OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 27 September 2001 [1]

I — Introductory remarks

1. In the present case the VAT and Duties Tribunal, Manchester, refers to the Court the question of whether a game of chance constitutes a taxable transaction for the purposes of value added tax law, in particular the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover tax — Common system of value added tax: uniform basis of assessment ('the Sixth Directive'), [2] even if it is not based on a legally enforceable transaction, and if so, how the taxable amount is to be calculated.

II — Facts, main proceedings and questions referred for a preliminary ruling

2. Town and County Factors Ltd ('Town & County') is registered for value added tax (VAT) in the United Kingdom as the representative member of a group of companies. That group also includes Vernons Games Ltd ('Vernons Games').

3. Vernons Games is involved in the organisation of weekly 'Spot the Ball' competitions. In the period from June 1994 to November 1995 ('the relevant period') Vernons Games organised competitions of the kind described in points 4 to 8 below.

4. On the entry forms for each competition were printed (a) a copy of a photograph taken during a football match from which the ball had been blanked out, (b) the rules of the competition, and (c) a list of the prizes. A competitor could mark up to 900 crosses on the photograph to indicate where, in his judgment, the centre of the football was most likely to be; the entry fee varied according to the number of crosses. The competitor completed the entry form and sent it to Vernons Games with the appropriate entry fee. A panel of three retired professional footballers decided on the basis of the retouched photograph

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

where the ball was most likely to be. The competitor the centre of one of whose crosses was closest to the centre of the ball thus located won the first prize; the competitor the centre of one of whose crosses was second nearest won the second prize, and so on.

5. The rules of each competition included *inter alia* the following provisions:

'1. In entering this competition, you agree to abide by all the Rules and Conditions. You agree that this transaction is binding in honour only and that any collector through whom your entry is submitted is your agent. You further agree with all such collectors that any transaction between you and them is binding in honour only.

...

4. ... The prizes, or in the event of a tie, an equal share in their cash value, both as stated above will be awarded to the successful entrants in order of the accuracy of their entries in the opinion of the panel, until all prizes have been awarded.

5.[3] If the panel determines that any one or more entries are completely accurate, the Jackpot of £200 000 worth of cash and prizes will be awarded (in place of the stated First Prize) to the entrant or shared equally between the entrants concerned.

...'

6. Under English law, the wording in rule 1 'this transaction is binding in honour only' ('the "binding in honour only" provision') excluded the existence of a legal relationship between the competitors and Vernons Games, with the consequence that an action brought by a competitor against Vernons Games to have his entry processed in accordance with the rules or to have a prize he had won paid or transferred to him would have been dismissed.

7. The receipts from each competition can be predicted to a very high degree of accuracy; the amount of the prizes offered for each competition is fixed accordingly. The prizes consist of money, goods and services. The value of the jackpot mentioned in rule 5 can exceed the amount of the entry fees received for the relevant competition, and this sometimes happened. In the past the entry fees for a competition were never insufficient to cover the prizes won, nor did the organiser of the competition ever refuse to pay or transfer a prize to the person who had won it.

3 — Introduced for a short period only.

8. Although there was nothing in the rules or anywhere else to oblige Vernons Games to pay or pay for the prizes out of the entry fees or any other specific moneys, in practice this was done — out of the entry fees — for every competition. Vernons Games did not, either under the terms or by the commercial reality of the transaction, have to deal with the entry fees in any specific manner or otherwise than as its own funds.

9. By letter of 28 March 1995 the Commissioners of Customs and Excise ruled that Town & County was liable to account for VAT on the full amount of the entry fees for the accounting periods contained in the relevant period, and not, as it contended, on the amount of the entry fees less the amount or value of the prizes.

10. Town & County challenged that ruling. In its decision of 27 August 1996 the VAT Tribunal held that:

(a) in the light of paragraph 14 of the judgment of the Court of Justice in Case C-16/93 *Tolsma* [1994] ECR I-743 the 'binding in honour only' provision, by negativing the existence of a legal relationship between the competitor and Vernons Games, raised a doubt whether a supply effected for consideration within the meaning of Article 2(1) of the Sixth Directive was made by Vernons Games to each competitor ('the *Tolsma* question');

(b) if there was such a supply, then, in the light of paragraphs 8 to 13 of the judgment in Case C-38/93 *Glawe* [1994] ECR I-1679, the taxable amount under Article 11A(1)(a) of the Sixth Directive was the full amount of the entry fees received and not the amount remaining after payment of or for the prizes ('the *Glawe* question');

(c) the need for a reference to the Court on the *Tolsma* question was to be considered at a further hearing.

11. The decisions made after that further hearing on the need for a reference were appealed to the High Court of Justice, which held that the *Tolsma* and *Glawe* questions should be referred to the Court and the case remitted to the tribunal to make the reference.

12. The VAT and Duties Tribunal, Manchester, accordingly asks the Court for a preliminary ruling on the following questions:

'(1) On a proper interpretation of Council Directives 66/227/EEC of 11 April 1967 and 77/388/EEC of 17 May 1977, in particular Articles 2(1) and 6(1) of the latter, and having regard to the case-law of the Court, in particular Case C-16/93 *Tolsma* v *Inspecteur der Omzetbelasting Leeuwarden* [1994] ECR I-743, is a transaction which is agreed by the parties thereto to be "binding in honour only" (and therefore unenforceable under domestic law by legal proceedings) capable of being a taxable transaction for the purposes of value added tax?

(2) If the answer to Question 1 is in the affirmative, then, on a proper interpretation of the said directives, in particular Article 11A(1) of the latter, and having regard to the case-law of the Court, in particular Case C-38/93 *Glawe* v *Finanzamt Hamburg-Barmbek-Uhlenhorst* [1994] ECR I-1679, is the taxable amount for the purposes of value added tax in respect of the services of organising a competition supplied by the organiser to entrants to the competition in return for the entry fees paid by the entrants —

(a) the amount of the entry fees, or

(b) the amount of the entry fees less the amount or value of the prizes given to the successful entrants, or

(c) some other and if so what amount?

Alternatively, if those services are correctly to be regarded as supplied by the organiser to each entrant in return for the entry fee paid by that entrant, is the taxable amount in respect of each supply —

(a) the amount of that entry fee, or

(b) the amount of that entry fee less a proportionate part of the amount or value of the prizes given to the successful entrants, or

(c) some other and if so what amount?'

III — Legal background

13. Article 2 of the Sixth Directive reads:

'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;

2. the importation of goods.'

14. Article 6(1) of the Sixth Directive reads:

'"Supply of services" shall mean any transaction which does not constitute a supply of goods within the meaning of Article 5.

Such transactions may include *inter alia*:

— assignments of intangible property whether or not it is the subject of a document establishing title,

— obligations to refrain from an act or to tolerate an act or situation,

— the performances of services in pursuance of an order made by or in the name of a public authority or in pursuance of the law.'

15. Article 11A(1)(a) of the Sixth Directive reads:

'The taxable amount shall be:

(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the cus-

tomer or a third party for such supplies including subsidies directly linked to the price of such supplies'.

16. Article 13B reads, in part:

'Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:

...

(f) betting, lotteries and other forms of gambling, subject to conditions and limitations laid down by each Member State...'.

IV — The first question

A — *Submissions of the parties*

17. *Town & County*, the appellant in the main proceedings, starts by observing that the concept of consideration in Articles 2 and 11 of the Sixth Directive is a concept of Community law, and must therefore be applied uniformly throughout the Community. Moreover, according to the Opinion of Advocate General Jacobs in *Glawe*, the entire legal and factual setting must be considered, which in the present case means having regard to the structure of the competition, which is typical of games of chance.

18. Town & County considers that the agreements at issue, whose particularity is that they give rise to a debt 'binding in honour only', are not subject to VAT. As follows from the *Tolsma* judgment, for there to be a supply of services there must be a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance.

19. In contrast to the *Tolsma* test, no legal relationship is created here between the competitor and the collector or between the competitor and Town & County. That corresponds to the national case-law on agreements 'binding in honour only', according to which such agreements produce no legal effects and are not enforceable by legal proceedings, and thus give rise to no rights or liabilities.

20. The arrangement at issue thus belongs to a special category of cases where, despite the commercial aspect, the necessary attributes of consideration or legal enforceability are absent, that is, those involved are aware that no legal attributes are to be attached to the arrangements.

21. Town & County concludes that in those circumstances there cannot be a transaction within the meaning of VAT law and the organisation of the 'Spot the Ball' competition is therefore outside the scope of VAT.

22. The *United Kingdom Government* states that if an agreement between two persons contains a 'binding in honour only' clause, all that means is that the parties have decided that their relationship is not to be enforceable by the courts. It does not mean, however, that there is no legal relationship at all.

23. The present case differs from *Tolsma* in that the clause was agreed between the organiser and the competitor when they entered into the agreement on the basis of which a supply was made for consideration. In *Tolsma*, by contrast, no legally recognisable tie was created, and there was no transaction as in the present case.

24. The United Kingdom Government considers that it suffices for VAT purposes that there is a legally recognisable relationship between the supplier and the recipient of the service pursuant to which the supplier makes a (taxable) supply for consideration. Whether it is legally enforceable is not relevant, however. Any other interpretation of the Sixth Directive would run counter to both the case-law of the Court and the principle of fiscal neutrality, and would be an open invitation to tax avoidance.

25. The United Kingdom Government further submits that if, in accordance with the Court's case-law, even illegal transactions, which in many legal systems are not legally enforceable, are subject to VAT on the basis of the principle of fiscal neutrality, that must also be the case with a transaction such as the present one.

26. Finally, application of the Sixth Directive may not depend on legal enforceability for the further reason that enforceability of debts may vary from Member State to Member State, which would lead to unjus-

tified disruption of uniform tax treatment in the Community.

27. In the United Kingdom Government's view, the first question should therefore be answered in the affirmative.

28. The *Commission* too considers that a transaction such as that at issue cannot be outside the scope of VAT because it is not enforceable in the courts. There is a clearly defined transaction with a *quid pro quo*, and for Article 2 of the Sixth Directive to be applicable what matters is only whether consideration has been agreed, not whether there is legally enforceable consideration.

29. Moreover, the Commission doubts whether in English law the 'binding in honour only' provision does in fact exclude any legal relationship between the parties involved.

30. By contrast, in the *Tolsma* case there was no agreement, not even one binding in honour only, and no consideration was paid for a defined service.

31. The Commission also observes that the view taken by Town & County would have the result that in many Member States various gambling transactions would fall outside the scope of VAT, without any need for an exception as provided for in Article 13B(f) of the Sixth Directive. In several Member States such transactions cannot be enforced in the courts.

B — *Opinion*

32. By its first question the VAT and Duties Tribunal seeks essentially to know whether a transaction may constitute a taxable transaction within the meaning of the Sixth Directive even if, because of a 'binding in honour only' provision, under national law it does not give rise to any legally enforceable debt.

33. It should be stated to begin with that the Second Council Directive 67/227/EEC of 11 April 1967, referred to in the first

question, need not be considered in the present case, since it was no longer in force at the time when the transactions at issue were effected. As will become clear below, it is also unnecessary in answering the first question to interpret Article 6(1) of the Sixth Directive, referred to by the tribunal, inasmuch as that provision merely defines the term 'supply of services' for the purposes of the directive.

34. Under Article 2(1) of the Sixth Directive, 'the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such' is subject to VAT. It is thus characteristic of such a taxable transaction that a supply of services or goods may be attributed to a consideration in such a way that the supply is to be regarded as made 'for consideration'.

35. On this point, the Court has held *inter alia* in the *Aardappelenbewaarplaats*,[4] *Apple and Pear*[5] and *Naturally Yours Cosmetics*[6] cases that the concept of a supply for consideration within the meaning of Article 2(1) presupposes the existence of a 'direct link' between the supply made and the consideration received. Only if that connection between the supply and the consideration exists can there be a supply for consideration and a taxable transaction.

36. In *Tolsma* the Court refined that conclusion by holding that a supply is made 'for consideration' and so is taxable only 'if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient'.[7]

37. In the light of Article 2 of the directive and the case-law of the Court cited above, that criterion of 'legal relationship' is not to be understood in isolation as meaning a particular specific legal characteristic which a transaction must display. The 'legal relationship' concerns rather the link between supply and consideration.

4 — Case 154/80 *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445, paragraph 12.

5 — Case 102/86 *Apple and Pear Development Council* [1988] ECR 1443, paragraph 12.

6 — Case 230/87 *Naturally Yours Cosmetics* [1988] ECR 6365, paragraph 11.

7 — Case C-16/93 *Tolsma* [1994] ECR I-743, paragraph 14.

38. Whether there is a 'legal relationship' in the *Tolsma* sense cannot depend, moreover, on the presence of specific legal characteristics, in particular contractual or procedural ones, such as enforceability in legal proceedings. Since the conditions for the existence and content of legal relationships vary according to national legal systems, that would also be incompatible with the principle of fiscal neutrality and the objective of harmonisation of VAT. Otherwise the inclusion of a 'binding in honour only' clause could open the way to tax evasion.

39. All that need be examined is whether the components of reciprocal performance are exchanged in the framework of agreements — even ones that are binding in honour only — from which it is apparent that there is a direct link between them.

40. In the *Tolsma* case there were no agreements of any kind whatever which might have created a link between service and payment sufficient for it to be possible to speak of a transaction 'for consideration' within the meaning of Article 2 of the Sixth Directive: the 'provider of the service' (in that case a street musician) admittedly received certain sums 'for' his service, but the 'recipients of the service' paid them purely voluntarily and in principle received the service regardless of their 'consideration'. [8]

41. In contrast to the *Tolsma* case, in cases such as that in the main proceedings there is indeed a type of agreement under which the entry fee is paid *for* the service provided by the organiser of the competition. To be able to take part in the competition, the competitor must accept the rules imposed by the organiser and undertake to comply with all the terms of the agreement, including the rules of the competition. Only if the contestant — on the one hand — submits the entry form under those conditions and pays the corresponding fee can he — on the other hand — take part in the competition and be given a chance of winning a prize.

42. Since the service and the payment are exchanged in the framework of agreements from which it is apparent that there is a direct link between them, so that they satisfy the 'for consideration' criterion in Article 2 of the Sixth Directive, there is in any case a 'legal relationship' in the sense of the *Tolsma* judgment. The exclusion of legal enforceability of the agreements by the 'binding in honour only' clause is thus not material.

43. Finally, as the United Kingdom Government submits, it may be deduced from

8 — Ibid., paragraph 17.

the Court's case-law to the effect that even illegal transactions, which in many legal systems are not legally enforceable, may be subject to VAT [9] that this must apply all the more in the case of unenforceable but legal transactions such as that at issue in the main proceedings.

44. There is therefore a 'legal relationship' even in the case of an agreement which is not legally enforceable.

45. The answer to the first question must therefore be that under the Sixth Directive, in particular Article 2(1), a transaction which the parties agree to be 'binding in honour only' (and therefore under national law cannot be enforced in the courts) may in principle constitute a taxable transaction for the purposes of VAT.

V — The second question

46. The second question refers expressly only to the organising of a competition, but as what is involved is a game of chance, that also includes the offering of a chance to win.

A — *Submissions of the parties*

47. *Town & County* submits that the service it supplies to the competitors is limited to the organising of a competition, and it merely provides the framework within which the competition can take place. The transaction with the competitor is to be regarded as 'betting' or 'gambling' within the meaning of Article 13B(f) of the Sixth Directive, and must be exempt in principle from the tax in application of that provision. The United Kingdom customs authorities evidently seek to tax these transactions not because they cannot be regarded as 'betting' or 'gambling' but because they rely on the discretion allowed to the Member States to tax certain transactions even though they would otherwise be exempt under Article 13B(f) of the Sixth Directive.

48. Town & County further submits that the structure of the transaction — whether they are gambling transactions or at least

9 — Case C-283/95 *Fischer* [1998] ECR I-3369.

transactions close thereto — must be taken into account in assessing the consideration.

49. In this connection, it refers to the factual similarity with the transactions considered in the *Glawe* [10] and *Fischer* cases.

Town & County says that in *Glawe* both the Court and the Advocate General concluded that the operator was to be taxed not on the basis of the entire amount of the coins put into the slot machines but only on that proportion which he could keep for his own use and did not pay out to the players as winnings.

50. Town & County also submits, finally, that the *Glawe* and *Fischer* judgments were decided on the basis of general principles of VAT, in particular the principle that the consideration should be the amount actually received by the taxable person and no greater amount. That view is confirmed by the approach adopted by the Court in the *Argos*, [11] *Elida Gibbs* [12] and *First National Bank of Chicago* [13] cases.

10 — Case C-38/93 *Glawe* [1994] ECR I-1679.

11 — Case C-288/94 *Argos Distributors* [1996] ECR I-5311.

12 — Case C-317/94 *Elida Gibbs* [1996] ECR I-5339.

13 — Case C-172/96 *First National Bank of Chicago* [1998] ECR I-4387.

51. Town & County thus proposes, in conclusion, that the answer to the second question should be that the taxable consideration it receives for the service — that is, organising the Spot the Ball competition for the competitors — corresponds to the amount of the entry fees paid by the competitors less the amount or value of the prizes paid out to the successful competitors as part of the competition.

52. The *United Kingdom Government* submits that in the light of the wording of Article 11A(1) of the Sixth Directive, for the organisation of a competition such as the present one, the taxable amount consists of the consideration paid by each competitor to the organiser. The Sixth Directive does not permit the taxable amount to be reduced by the amount or value of the prizes paid out to the successful competitors (or a proportionate part thereof).

53. In the Government's opinion, the *Glawe* judgment is not applicable to the present case, because no part of the fees paid by the competitors is withheld by law from the disposal of the organiser, who is not under any legal obligation to pay the prizes out of the entry fees or any other specific funds.

54. Nor is *Fischer* applicable to the game of chance at issue, since in this case the payment of prizes — unlike in the game concerned in that case — does not consist in refunding the stake (possibly increased by an amount corresponding to the odds for the bet) and bears no relation to the amount of the entry fees of the successful competitors. The organiser of the competition may therefore be compared to any other provider of services who uses the consideration received for his services for financing his ongoing business. The fact that the amount of the prizes paid out is calculated on the basis of the expected receipts does not distinguish the organiser of the competition from any other trader in another line of business.

55. In the United Kingdom Government's opinion, the answer to the question is therefore that the taxable amount in respect of the organisation of a competition — that is, a game of chance — such as in the present case is the sum of the entry fees paid by each competitor.

56. The *Commission* considers that the answer to the second question is to be found in the judgment in *Glawe* and the Opinion in *Fischer*. No sensible distinction can be drawn between the competition at issue and games of chance (gaming machines, roulette).

57. The Commission further refers to the Court's decisions in *Naturally Yours Cosmetics* and *Boots*, according to which the consideration actually received by the supplier constitutes the taxable amount. In a case such as the present one, it is therefore necessary to ascertain what the service supplied consists in and what proportion of the entry fee is the remuneration for that service.

58. The service provided by the organiser of the competition consists in the organisation of the competition, the remuneration for which is the amount he actually retains after deducting the prizes. That is the amount with which he covers his operating costs and taxes and which leaves him a margin of profit.

59. Accordingly, part of the stake is paid into the prize fund, while the other part is remuneration for the organiser's service of organisation; only the latter part, that is, the sum of the entry fees less the prizes paid out, is subject to VAT, even though, unlike in *Glawe*, the amount of the prizes is not

'statutorily prescribed' but determined by the organiser himself. What matters is solely that a proportion of the stake paid by each competitor constitutes not remuneration for the organiser but a contribution to the prize fund.

60. The present case also differs from *Glawe* and *Fischer*, however, in that not only money prizes but also prizes in the form of goods and services are paid out. That may be taken into account in two ways. Either the organiser is treated as the final consumer of the goods and services which he effectively contributes as his 'stake', and cannot then claim to deduct input tax on them, or the goods and services are regarded as expenditure incurred by the organiser for the organisation of the competition, the cost of which forms part of his remuneration and entitles him to deduct input tax.

61. Finally, in the Commission's view, it makes no difference whether the taxable amount is to be determined as a proportion of the total entry fees for a competition or *pro rata* in respect of each individual service supplied to each competitor. The fact that the precise amount of the consideration components of the entry fee cannot be determined at the time of payment does not prevent the transaction from being treated as described for VAT purposes. It suffices, and is not problematic in practice, for the amount of the consideration to be determined *a posteriori*. Moreover, according to the judgment in *First National Bank of Chicago*, the recipient of the service does not have to be aware of the precise taxable amount.

62. The Commission thus concludes that the taxable amount in respect of a transaction such as the present one is the total amount of the entry fees less the amount or value of the prizes paid out to the winners.

B — *Opinion*

63. By its second question the VAT and Duties Tribunal seeks essentially to know whether, in respect of a transaction such as that at issue in the main proceedings, the taxable amount under the Sixth Directive is to be calculated on the basis of the amount of the entry fees or of the entry fees less the prizes paid out, or in some other way.

64. In the context of the first question, it had to be considered, on the basis of Article 2 of the Sixth Directive, whether the transaction at issue falls within the

scope of the Sixth Directive at all, that is, whether there is a supply for consideration of any sort.

65. How precisely the taxable amount is to be assessed and what in detail is to be included must now be determined on the basis of Article 11A(1)(a) of the Sixth Directive. Under that provision, the taxable amount for 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'.

66. The Court has consistently held that the taxable amount is thus determined by the consideration actually received by the supplier for his goods or services, which is a subjective value capable of being expressed in money and directly linked to the supply of goods or services. [14]

67. Consequently, to ascertain the taxable amount, it must first be examined what interrelated components a transaction such as that at issue in the main proceedings is composed of, and hence what amount is to be classified as the consideration for the supply.

1. Games of chance in VAT law

68. As Advocate General Jacobs already concluded in his Opinion in *Glawe* [15] and the Court has also recently held, [16] gaming transactions generally do not lend themselves easily to the application of VAT. That is no doubt why the Commission took the position, in its proposal for the Sixth Directive, that it would be better for games of chance and lotteries to be subject to a special tax. [17]

69. In the Sixth Directive the practical difficulties in applying VAT to transactions of this kind were taken into account at least to the extent that, under Article 13B(f), games of chance with money stakes are exempted in principle from the tax. However, according to that provision, it is within the discretion of each Member State to determine, observing the principle of

14 — Case C-288/94, cited in note 11, paragraphs 16 and 17 and the cases cited there.

15 — Opinion in Case C-38/93, cited in note 10, paragraphs 9 and 16.

16 — Case C-86/99 *Freemans* [2001] ECR I-4167, paragraph 30.

17 — *Bulletin of the European Communities*, Supplement 11/73, p. 16.

fiscal neutrality, the 'conditions and limitations' of such an exemption, so that it is possible for the Member States to impose VAT on particular forms of gaming whose structure is suited to that. [18]

70. The particular problems in applying VAT to games of chance, as opposed to other transactions, result from the nature of games of chance, which is not directed primarily at the (final) consumption of goods or services for payment, to which VAT attaches, but to the award of a prize which is linked to the competitor's 'consideration', his stake, via an element of chance, namely the chance of winning.

71. VAT fastens in principle on the actual shift of assets between the taxable person and the recipient of the goods or services. This finds expression in the tax principle that VAT is to be charged in proportion to the turnover actually achieved by the taxable person with his supplies of goods or services and that the fiscal authorities may not charge an amount which exceeds the amount paid to the taxable person.

18 — On the interpretation of that article, compare Case C-283/95, cited in note 9, paragraph 27, and the observations of Advocate General Jacobs in Case C-38/93, cited in note 10, paragraph 9 et seq.

72. Besides the possible kinds of reciprocal performance, varying according to the structure of the game of chance, in other words the supply of services or goods for consideration, another kind of (chance-based) 'reciprocal performance' typically takes place with games of chance which is difficult to grasp with concepts of tax law.

73. In a game of chance, the actual shift of assets is ultimately determined by the realisation of a chance. In economic terms, the shift operates with an intermediate 'pool of assets' which contains an element of setting off (the losses of one player feed the winnings of another player). The concepts of tax law ('consideration', 'supply', and so on) are therefore transferable to gaming transactions only to a limited extent or only after a precise analysis of the structure of the game.

74. Since, in view of the discrepancy between the nature of games of chance, which is characterised by the element of the chance of winning, and the concepts of VAT based on 'classic' reciprocal performance, the specific form taken by the structure of the game and the course of the individual game must be considered, not only is it 'hardly... appropriate to draw general conclusions from the taxation of [gaming] transactions in order to apply

them to the taxation of ordinary supplies of goods', [19] it is actually not possible to take a taxable amount ascertained for a particular game of chance and simply transfer it to another game of chance.

2. The decision in *Glawe*

75. The appellant in the main proceedings and the Commission rely on the Court's judgment and the Advocate General's Opinion in *Glawe* [20] and take the view that the service supplied by the organiser consists solely in the organisation of the competition, and that only a proportion of the entry fees constitutes consideration for that service, namely the entry fees less that proportion which corresponds to the prizes paid out to the players. In the present case, therefore, as with the gaming machines in the *Glawe* case, the winnings paid out are not to be included in the taxable amount.

76. As regards the application of the decision in *Glawe* to a game of chance such as that at issue in the main proceedings, however, caution seems indicated.

19 — Case C-86/99, cited in note 16, paragraph 30.

20 — Case C-38/93, cited in note 10, and Opinion of Advocate General Jacobs at p. I-1681 et seq.

3. Application of the case-law to a case such as that in the main proceedings

77. It must be noted to begin with that the structure of a game of chance such as that at issue in the main proceedings differs in essential points from the structure of a game of chance with gaming machines such as in *Glawe*.

78. When the Court held in *Glawe* that the consideration received by the organiser consisted only of the stakes remaining after payment out of the winnings, it expressly referred to the fact that because of mandatory statutory provisions the gaming machines were set in such a way that on average at least 60% of the stakes were paid out to the players as winnings. [21] In *Glawe* the obligation to pay out a specified proportion of the stakes was complied with by arranging the gaming machines technically in such a way that the proportion to be used for paying out winnings was collected in a separate compartment and paid out from there.

21 — Case C-38/93, cited in note 10, paragraph 9.

79. At least two principles of value added tax assessment may be identified which the Court (impliedly) took into account in *Glawe*.

(a) First principle

80. According to the first principle, only the final consumer may be burdened by the VAT system. [22] But that means that, with a mandatory pay-out quota fixed by statute, tax cannot also be imposed on the value of the winnings paid out. With such a pay-out quota, the taxable person has no possibility of economically rolling over onto the consumers (players) the VAT charged on the full amount of the stakes by correspondingly adjusting the level of winnings paid out. If such a possibility does not exist, however, that could even lead to the tax to be accounted for by the taxable person exceeding the proportion of the stakes left to him after deducting the winnings paid out. If, on the other hand, only the proportion of the stakes left to him after deducting the winnings constitutes the taxable amount, that cannot happen.

81. With the game of chance at issue, the problem of displacing the economic burden of tax cannot arise, since, according to the tribunal's account of the facts, there is no statutorily prescribed quota of winnings, which are instead determined by the organiser himself according to the economic circumstances.

(b) Second principle

82. The second principle is that the taxable amount can only be the consideration *actually received* for the supply. [23]

83. Since at least 60% of the stakes had to be paid out again and there was a technical separation of the stakes, the Court found in *Glawe* that the operator had never actually received the coins which were paid out again and that proportion of the stakes thus could not constitute consideration. [24]

84. In contrast, with a game of chance such as that in the main proceedings, no such 'splitting' of the stakes takes place. No proportion of the entry fees is withheld

22 — Case C-317/94, cited in note 12, paragraph 19.

23 — Case C-38/93, cited in note 10, paragraph 8, referring to Case 238/87, cited in note 6, paragraph 16.

24 — See paragraphs 9 to 12.

from the organiser, he actually receives the entire sum and can dispose over it. Winnings may be paid out of those or other funds or in another way, namely in the form of prizes in kind (goods or services).

85. Contrary to the submissions of Town & County and the Commission, the present game of chance must therefore be assessed differently, as regards the question of what the service and the consideration consist in, from a game of chance with gaming machines such as in *Glawe*.

86. That is not affected by the possible existence of a separate account in which the entry fees intended for prizes are kept and out of which the winnings are paid.

4. Supplies made by the organiser of the competition in a case such as the present

87. Also decisive for the taxable amount are the supplies made by the organiser of the competition to the competitors.

88. What supplies make up a transaction by a taxable person, that is, whether it is a supply of services or goods and whether there is a single service, is to be ascertained by taking an overall view, having regard to the point of view of a typical consumer. [25]

89. The service supplied by the organiser in the present case consists in a service which includes both the organising of the competition and the providing of a chance of winning. In the case of a game of chance such as that at issue in the main proceedings it would be artificial to split up the organiser's supply and relate the consideration (the entry fee) solely to the organisation of the competition and not to the provision of the chance to win. The average competitor pays the entry fee precisely in order to get a chance to win a prize, and only for that reason does he also pay for the organisation of the competition. Conversely, the organiser would not organise the competition and offer the chance to win if he did not receive the entry fees in return.

90. Furthermore, the chance of winning is proportionate to the amount of the stake: the more the competitor pays in, the more crosses he can make and the greater his chances of winning are.

25 — Compare Case C-231/94 *Faaborg-Gelting Linien* [1996] ECR I-2395, paragraph 12, and Case C-349/96 *Card Protection Plan* [1999] ECR I-973, paragraphs 28 and 29.

91. The necessary direct link thus also exists between the service supplied by the organiser, consisting of the organisation and the provision of a chance to win, and the entry fees as consideration.

92. The supply made by the organiser for VAT purposes includes the provision of the *chance* of winning, but not the paying out of winnings. As regards the paying out of winnings, there is no direct link to the consideration: the competitor pays the entry fee not on condition that he wins but on condition that he receives a chance to win, in other words in the hope of winning. That a player cannot count with certainty on winning a prize is in the nature of games of chance.

93. Seen thus, the payment of winnings is not a supply of goods or a supply of services for consideration within the meaning of Article 2 or Article 11 of the Sixth Directive. Rather, for the organiser, it constitutes a mere 'cost factor' for the provision of the service, specifically for providing the chance to win.

94. It follows from the above considerations that, in the case of a competition such as that at issue in the main proceedings, the organiser of the competition supplies a service in the form of organising the competition and offering a chance to win, in return for which he actually receives the entry fees as consideration. The taxable amount therefore comprises the amount of the entry fees in full.

5. Deduction of input tax

95. In view of the fact that in accordance with the principle of fiscal neutrality of the VAT system the taxable person must be relieved of any value added tax on the various cost components of his supply, it must be examined to what extent the organiser is entitled to deduct input tax for the prizes under Article 17 of the Sixth Directive.

96. That winnings in a game of chance have no direct link in terms of consideration to the entry fees does not alter the entitlement in principle to deduct input tax, since under Article 17(2) that presupposes merely that goods and services are used for the purposes of the taxable person's taxable transactions. That undoubtedly applies also to the prizes in kind paid out by the organiser, that is, the corresponding goods and services, such as travel.

97. For money prizes, on the other hand, there is *a priori* no claim to tax against the

taxable organiser of the competition, and there is therefore also no expenditure which could be neutralised fiscally by means of input tax deduction.

98. For goods or services which the organiser of the competition acquires in order to pass them on the winners as prizes, he is entitled to deduct input tax, however.

6. The alternative question

99. In its second question, finally, the VAT and Duties Tribunal puts an alternative question in case the competition is to be regarded as supplied by the organiser to each individual competitor in return for the individual entry fee. The tribunal wishes to know in this respect whether, if the matter is looked at in this way, the taxable amount consists of the amount of the entry fee, or that amount less a proportionate part of the amount paid out in prizes, or some other amount.

100. The basis of the question is no doubt the problem of setting off the losses of some competitors against the winnings of others, which then arises — generally — with respect to the precise taxation of the consideration of each competitor, if it is assumed that the precise amount of the consideration components less the 'flow-back' in the form of prizes has to be calculated. The amount of the consideration would then vary individually, depending on whether someone has won or not.

101. That problem does not arise, however, if the suggested answer is adopted, and the paying out of prizes is not to be regarded as a service supplied by the organiser of the competition. The prizes are only included as cost components in the service of providing a chance to win. For providing that chance of winning, the organiser receives the same amount from every competitor, whether he later turns out to be a loser or a winner.

102. Whether the taxable amount is related to the individual competitor or the whole competition consequently makes no difference. The tribunal's alternative question need not therefore be considered further.

103. The answer to the second question must therefore be that under Article 11A(1) of the Sixth Directive the taxable amount for VAT purposes for the service of orga-

nising a competition which is arranged for the competitors by the organiser in return for the entry fees paid by them is the amount of the entry fees.

VI — Conclusion

104. On the basis of the above considerations, I propose that the Court answer the questions referred as follows:

(1) 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 tax — Common system of value added tax: uniform basis of assessment, in particular Article 2(1), a transaction which the parties agree to be 'binding in honour only' (and therefore under national law cannot be enforced in the courts) may in principle constitute a taxable transaction for the purposes of value added tax.

(2) Under Article 11A(1) of the Sixth Directive, the taxable amount for value added tax purposes for the service of organising a competition which is arranged for the competitors by the organiser in return for the entry fees paid by them is the amount of the entry fees.