OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 6 March 2001 [1]

I — Introduction

1. In the instant case, the Bundesfinanzhof (Federal Finance Court), Germany has referred to the Court the question as to whether, under the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (hereinafter, 'the Sixth Directive'), [2] the taxable amount in respect of the supply of a bonus payable in kind, which is sent to the recipient in exchange for recruiting a new customer, includes not only the purchase price of the bonus but also the delivery costs.

II — Legal framework

A — *Community law*

2. Under Article 11A(1)(a) of the Sixth Directive, the taxable amount in respect of supplies of goods and services is, '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'.

3. Subparagraph 2 of this provision specifies various items that must be included in the taxable amount, including in particular under (b), 'incidental expenses such as commission, packing, transport and insurance costs charged by the supplier to the purchaser or customer. Expenses covered by a separate agreement may be considered to be incidental expenses by the Member States'.

B — *National law*

4. Paragraph 3 of the Umsatzsteuergesetz (Law on Turnover Tax) of 1980 (hereinafter, 'the UStG') specifies what transactions are subject to value added tax. Subparagraph 12 of this provision gives the following rule in relation to transactions of exchange: 'There is an exchange

1 — Original language: German.
2 — OJ 1977 L 145, p.1.

where the consideration for a supply consists in a supply. There is a transaction akin to an exchange where the consideration for another service consists in a supply or another service'.

5. Apart from that, Paragraph 10(2)(2) of the UStG, which relates to the calculation of the taxable amount in the context of transactions of exchange and transactions akin to exchange, provides as follows: 'In the case of exchanges (first sentence of Paragraph 3(12)), transactions akin to exchanges (second sentence of Paragraph 3(12)) and in respect of surrender in lieu of payment, the value of one transaction constitutes the consideration for the other transaction'.

III — Facts and proceedings

6. The plaintiff in the proceedings, Bertelsmann AG (hereinafter, '*Bertelsmann*'), is a company controlling several other companies which are engaged in the business of book and record clubs. In the years 1985 to 1990, the Bertelsmann companies gave bonuses payable in kind, such as books, records and bicycles, to long-standing customers who recruited new customers as new members. These bonuses for introducing members were obtained by the companies from third-party suppliers and were sent to the introducers at the companies' own cost.

7. The Finanzamt (Tax Office) Wiedenbrück, the defendant in the proceedings, included in the taxable amount for the purposes of the tax assessments for the years 1985 to 1990 not only the purchase price of the bonuses but also the delivery costs paid by the companies.

8. As *Bertelsmann* considered that the inclusion in the taxable amount of the delivery costs of the supply of the bonuses infringed the Sixth Directive, it raised a 'leap-frog' action (Sprungklage) in the Finanzgericht (Finance Court). The Finanzgericht dismissed the action on the ground that in the assessment to be undertaken for the purpose of determining the taxable amount of the transactions akin to exchange in accordance with Paragraph 10(2)(2) of the UStG, account must be taken not only of the purchase price of the bonuses but also of the delivery costs for the supply of the bonuses. It was moreover the case, therefore, that, contrary to the submission of the plaintiff, there was no breach of Article 11A(2)(b) of the Sixth Directive either.

9. *Bertelsmann* appealed against the judgment of the Finanzgericht to the Bundesfi-

nanzhof on the ground that the interpretation placed on Paragraph 10(1) and (2)(2) of the UStG by the Finanzgericht infringed Article 11A(1)(a) and (2)(b) of the Sixth Directive and was also irreconcilable with the judgment of this Court in the case of *Empire Stores*,[3] in which it was decided that only the purchase price of the bonuses, but not, however, the incidental expenses, should be included in the taxable amount.

taxable amount in respect of the supply of a bonus payable in kind, which is sent to the recipient in exchange for recruiting a new client, includes not only the purchase price of the bonus but also the delivery costs?

IV — Arguments of the parties

10. Since the Bundesfinanzhof did not consider the question as to the inclusion of incidental expenses in the taxable amount as it arose in the instant case of transactions akin to exchange to have received a clear answer in the cases *Naturally Yours Cosmetics*[4] and *Empire Stores*, it stayed the appeal proceedings and by order of 5 August 1999 referred the following question to the Court for a preliminary ruling:

11. Is Article 11A(1)(a) of the Sixth Council Directive of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (77/388/EEC) to be interpreted as meaning that the

12. *Bertelsmann* submits that the taxable amount for the supply of a bonus that is sent to the recipient in exchange for recruiting a new customer includes only the purchase price of the bonus, and not the delivery costs. This follows from the judgment in *Empire Stores*, in which the Court held that the purchase price alone, and not any other amount such as, for example, the purchase price plus delivery costs, determined the taxable amount. Although the case of *Empire Stores* concerned a mail-order business and delivery costs were incurred as a necessary consequence of that, the Court did not include them in the taxable amount.

Bertelsmann argues furthermore that only taking into account the purchase price under Article 11A(1)(a) of the Sixth Directive is also justified as a matter of substance, because the instant case concerns a

3 — Case C-33/93 *Empire Stores* [1994] ECR I-2329.

4 — Case C-230/87 *Naturally Yours Cosmetics* [1988] ECR 6365.

transaction akin to an exchange, in which the consideration for the supply of bonuses that functions as the taxable amount is, according to *Empire Stores* and *Naturally Yours Cosmetics*, a subjective value, that is to say, the consideration actually received, being in the instant case the supply of the introduction. As the subjective value can only be determined with difficulty, only the purchase price of the bonuses ought to be taken into account. In this way, bonuses are given not just for recruiting new customers: they also serve to cultivate and maintain the existing customer base. *Bertelsmann* also points out that mail-order businesses do not necessarily on-charge postage costs and most indeed do not charge delivery costs, at least on orders of more than a specified amount.

Finally, *Bertelsmann* argues that delivery costs are not to be taken into account as incidental expenses under Article 11A(2)(b) of the Sixth Directive either, because in the instant case it incurs them itself as the supplier of the service and does not charge them to its consumers, the existing customers who do the recruiting.

13. The other participants in the proceedings — the *German Government*, the *United Kingdom Government* and the *Commission* — contend, by contrast, that, in short, the taxable amount for the bonus includes the delivery costs as well as the purchase price.

14. The *Commission*, like *Bertelsmann*, contends that Article 11A(2)(b) of the Sixth Directive, which must be considered first, [5] is not applicable.

Article 11A(1)(a), which, according to the Commission, is alone determinative, points to the 'consideration' in connection with the taxable amount. This concept must be interpreted in conformity with the judgments in *Naturally Yours Cosmetics*, *Coöperatieve Aardappelenbewaarplaats* [6] and *Empire Stores*. According to the Commission, this case-law decides that the following are the requirements for determining the taxable amount corresponding to the value of the service: first, the existence of a direct link between the supply of the goods and the supply of the service provided as consideration; second, the possibility of expressing the value of the service received in a monetary amount; third, the subjective value of the consideration is to be used as the taxable amount, since the taxable

5 — For this analysis, see Case C-126/88 *Boots Company* [1990] ECR I-1235.

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

amount must correspond to the consideration actually received.

According to the *Commission*, the first two criteria are, in the light of the decision in *Empire Stores*, fulfilled in the instant case. The recruitment of customers is the consideration within the meaning of Article 11A(1)(a) of the Sixth Directive for the supply of the bonus.

As regards the determination of the subjective value of the consideration — the third criterion — the sole determining factor is the expense the supplier incurred in order to receive the service sought in the exchange in return for his supply. It follows from the decision in *Naturally Yours Cosmetics* that this expense includes all costs that the supplier has to incur in order to attain this objective, including, in the instant case, the delivery costs borne by the supplier.

Furthermore, the *Commission* argues that in the case of *Empire Stores*, the Court, because of the way the question was formulated, did not explicitly rule on the inclusion of delivery costs, and that its judgment therefore does not gainsay the Commission's contention. On the contrary, what undoubtedly does emerge from the judgment is that such ancillary services are to be included in the taxable amount.

15. The *German Government* and the *United Kingdom Government* agree in substance with these submissions of the *Commission*.

16. The *German Government* further submits, referring to the case-law of the Bundesfinanzhof, that the consideration for the successful recruitment of customers consists of a principal supply (the bonus) and an ancillary supply (the delivery), such that the requisite direct link also exists between the supply of the introduction and the delivery. This submission finds support in the judgment of the Court in *Card Protection Plan*,[7] from which it appears that an ancillary service must be treated in the same way as the principal service. What is due is a unitary consideration and it would be unrealistic, in the legal analysis, to make an 'artificial' distinction between the supply of delivery and the transfer of the object.

That merger with the principal supply means that the same measures of value are to be applied to the supply of the delivery as to the supply of the bonus. For the supply of the delivery there must also be determined a value that the dispatcher attributes to it, and, according to the judgment in *Empire Stores*, this value must

7 — Case C-349/96 *Card Protection Plan* [1999] ECR I-973.

correspond to the costs incurred by the person making the delivery.

17. Finally, the *German Government* and the *United Kingdom Government* also contend that it is necessary to include the delivery costs on the basis of the principle that value added tax must be levied in a manner that is neutral in its effects on competition and non-discriminatory. Otherwise, the result would be an end use that was not taxed. Value added tax must in economic terms apply as if the person who made the introduction received the bonus, including its delivery, in return for a monetary payment that covered the delivery costs as well.

18. According to the *United Kingdom Government*, the subjective value of the supply of the introduction for the taxable person is comprised of the acquisition and the delivery costs, the aggregate of which is therefore the taxable amount. If one were, in contrast to this, to accept the argument of *Bertelsmann*, the taxable amount would not reflect the whole of the subjective value of the consideration given by the taxable person for the supply of the introduction. This would distort the value added tax regime under the Sixth Directive and would provide an opportunity for tax avoidance in supplying goods, in that the taxable amount would be fixed too low.

19. In respect of the taxable amount, the *United Kingdom Government* further argues that Article 11A(2)(b) of the Sixth Directive confirms that transport and dispatch costs are to be included and disputes to that extent the view *Bertelsmann* puts forward of the judgment in *Empire Stores*, a view which, it claims, is not reconcilable with that provision. In *Empire Stores* the Court was only asked how to value a supply of goods provided as the consideration for the supply of services, whereas the present case concerns a composite supply, namely, the supply of the bonuses and their delivery.

While it is for the national court to decide whether there is a composite supply, it is none the less clear on the facts set out by that court that there is such a supply here. Accordingly, the taxable person supplies goods that are to be valued in accordance with the principles in *Empire Stores*. The taxable person moreover supplies its existing customers with the service of the delivery of these goods. It follows that it is the combined value of the two elements of the composite supply that equals the taxable amount.

V — Analysis

20. The question in the instant case is whether the costs of delivery of bonuses, that delivery being itself a supply of a service, are to be included in the taxable

amount under Article 11A of the Sixth Directive where the only possible consideration is the supply of a service.

21. Before Article 11A(1)(a) can be considered, it is necessary, in accordance with the judgment of the Court in *Boots Company*, first to examine the applicability of Article 11A(2)(b). [8]

22. The delivery costs in the instant case are indeed transport costs within the meaning of Article 11A(2)(b), but that provision requires the supplier to charge them to the purchaser or customer. This rule would appear to serve two purposes. In the first place, it is intended to ensure that what is included in the taxable amount is only the value that the taxable person actually receives, without further qualification; in the second place, a particular act is required of the taxable person, as is indicated by the word 'charged'.

23. Since in the instant case *Bertelsmann* does not 'charge' the transport costs to the recipient, Article 11A(2)(b) of the Sixth Directive cannot be the legal basis for calculating the taxable amount.

24. Under the Sixth Directive, the taxable amount in the case of the supply of goods or services is the consideration actually received for that supply. Article 11A(1)(a) provides that what is included is, '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'. In respect of the service of delivery, what must be considered is whether the person making the delivery has received consideration for it and, if so, in what amount. If the introduction is not the consideration for the delivery as well, then the latter is a gratuitous service which is not a taxable supply within the meaning of Article 2(1) of the Sixth Directive and which is furthermore irrelevant to the taxable amount under Article 11A(1)(a).

25. In respect of the inclusion of delivery costs, all the parties made submissions on *Empire Stores*, though the effect of the judgment was disputed.

26. In the first place, it must be noted that according to the documents in the main

8 — Case C-126/88 (above, footnote 5), paragraph 16.

proceedings in *Empire Stores* the parties did not make submissions as to the delivery of the bonuses or the costs of delivery, but only as regards the bonuses themselves. Whereas the plaintiff only included the cost price to it of the bonuses, the defendant tax authority used the price that the plaintiff would have charged for the articles in question if they had been offered in its sales catalogue. [9]

27. It is against this background that the first question put to the Court in *Empire Stores* is to be understood. What the national court wanted to know by this question was what represents the consideration for the supply of the bonuses if it is not the amount in monetary terms to be paid to the supplier for goods ordered from his catalogue. It was only the second question that referred to the taxable amount and specified a number of alternatives: the purchase price paid, the hypothetical sale price or 'some other and if so what amount'.

28. Where the Court refers in its judgment in *Empire Stores* to the 'supply' of goods, it refers exclusively to the supply of the object. Because the Court had not up to that point considered the delivery, it had no reason to speak itself on the costs of delivery.

29. Therefore, the Court has to this extent spoken neither for nor against the inclusion of the costs of delivery in the taxable amount.

30. What must next be considered is the question as to what, in the instant case, is to be regarded as the value of the consideration that serves as the taxable amount. As the Court held in its judgment in *Empire Stores*, referring to its judgment in *Naturally Yours Cosmetics*, 'the consideration for a supply of goods may consist in a provision of services, and so constitute the taxable amount within the meaning of Article 11A(1)(a) of the Sixth Directive in respect of such supply, if there is a direct link between the supply of goods and the provision of services and if the value of those services can be expressed in money'. [10] As the Sixth Directive treats goods and services in the same way, these criteria must also apply to services.

31. Therefore, the first point to examine is whether the introduction, that is, the service supplied by the existing customers, is directly linked to the bonus and its delivery. As appears from the judgment in *Naturally Yours Cosmetics*, a service can in principle be the consideration for a supply of goods.

9 — See Case C-33/93 (above, footnote 3), paragraph 5.

10 — Judgment in Case C-33/93 (above, footnote 3), paragraph 12.

32. As the Court has consistently held, two supplies are directly linked where they stand as regards one another in such a way that one supply is conditional on the other. [11]

33. As the Court has already held in *Empire Stores*, there is a direct link between the supply of a bonus and the activity of recruitment. [12]

34. What has still to be clarified is whether the supply of the delivery is also made for a consideration, that is to say, whether it too is directly linked to the supply of the introduction.

35. In that regard it may be assumed that the delivery is an ancillary supply of a principal supply consisting of the bonus. According to the judgment in *Card Protection Plan*, a service must, 'be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied'. [13] In this way, the bonus and delivery constitute a single supply, the consideration for which takes the form of the supply of an introduction.

36. Once the supply of the introduction has been effected, the existing customer is entitled to the bonus as well as its delivery. Therefore, there is a direct link not only between the bonus and the introduction, but also between the delivery and the introduction.

37. The inclusion of delivery is also suggested by the commercial considerations that are fundamental to value added tax. For in the commercial world it must generally be assumed that supplies are not provided gratuitously.

38. In conclusion it must therefore be affirmed that the value of the bonus and the value of the delivery together comprise the taxable amount within the meaning of Article 11A(1)(a).

39. As the requirement that the value of the service, in this case the delivery, is capable of being expressed in money is satisfied, what remains to be determined is the subjective value of the consideration, which

11 — See Case C-258/95 *Fillibeck* [1997] ECR I-5577, paragraph 16 and Case C-16/93 *Tolsma* [1994] ECR I-743, paragraph 13.

12 — See the judgment in Case C-33/93 (above, footnote 3), paragraph 16.

13 — Judgment in Case C-349/96 (above, footnote 7), paragraph 30.

is, according to the judgment in *Naturally Yours Cosmetics*, decisive. [14]

40. According to the judgment in *Empire Stores*, this subjective value is the value 'which the recipient of the services constituting the consideration for the supply of goods attributes to the services which he is seeking to obtain'. This value 'must correspond to the amount which he is prepared to spend for that purpose'. [15]

41. In the first place, one must start from the position of the recipient of the service in order to determine what the supplier of the service has actually given as consideration. In the second place, the basis of the value of this consideration is in principle at least the expenses of the supply.

42. Moreover, this approach is not alien to the Sixth Directive. It is, for example, applicable to the supply of services that are not provided in return for payment of a monetary amount, that is to say, for so-called equivalent services within the meaning of Article 6(2). In respect of these, Article 11A(1)(c) provides that the taxable amount is the amount of the expenses incurred by the taxable person in providing the service.

43. In the instant case, the expenses of delivery, that is to say, the delivery costs, are to be ascribed to the supply of the delivery.

44. In support of this finding, there is, finally, the view put forward by the *German Government* and the *United Kingdom Government* that leaving delivery costs out of the taxable amount would breach the principle that the levy of value added tax must be neutral in its effects on competition and non-discriminatory. For the delivery of a bonus in exchange for which the recipient has supplied a service is not, in a question of tax, to be treated differently from the delivery of goods for which the recipient has paid. [16]

45. Article 11A(1)(a) of the Sixth Directive is therefore to be interpreted as meaning that the taxable amount in respect of the supply of a bonus payable in kind, which is sent to the recipient in exchange for recruiting a new customer, includes not only the purchase price of the bonus but also the delivery costs.

14 — Judgment in Case C-230/87 (above, footnote 4), paragraph 16.

15 — Judgment in Case C-33/93 (above, footnote 3), paragraph 19.

16 — On the point that in Article 11A(1)(a) no distinction is made between consideration in the form of monetary payments and consideration in the form of the supply of goods, see the judgment in Case C-330/95 *Goldsmiths* [1997] ECR I-3801, paragraph 23: '[S]ince the two situations are, economically and commercially speaking, identical, the Sixth Directive treats the two kinds of consideration in the same way'.

VI — Conclusion

46. For these reasons, I suggest that the question referred by the national court should be answered as follows:

Article 11A(1)(a) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment is to be interpreted as meaning that the taxable amount in respect of the supply of a bonus payable in kind, which is sent to the recipient in exchange for recruiting a new customer, includes not only the purchase price of the bonus but also the delivery costs.