 of the 1980 Order).

Its members consist, apart from independent members, of representatives of growers and persons employed in the industry and of persons with special knowledge of the marketing of apples and pears.

Growers in England and Wales of apples and pears for sale who occupy not less than two hectares of land planted with 50 trees or more are required by the Order to register with the Council and they can be required to furnish returns as to their production and sales.

By Article 9 of the 1980 Order 'For the purposes of enabling them to meet administrative and other expenses incurred or to be incurred in the exercise of their functions the Council may, with the approval of the Minister, impose an annual charge at a rate not exceeding' an amount prescribed (as amended from time to time) in respect of each hectare planted with trees, the growers being able to elect to pay a charge per 50 trees rather than per hectare where the density is less than 125 trees per hectare.

Growers with less land or less trees than the minimum prescribed pay no charge.

The charge has been imposed annually in the light of current conditions. It appears that the charges imposed in 1982 produced under this scheme UKL 585 000 which was spent largely on publicity and research, though obviously administrative costs had to be met.

The Council was also empowered to impose an additional charge to meet the costs of particular schemes adopted. Such a scheme was launched to promote the sale of standard top quality apples. This, known as 'the Kingdom Scheme', was a voluntary scheme and apart from an initial government grant was self-financing.

Under the Finance Act 1972 as amended, the supply of goods or services in the United Kingdom by a taxable person in the course of his business is subject to VAT unless that supply is an 'exempt supply' or is made otherwise than for a consideration. Tax paid on the receipt of goods or services is known as input tax: tax charged on the provision of goods and services is known as output tax. Inputs can be set off against outputs to the extent that the goods or services received are used or to be used for the purposes of a business carried on. If they are to be used partly for such purposes and partly for other purposes then the Commissioners must apportion such part of the input tax as is attributable to the taxable supplies.

Between 1973 and 1981 the Commissioners accepted that the Council was not liable for VAT in respect of the annual charges save as to those made in respect of the Kingdom Scheme, and that since the exercise of its functions in promoting the sale of apples and pears amounted to 'business activities', tax incurred on purchases for that purpose might be deducted or repaid as 'input tax', whether or not those expenses related to the Kingdom Scheme or to the general scheme. In 1981, however, the Commissioners changed their minds. They ruled that activities under the general scheme did not constitute business activities for the purposes of VAT so that input tax relating to such activities could not be repaid to the Council.

The matter came before a value-added tax tribunal which ruled that the Council carried on a business with regard to all its activities promoting the sale of apples and pears of the growers so that it could claim credit for all input tax.

That result was reversed by the Divisional Court of the High Court of Justice, whose decision was upheld by the Court of Appeal. The latter ruled that there was no consideration for the supply of services by the Council except as to the Kingdom Scheme and that accordingly there were no taxable supplies. Input tax paid on receipt of goods or services attributable to the general scheme could not, therefore, be deducted or repaid.

On appeal the House of Lords took the view that the first question was whether the charges under the general scheme constituted consideration for the purposes

of section 6 (2) (a) of the Finance Act 1972, as amended. This provides that 'Subject to [certain exemptions] "supply" in this Part of this Act includes all forms of supply, but not anything done otherwise than for a consideration'. Since the 1972 Act was amended in 1977 to give effect to the Sixth Council Directive (77/388/EEC) 'on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment' (Official Journal 1977, L 145, p. 1) it was considered necessary to ask:

'Does the exercise by the Apple and Pear Development Council of their functions pursuant to Article 3 of the Apple and Pear Development Council Order 1980, SI No 623 (as amended by the Apple and Pear Development Council (Amendment) Order 1980, SI No 2001), and the imposition on growers pursuant to Article 9 (1), of an annual charge for the purposes of enabling the Council to meet administrative and other expenses incurred or to be incurred in the exercise of such functions, constitute "the supply of ... services effected for consideration" within the meaning of Article 2 of the Sixth Council Directive of 17 May 1977? '

Article 2 (1) of the Sixth Directive provides:

'The following shall be subject to value-added tax:

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

The Council, supported by the Commission, contends that the charges paid by the growers under Article 9 of the 1980 Order constitute consideration for the supply of services by the Council to the growers within the meaning of the Directive. If that is right, output tax will be payable on such supply (which in many cases can be set off by the growers as input tax against their own output tax) but the Council will be able to set off against it the input tax on goods or services supplied to the Council.

The United Kingdom and the Federal Republic of Germany contend that the charges are not consideration for services. If that is right the Council will not charge tax on the sums levied under the general scheme but it will not be able to recover the input tax on services or goods supplied to it. In the result, it will be worse off than if it were liable for tax on the charges levied. The charge to growers would ultimately have to be increased to enable the Council to pay the VAT on goods and services supplied to it.

For there to be liability to tax there must be both a taxable transaction and a taxable person. There is a link between these two concepts as the Court's judgment in Case 89/81 (the *Hong-Kong Trade Development Council* case [1982] ECR 1277) shows, and a consideration of one may help in the resolution of the other in any particular case. They are, however, distinct concepts. The question raised here is not whether the Council is a taxable person but whether there is a taxable transaction. Does the exercise of the functions described and the payment of the charges imposed by the

Order constitute 'the supply of services effected for consideration'?

Consideration is not defined in the Sixth Directive as such, though paragraph 1 (a) of Article 11 (A) specificies that the taxable amount shall be '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'.

The Second Directive, which the Sixth Directive replaced as and when Member States brought it into operation, was in different terms. By Article 2 VAT was imposed on '(a) the supply of goods and the provision of services . . . by a taxable person against payment'. By Article 8 of the Second Directive the basis of assessment of the tax was to be '(a) in the case of supply of goods and of the provision of services, everything which makes up the consideration for the supply of the goods or the provision of services, including all expenses and taxes except the value-added tax itself'. By paragraph 13 of Annex A: 'The expression "consideration" means everything received in return for the supply of goods or the provision of services, including incidental expenses (packing, transport, insurance, etc.) that is to say not only the cash amounts charged, but also, for example, the value of the goods received in exchange or, in the case of goods or services supplied by order of a public authority, the amount of the compensation received'.

Article 2 is generally descriptive of the scope of the tax. The necessary characteristic of the transaction subject to VAT is that there should be a quid pro quo. Article 8 (read with paragraph 13 of Annex A) of the Second Directive and Article 11 of the Sixth Directive have the more precise function of defining how the taxable amount is to be assessed and what it is to include in particular cases.

The object of both directives was to harmonize the laws of the Member States relating to turnover taxes, to establish a common system and a uniform basis of assessment.. Each of the language versions must have been intended to have the same meaning and to achieve the same object. It would, therefore, be wrong to construe the phrase 'supply . . . effected for consideration' in the light of the technical meaning of the words in English domestic law, as it would equally be wrong to construe the other language texts by reference to their technical meaning in the appropriate domestic law. To give such technical meanings to the words would be capable of producing, if not likely to produce, diversity rather than harmonization. The words must thus be construed in their Community law context as a Community law phrase, regard being had to the different language versions.

As already noticed the phrase 'against payment' in Article 2 of the Second Directive was changed to 'for consideration' in Article 2 of the Sixth Directive. That change seems likely to have been made to make it clear that what is received in return for services does not necessarily have to be cash. If reference is made to the language

versions which were official at the time when the Second Directive was adopted (since the United Kingdom was not at that stage a member of the Community) it is to be seen that they provided in Article 2, of the French text, 'à titre onéreux', of the German, 'gegen Entgelt', of the Italian, 'a titolo oneroso', of the Dutch, 'onder bezwarende titel'.

The Dictionnaire *Littré* (1951) defines 'titre onéreux' as 'celui par lequel on acquiert une chose sous la condition d'acquitter certaines charges', *Petit Robert* (1979) as 'la condition d'acquitter une charge, une obligation'. Its opposite is 'à titre gratuit' and, as I understand it, the phrase denotes the obligation to give or the giving of, something in return for a benefit received as opposed to gratuitously. The Italian and Dutch texts, I understand, have similar meanings. 'Gegen Entgelt' is defined as 'against payment' *(Langenscheidt's* Dictionary 1979) as opposed to 'ohne Entgelt' which is 'free of charge'. 'Entgelt' is 'the performance which the parties regard as the economic equivalent for another performance' (*Die Struktur des vertraglichen Schuldverhältnisses im anglo-amerikanischen Recht,* Rheinstein, 1932, p. 100.)

Looking at these other versions it seems to me that the phrase 'against payment' subsequently adopted in the English version of the Second Directive fell to be construed more broadly than 'for money' and that it meant the same as 'for consideration' in the Sixth Directive adopted after the United Kingdom joined the Community. This latter conclusion is supported by the fact that in the other language versions the relevant words in Article 2 were the same in both the Second and the Sixth Directives, thus showing that no change in meaning was intended.

The English language version of the Second Directive in Article 8 speaks of 'the consideration for the supply' and defines it in more detail in paragraph 13 of Annex A; Article 11 of the Sixth Directive defines the taxable amount in terms of the consideration which has been or is to be obtained by the supplier from the purchaser and includes all taxes and duties and packing and other expenses.

It has been suggested in argument that it is necessary to carry over the definition of consideration in paragraph 13 of Annex A of the Second Directive to Article 2 of the Sixth Directive. Having regard to the different functions of Article 11 and Article 2 of the Sixth Directive, I am not satisfied that this a relevant or necessary exercise, though obviously if the supply is for a consideration, the full consideration will be that obtained by applying the rules in Article 11. It is sufficient for the purposes of Article 2 that the services should not be rendered gratuitously but should be for some form of payment. Ascertaining the precise value of the payment is a later exercise.

The difference between the functions of the Articles is shown by the other language versions. Article 8 of the Second Directive speaks of 'tout ce qui constitue la contre-valeur de la livraison', 'tutto ciò che compone il controvalore della cessione', 'alles was den Gegenwert für die Lieferung . . . bildet' in German to which, I

understand, the Dutch text is similar. The key words are then defined in Annex A. I give merely by way of example the French and German texts. 'Contrevaleur' is defined as 'tout ce qui est reçu en contrepartie de la livraison'; 'Gegenwert' as 'alles . . . was als Gegenleistung für die Lieferung . . . erhalten wird'. In Article 11 of the Sixth Directive the words used are simply 'contrepartie' and 'Gegenleistung'. There is thus no identity of language between Article 2 and the words defining the taxable amount in the later Article. It is only the English version which has the same term though used for different purposes.

At the end of the day, in view of the different purposes of the provisions and of these linguistic differences, I consider that Article 2 can be looked at alone, and the essential question is whether the payment of a statutory charge based on land holding or number of productive units, here trees, is to be treated as payment for the exercise of functions of the kind specified.

I find the arguments put forward by the Council and by the European Commission in favour of an affirmative answer, and by the United Kingdom and the Federal Republic in favour of a negative answer to the question referred by the House of Lords almost evenly balanced.

On the behalf of the former it can be said with force that the Council could not perform its functions unless the growers paid the levy. The sole purpose of the levy is to enable it to do so and the levy for the general scheme is almost the sole source of the Council's income. The growers pay for what they get and it is likely that the larger growers who pay the most will get the most benefit from the activities of the Council. There is a link between the concept of a taxable person (which the Council can be under Article 4 (5) of the Sixth Directive) and the supply of services for consideration. If the Council is to treated as a taxable person, it can be argued that it is likely that its activities constitute the supply of services for consideration.

There are, however, no less forceful arguments the other way and in the end I have come to the conclusion that these contrary arguments should prevail.

In the first place development councils of the kind in question are to be set up in the interests of the relevant industry as a whole and in the interest of the community as a whole. The 1947 Act itself empowers the minister to assign functions to increase efficiency or productivity in particular industries and to improve or develop the service that they render to the community. If regard is had to the details of Article 3 of the 1980 Order it is clear that the functions to be exercised (e. g. in the research to be done, in the promotion of production and marketing and the methods of labour utilization and of export, and in the better definition of trade descriptions) are in the interests of the industry as a whole and the service it renders to the community.

Secondly, it is to be noted that by Article 9 of the 1980 Order the purpose of the charge

is to enable the Council 'to meet administrative and other expenses incurred or to be incurred in the exercise of' the functions referred to in Article 3 which the Council is obliged to exercise. The charge is only made if the Council decides to impose it and if the minister approves. It seems likely that the charge will be imposed annually, though not necessarily certain that the proportion used for publicity, advertising and promotion should continue to constitute approximately two-thirds of total expenditure as apparently it does at present. The fact that the levy is obligatory may not be conclusive against it being consideration, but the absence of any consensual element in the payment and the lack of control by individual growers over what the Council does for them are pointers to the levy not being in any real sense a payment for particular services.

Thirdly, the essence of the supply of services for consideration is that the payment should be 'for' the services rendered. As the Court put it in Case 154/80 the *Dutch Potato Storage* case [1981] ECR 445, at p. 454: 'A provision of services is taxable within the meaning of the Second Directive, when the service is provided against payment and the basis of assessment for such a service is everything which makes up the consideration for the service; there must therefore be a direct link between the service provided and the consideration received'.

The need for a direct link is also to be seen, in relation to consideration under Article 8 of the Second Directive, in Case 222/81 (*Bausystem* v *Finanzamt München für Körperschaften* [1982] ECR 2527) and, in relation to the concept of a taxable person, in Case 89/91 *Hong-Kong Trade Development Council* (supra).

It seems to me that the payment here is only indirectly for the benefit, if any, received by a particular grower. Although, as is argued, it may well be that growers with larger holdings will pay more and receive more benefit from the improvement of the industry, and although small growers can be charged according to the number of trees and will pay less and may receive less benefit, there is no necessary correlation between size and benefit. The obligation is to pay towards the Council's expenses of improving the industry. It is not to pay for what is individually received.

It is possible for persons to pay the same amount for different degrees of benefit and for that payment to be consideration. Such a position seems more likely to indicate that the money paid is more in the nature of an across-the-board tax than a true payment for services.

Although I do not consider that it is necessary to be able to attribute particular parts of a consideration to particular services, since a direct overall charge for an overall service could be sufficient, I am not satisfied that the necessary reciprocity or direct link has been established between the payment and the services in this case.

In Case 15/81 (*Gaston Schul* [1982] ECR 1409, at paragraph 14) the Court recognized the distinction between 'a transaction' necessary for an internal supply under

which there is a supply of goods for valuable consideration and the mere importation of goods, itself a chargeable event 'whether or not there is a transaction and irrespective of whether the transaction is carried out for valuable consideration or free of charge'.

In this case (where what is in issue takes place within the territory of a Member State and importation is not involved) there is no transaction to which a particular payment can be related and indeed it is perfectly possible for some growers to be unable to point to services specifically supplied to them as opposed to the industry as a whole. Some brands of apples may not be advertised or promoted; the apple growers may get no benefit from the promotion of pears and conversely.

It does not seem to me that the obligatory payment of the levy and the obligatory discharge of statutory functions unrelated to individual growers constitute the necessary transaction let alone any form of bargain. The position seems to me to be very different in relation to the Kingdom Scheme where growers voluntarily pay for services directed to their specific products.

I do not consider that this position is affected by reference to Article 4 of the Sixth Directive. That article provides in paragraph 5 that State authorities and other bodies governed by public law (which I assume the Council to be or to be deemed to be) shall not be considered taxable persons in respect of the activities or transactions in which they engage as such public authorities, even when they collect dues, fees or payments connected with those activities or transactions, unless treatment of them as non-taxable persons would lead to significant distortions of competition. Similarly they are considered taxable persons in respect of activities listed in Annex D which include 'the transactions of agricultural intervention agencies in respect of agricultural products carried out pursuant to regulations on the common organization of the market in those products' and 'the activities of commercial publicity bodies'.

These provisions relate to the question whether someone is or is to be treated as a taxable person. If he is, that may indicate that what he does is the supply of goods or services for consideration. It does not, however, decide the question. If, as I have concluded, in a situation of the kind illustrated by the present case there is no such supply, then there is no liability to VAT even if the person involved in what has been done is a taxable person. In any event, the question whether the Council is a taxable person is not referred to this Court; it is a matter for the national court as to whether if the Council is not to be considered as a taxable person significant distortions of competition would arise. It does not seem to me to have been so far demonstrated in this case.

So far as Annex D is concerned it seems to me that the Council is plainly not an agricultural intervention agency, nor is it carrying out transactions pursuant to regulations on the common organization of the market.

Whether it is carrying out the activities of a commercial publicity body in regard to the kind of publicity information it engages in is once more a question for the national court. Even if it were, it seems to me that it would be necessary to consider what part of the levy related to those publicity activities as opposed to its other activities, such as, for example, research, which could not be said to be those of a commercial publicity body. Nor does Article 13 of the Sixth Directive (referred to by the Council) help in deciding the question. That article merely enables exemptions to be made. It contemplates that some activities carried out by public bodies and paid for pursuant to a statutory obligation may be, if not exempted, liable to VAT. It leaves open the essential question under Article 2 of the Directive.

Accordingly, I am of the view that the question referred by the House of Lords should be answered along the following lines:

'The phrase "the supply of . . . services effected for consideration" in Article 2 of the Sixth VAT Directive does not apply to the situation where a body set up by the legislation of a Member State exercises pursuant to that legislation the functions of improving the efficiency of production, keeping up the quality of the products and enhancing the sales of the products in a particular sector of agriculture and imposes on growers pursuant to that legislation an annual charge for the purpose of enabling it to meet administrative and other expenses incurred or to be incurred in the exercise of such functions.'

The costs of the parties to the main proceedings are a matter for the national court. The costs of the Commission and of the Member States which have submitted observations in these proceedings are not recoverable.