

OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 27 June 1996 ^{*}

1. Elida Gibbs finances two types of coupon scheme to promote consumer sales of its toiletry products in the United Kingdom. By presenting a 'money-off' coupon, the consumer obtains a reduction in the price from the retailer. By sending in a 'cash-back' coupon, he obtains a refund directly from Elida Gibbs. Elida Gibbs argues before the Value Added Tax Tribunal, London, that both should be reflected in retroactive adjustment of the taxable amount which fixes its VAT liability on its own prior sales of the products to wholesalers or retailers. The Tribunal has referred two questions of interpretation to the Court.

nization 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')¹ provides:

"The following shall be subject to value added tax:

I — Factual and legal context

A — *Legislative background*

2. Article 2 of Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (hereinafter 'the Sixth Directive')¹ provides:

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

^{*} Original language: English.

¹ — OJ 1977 L 145, p. 1.

Article 11(A)(1)(a) of the Sixth Directive provides:

taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.

‘Within the territory of the country

However, in the case of total or partial non-payment, Member States may derogate from this rule.’²

1. The taxable amount shall be:

- (a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies.’

B — *Factual background*

4. Elida Gibbs (hereinafter for brevity ‘Gibbs’) is a manufacturer of toiletries and a subsidiary of the Unilever group of companies. 70% of all its sales are direct to retailers; the rest are to wholesalers and to cash and carry traders from whom retailers may buy Gibbs products. Gibbs promotes the retail sale of its products by operating two types of money-off coupon schemes and a cash-back coupon scheme.

Article 11(A)(2) and (3) define the elements to be included in the taxable amount and those to be excluded. According to Article 11(A)(3)(b), the taxable amount is not to include ‘price discounts and rebates allowed to the customer and accounted for at the time of the supply’.

(i) Money-off coupons

3. Article 11(C)(1) provides, under the heading ‘Miscellaneous provisions’, that:

5. Under its first, basic money-off coupon scheme, Gibbs arranges a general promotion for a limited period. It distributes coupons to consumers, either directly or in the form of

‘1. In the case of cancellation, refusal or total or partial non-payment, or *where the price is reduced after the supply takes place*, the

² — Emphasis added in view of the central importance of this paragraph.

cut-out coupons in newspapers and magazines. Each coupon has a nominal value and carries instructions both for potential customers and retailers. Retailers are informed that the full face value of the coupon will be refunded by Gibbs, provided that they can show that the coupon was redeemed against a product on promotion during the currency of that promotion.

8. Under the basic scheme, the consumer may present a coupon in part payment for the particular product. The retailer is not obliged to accept coupons but, where he does, he seeks a reimbursement directly from Gibbs on proof that the coupons represent Gibbs products sold by him. Under the retailer-specific scheme, the retailer is contractually obliged to accept the coupon.

(ii) Cash-back coupons

6. Under the second, the retailer-specific scheme, Gibbs, acting in association with the retailer, arranges a promotion for a particular product or line of products, which also lasts for a certain period of time. With this scheme it is the retailer who prints the coupons and who distributes them to potential customers.

9. Under this scheme, coupons are printed directly on the packaging of Gibbs' products. The coupon offers a specific cash refund of part of the purchase price paid by the retail consumer to the retailer, while also acting as proof of purchase. Any consumer who is able to satisfy the conditions printed on the coupon may send it directly to Gibbs (or its agent) for the promised payment. These conditions, as appear from the order for reference, require the consumer to send in the cash-back coupon accompanied by two other cartons of Gibbs' products.

7. Regardless of whether the purchaser from Gibbs is a wholesaler or a retailer, an amount inclusive of value added tax (hereinafter 'VAT') is charged for the supply of the goods, without reference to any present or future promotion scheme. Normally, it will not be known at the time of purchase whether the goods will subsequently be the subject of a promotion scheme. Sales from wholesaler to retailer take place at wholesale prices and are unaffected by any promotion scheme. The retailer puts the goods on sale at the normal shelf price.

(iii) Gibbs' claim

10. On 24 August 1992 Unilever, Gibbs' parent company, requested the Commissioners of Customs and Excise (hereinafter 'the Commissioners') to repay the UK £883 894

allegedly over-declared since 1984 in respect of both the money-off and the cash-back coupons, on the basis that the reimbursement of the face value of the coupons constituted a retrospective discount, thus reducing the taxable amount of the original supply. On 5 May 1993 this request was refused on grounds that the coupons did not effect any price reduction between manufacturer and retailer but were part of the consideration for the supply of the goods by the retailer to the customer, i. e. 'third-party consideration' under Article 11(A)(1). The Commissioners later contended, in addition, that there was 'no direct link between the supply of goods (by the manufacturer to the retailer or wholesaler) and the payment of the "cash-back" (from the manufacturer to the final customer)'.

12. The Commissioners argued that the transactions involving the coupons do not result in any reduction in the consideration obtained by Gibbs for VAT purposes, which remains the amount payable to Gibbs by the retailers or wholesalers for the goods which Gibbs has supplied. The redemption by Gibbs of the coupons under both schemes represents third-party consideration for the supply by the retailer to the customer. In the case of money-off coupons, the Commissioners maintained that the retailer obtains two elements of consideration, namely the cash amount from the customer and the monetary value of the coupon from Gibbs. The Commissioners contended that the consideration for the supply to the retailer is the amount which the retailer is obliged to pay to Gibbs or, where the supply is through a wholesaler, the amount the retailer pays to or is invoiced for by the wholesaler. There can be no retrospective adjustment to the consideration either for the supply by Gibbs to the retailer or, *a fortiori*, to a wholesaler, who is not a party to and is in no way affected by the promotion scheme.

C — *National proceedings*

11. Gibbs challenged those decisions before the Value Added Tax Tribunal, London (hereinafter 'the Tribunal'). Gibbs contended that under Article 11(A)(1)(a) the 'consideration' which it received for the supply of the products in question is the amount actually invoiced in respect of such sales less the amount paid out in redemption of the coupons. Alternatively, it submitted that the payments made on redeeming the coupons should be regarded as bringing the transactions involved within Article 11(C)(1).

13. Under the cash-back coupon scheme, the retailer receives the full retail price from the consumer; the retailer is unaffected by the redemption rights which affect only his customer. The Commissioners argued that, as there was therefore no question of the retailers offering a reduction on the retail price of the goods sold, Gibbs could not be regarded as having obtained a consideration on its earlier sale of those goods less than that which was actually charged to the retailer (or the wholesaler).

14. The Tribunal believes that issues of Community law raised by the operation of these schemes were not resolved by the Court's judgment in *Boots Company*³ and that an argument of substance can be made that the redemption of coupons by Gibbs on the sale of its products to consumers should be taken into account in determining the 'taxable amount' of its earlier sale of those products. The Tribunal, in particular, notes that 'a wider application' of the Court's judgment in *Glawe*⁴ might support Gibbs' argument. Referring specifically to the need for a uniform interpretation of Community law, the Tribunal decided to refer the following two questions to the Court:

- (b) the coupon which is distributed to a potential customer in the course of a sales promotion campaign may be accepted by the retailer when the customer purchases a specified item of goods from the retailer;
- (c) the manufacturer has sold the specified item of goods at the "original supplier's price" either direct to the retailer or to a wholesaler; and

'1. Money-off coupons

What, on the proper construction of Article 11(A)(1)(a) and 11(C)(1), is the "taxable amount" of an original supplier in the situation of Elida Gibbs (as found in paragraph 4 of the Interim Decision), namely where:

- (d) the retailer accepts the coupon on sale of the item of goods to the customer, presents it to the manufacturer and is paid the stated amount?

- (a) the original supplier is a "manufacturer" who procures the issue of a money-off coupon which is redeemable at the "stated amount" (as printed on the coupon) by or at the expense of the manufacturer in favour of the retailer;

Is the manufacturer's taxable amount the manufacturer's price or that price less the stated amount?

Is the answer to the above question any different if the original supply is made by the manufacturer to a wholesaler rather than directly to a retailer?

³ — Case C-126/88 [1990] ECR I-1235, hereinafter '*Boots*'.

⁴ — Case C-38/93 [1994] ECR I-1679.

2. Cash-back coupons

Is the manufacturer's taxable amount the manufacturer's price or that price less the stated amount?

What, on the proper construction of Article 11(A)(1)(a) and 11(C)(1), is the "taxable amount" of an original supplier in the situation of Elida Gibbs (as found in paragraph 5 of the Interim Decision), namely where:

Is the answer to the above question any different if the original supply is made by the manufacturer to a wholesaler rather than directly to a retailer?

(a) in the course of a promotion scheme the original supplier ("the manufacturer") sells items of goods at "the manufacturer's price" either direct to a retailer or to a wholesaler;

(b) a cash-back coupon for a "stated amount" is printed on the wrapping of those items of goods entitling the customer, who proves purchase of one of those items of goods and satisfies other conditions printed on the coupon, to present the coupon to the manufacturer in return for payment of the stated amount; and

(c) a customer purchases such an item of goods from a retailer, presents the coupon to the manufacturer and is paid the stated amount?

II — Observations submitted to the Court

15. Written observations were submitted by Gibbs, the United Kingdom of Great Britain and Northern Ireland, the French Republic, the Federal Republic of Germany, the Italian Republic and the Commission, while Gibbs, the United Kingdom, France, the Hellenic Republic and the Commission presented oral observations.

III — Consideration of the questions referred to the Court

16. I propose to begin with the second question, dealing with the 'cash-back' scheme, since I share the view of Germany that an answer to the second question assists an analysis of the first.

A — *Cash-back coupons*

17. By its second question the Tribunal asks essentially whether the taxable amount for the purposes of the Sixth Directive of a transaction involving the supply of goods by the manufacturer of goods to retailers (and in some cases to wholesalers who in turn supply retailers) at a certain specified price can be affected by the subsequent redemption by that manufacturer of cash-back coupons printed on the packaging. In other words, the Court is asked whether the consideration for VAT purposes for the original supply of the goods by the manufacturer is reduced retroactively if it subsequently reimburses part of the retail price paid for those goods to any consumer who sends in a coupon for a cash refund.

18. Gibbs lays particular emphasis on the principle that VAT is a tax on turnover, that this should be 'real actual turnover' and that this principle is expressed in Article 2 of First Council Directive 67/227/EEC of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (hereinafter 'the First Directive'),⁵ i. e. that VAT 'involves the application to goods and services of a *general tax on consumption exactly proportional to the price of goods and services*, whatever the number of transactions which takes place in the production and

distribution process before the stage at which the tax is charged'.⁶ This real turnover would be the price received from retailers reduced by the cash paid to consumers who send in cash-back coupons. It submits that 'the economic effect of the "cash-back" is identical to the situation where a discount is given by the manufacturer to the retailer, who in turn passes on the full discount to the customer'. Gibbs contends that, if VAT is to be a tax on consumption, then the tax authorities must receive VAT only on the net amount paid by the final (retail) customer; this, it submits, will not be the case unless the reimbursement made by the manufacturer is deductible from the taxable amount of the original supply in accordance with Article 11(C)(1) of the Sixth Directive. The Commission, in support, contends that, on the redemption of the coupons by Gibbs, the price should be regarded as having been 'reduced after the sale takes place' as envisaged by that provision.

19. It helps to focus, firstly, on the retail, or consumer price. In transactions such as those involved in the Gibbs cash-back scheme the consideration for the supply by the retailer can, in my view, only be the full retail price. This is the only identifiable consideration which it receives. It is, furthermore, the 'subjective value' attributed by the parties to the consideration, as that term is used in *Naturally Yours Cosmetics v Commissioners of*

5 — OJ, English Special Edition 1967 (I), p. 14.

6 — Emphasis of Gibbs.

Customs and Excise.⁷ Equally, the consideration for the original supply by the manufacturer to the retailer must remain the original invoiced price.⁸ When the retailer supplies the goods he has no idea whether the customer will, on completing the purchase, be in a position to or will in fact satisfy the conditions required by Gibbs for a refund. More to the point, there is no way of knowing at the time of original supply by Gibbs whether any or all of the cash-back coupons will be presented for redemption.

20. Gibbs, however, relies on Article 11(C)(1) of the Sixth Directive, stating that the taxable amount at the final consumer stage should be the price as reduced by the supposed discount granted by it to the consumer. This provision cannot, in my view, apply to a payment made, as in the present case, by a third party. No change in price takes place between the parties to the retail sale. As Germany rightly submits, under Article 11 'a change (reduction) of the taxable amount can occur only by means of a process which affects the taxable amount of the *transaction between the person making the supply and the recipient*'.⁹ In *Boots* the Court did not decide that a refund made not to the immediate customer of the taxpayer (namely here the retailer) but, rather, to a third party (here the retail customer) could

affect the taxable amount of the original supply.

21. Moreover, when a successful redemption application is made to the manufacturer, neither the retailer nor the manufacturer will be in a position to verify whether the goods in respect of which the refund is granted are those which the manufacturer actually supplied to any particular retailer and, yet, on the Gibbs argument, the refund is to be attributed to that original supply.¹⁰ I do not think that the *Glawe* case assists Gibbs in overcoming the lack of correlation between the original supply and the goods in respect of which the coupon is subsequently redeemed. The service in that case was concerned with the installation and operation of gaming machines, which were programmed so as to pay out to players a minimum of 60% of the total stakes inserted; it was thus clear that the consideration paid by each player in order to have the opportunity of winning was *on average* 40% of his stake. However, the case only concerned transactions at one stage of the trading process, namely that between the proprietor or operator of the machine and the players. The Court adopted the only feasible method of applying VAT to what were *sui generis* gambling transactions. The reasoning adopted in the very specialized circumstances of *Glawe* cannot be extrapolated so as to create a principle of general import applicable to a more complex series of transactions at different stages of the supply chain. The retailer is a stranger to the

7 — Case 230/87 [1988] ECR 6365, paragraphs 16 and 17 of the judgment; hereinafter '*Naturally Yours*'.

8 — This analysis applies *a fortiori* where the manufacturer originally supplied a wholesaler.

9 — Emphasis in original.

10 — The argument becomes even more implausible when there is an intervening transaction between the manufacturer and a wholesaler. At the hearing, however, the agent for Gibbs expressly requested the Court to concentrate on cases where there is no wholesaler. As it is clear from the facts established by the Tribunal that those cases represent the majority and as France alone treats the distinction as significant, I will hereinafter concentrate my analysis on direct supplies to the retailer.

transaction between the manufacturer and the retail customer comprised in the cash-back schemes. To attempt, like Gibbs, to maintain that the acceptance by the retail customer of the 'offer' printed on the coupon, affecting the retail sale, can alter the agreed price in the earlier transaction involving the supply of goods by the manufacturer to the retailer, would distort commercial realities and introduce an unacceptable and unjustifiable degree of uncertainty into the Community VAT system.

22. The United Kingdom submits that the retail customer who secures a refund from Gibbs under the cash-back scheme receives what amounts to a subsidy. Such a subsidy should, it effectively submits, be regarded as 'directly linked' to the retail supply under Article 11(A)(1)(a) and, thus, as forming part of the consideration for that retail supply. I do not find this argument convincing. Subsidies must be included in the consideration 'obtained by the supplier' in order to fall within the scope of that provision. Here, the payments are made to the purchaser. A strict construction of this provision accords with the need for certainty in the ascertainment of the price and turnover of the retailer.

23. Article 11(A)(1)(a) provides that the taxable amount in respect of supplies of goods shall be '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 ...'. The Court stated in *Boots* that 'Paragraphs 2 and 3 of Article 11(A) enumerate certain items which are to be included in the taxable amount and other amounts which are not to be included [...]'. Thus, the items referred to in paragraph 2 of Article 11(A) are treated by the directive itself as constituting the "consideration" and therefore the taxable amount and the items referred to in paragraph 3 are excluded, likewise *ex lege*, from that concept of consideration'.¹¹ To classify a specific item, the Court held that paragraphs 2 and 3 of Article 11(A) should first be examined to see whether the item falls within either of those paragraphs, and that 'reference must be made to the general concept in paragraph 1(a)' only when such a classification is not possible.

24. Gibbs, it is true, does not invoke any of these paragraphs in its claim for a reduction, by the amount of the cash payments, of the consideration attributed to it and consequent adjustment of its taxable amount. It does, however, claim that these payments represent 'discounts granted to the final consumer'. Discounts are allowed as reductions in two situations under Article 11(A)(3). The refund cannot, in my view, be classified as a price discount or rebate within paragraph 3(b) because it is manifestly neither 'allowed to the customer' of the manufacturer nor 'accounted for at the time of supply'. Nor is it a 'discount for early payment' as allowed in Article 11(A)(3)(a). In other words, Article 11(A)(3)(b) does not provide for 'price reductions', to use the general descrip-

¹¹ — See paragraph 15 of the judgment.

tion adopted by Advocate General Van Gerven in his Opinion in *Boots*,¹² which arise indirectly from cash payments made by a third party to the purchaser of goods or services. I do not consider it reasonable to interpret Article 11(A)(1)(a), as Gibbs does, so as implicitly to exclude payments of part of the price effected by third parties from the determination of the taxable amount. That paragraph, as we have seen, makes explicit reference to third-party consideration in terms which are not consistent with the Gibbs argument.

taxable amount of a transaction so determined cannot be reduced in accordance with Article 11(C)(1), unless there is a similarly direct link between the alleged subsequent reduction and the relevant taxable transaction. In the present case, there is no such link. In one transaction, Gibbs supplies goods, normally to a retailer, for a specified price, which does not change, and in the other it reimburses a third party some of the price paid for purchasing some of those goods from such a (but not necessarily the same) retailer.

25. I do not find the Gibbs argument, supported by the Commission, and based on Article 11(C)(1), that the redemption of the coupon should be regarded as constituting a price reduction allowed after the supply any more plausible. A unilateral payment made to some retail customers cannot be metamorphosed into an *ex post facto* price reduction for an entirely different and unidentified transaction. The cash-back scheme does not require the consumer claiming the refund to identify the retailer from whom he bought the product. As stated above, the Court has consistently referred, when assessing the amount of consideration paid in accordance with Article 11(A), to the need for a direct link between the goods or services provided and the alleged payment.¹³ In my view, the

26. I am also of the opinion that the exclusion from the taxable amount of part of the agreed price, by reference to a later payment to the purchaser by a third party, would potentially distort the whole scheme of the VAT system. Article 2(1) of the Sixth Directive defines the supplies which are subjected to VAT as the supply of goods or services effected *for consideration* within the territory of the country by a taxable person acting as such.¹⁴ The Court has defined this consideration as an amount which must be capable of being 'assessed in money' and as 'a subjective value', namely the money which is 'actually received' by the person supplying the goods or services 'and not a value assessed according to objective criteria'.¹⁵ The use of the word 'subjective' can be confusing but, in my opinion, is intended to exclude any sup-

12 — See paragraph 11 of the Opinion.

13 — See, for example, Case 154/80 *Staatssecretaris Van Financiën v Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445, hereinafter 'Dutch Potatoes', paragraph 12 of the judgment, and *Naturally Yours*, paragraph 12.

14 — Quoted initially in paragraph 2 above, emphasis added.

15 — See 'Dutch Potatoes', paragraph 13 of the judgment.

posed valuation independent of that adopted by the parties to the transaction.¹⁶ To allow the 'subjective' amount determined by the parties to the transaction under consideration to be varied as a result of an entirely independent transaction between one of the parties and a third party would, in my view, subvert fundamentally the concept of consideration employed in the Sixth Directive, as it has been interpreted in the case-law of the Court.

27. I am also in particular struck by the force of the submission of the United Kingdom, Germany and Greece that to accept the Gibbs and Commission argument that the amount of these retrospective refunds must be subtracted from the taxable amount of the original supply under Article 11(C)(1) would have grave repercussions for the system of input tax deduction under the Sixth Directive. Germany points out that the customer of Gibbs (i. e. typically the retailer) is under no legal or other obligation to adjust (here downwards) the claim to input tax in accordance with the refund made by Gibbs to the third party (i. e. the retail customer). The dilemma was succinctly expressed by the agent for the United Kingdom at the hearing: '... by what process does, firstly, the retailer now reduce by [the refund] the amount upon which input tax is claimed and,

secondly, the consumer, if he happens to be VAT registered, also reduce his input tax by reference to the amount of the subsidy?'¹⁷ In logic Gibbs should refund to the retailer any VAT by which he has supposedly been overcharged in the original price. This would, of course, be impossible since the retailer is not identifiable. The objective of harmonizing the taxable amount of VAT, identified by the Court in *Chaussures Bally*,¹⁸ would be undermined if a different method of calculation of consideration were adopted, on the one hand, for the taxable amount of Gibbs (price less cash payments), and, on the other hand, the purchases of the retailer (price without deductions). In *Chaussures Bally* the Court rejected an argument that the retailer could be taxed on the amount received from credit card companies, net of commission, whereas the consumer had paid the full price, with its inherent VAT, on using his credit card. I do not agree with Gibbs and the Commission that this is merely an invoice or paperwork problem. As Greece correctly pointed out, invoices serve a fundamental purpose in the VAT system.

28. At the hearing, the Commission responded to this submission by stating that Article 20(1)(b), as part of the article devoted to 'Adjustments of deductions', expressly

16 — See in this respect my Opinion of 27 June 1996 in Case C-288/94 *Argos Distributors v Commissioners of Customs and Excise*, [1996] ECR I-5311, paragraph 21.

17 — The United Kingdom refers to subsidy in this context when, as stated in paragraph 22 above, the payment constitutes in reality third-party consideration.

18 — Case C-18/92 [1993] ECR I-2871, paragraph 12 of the judgment.

provides for the case where a deduction occurs after the return has been made. This is wholly unconvincing. It is quite natural that provision is made for such deductions in so far as they arise in accordance with Article 11(C)(1). However, the mere requirement imposed on Member States to put in place an adjustment mechanism does not, in my opinion, warrant an interpretation of Article 11(C)(1) which flies in the face of Article 11(A). A valid right to have a price reduction taken into account can only arise where it is the supplier who subsequently allows the relevant price reduction in favour of its customer.¹⁹

29. I am therefore satisfied that the Court should answer the second question referred by the Tribunal to the effect that the taxable amount of the manufacturer's original supply to the retailer (or wholesaler) is unaffected by the amount of any refund subsequently made by the manufacturer to the retail customer. It is now necessary to address the Tribunal's first question concerning money-off coupons.

B — *Money-off coupons*

30. Gibbs argues that, in order for the tax to be exactly proportional to the price of the

goods, the taxable amount must be calculated on the basis of the amount the supplier actually receives; i. e. , in the present case, net of the amount expended in redeeming the coupons. It suggests that this result can be achieved under Article 11 of the Sixth Directive in either of two ways: namely, by regarding the consideration received for the purposes of Article 11(A)(1)(a) as the net income of the manufacturer or, alternatively, by treating the sums expended in redeeming the coupons as price reductions under Article 11(C)(1) effected after the supply has occurred.

31. In respect of the first approach, Gibbs relies in particular on *Boots*. While it accepts that the Court's judgment in *Boots* was concerned with a discount scheme operated by a retailer in favour of its customers, Gibbs contends that the same reasoning may be applied to discounts offered by manufacturers to retail customers. In this respect, it refers the Court to the reasoning of the French Conseil d'État in *Berthier-Savéco*.²⁰ The Commission supports the second approach. It contends that if a manufacturer operating a discount scheme such as that of Gibbs were to be assessed, as the Commissioners have done, on the full amount of the original supply, this would be equivalent to employing an 'open-market value' contrary

¹⁹ — See paragraph 24 above.

²⁰ — Judgment of 20 March 1974, Case No 85.681.

to Article 11(A)(1)(a) as interpreted by the Court. In its view, the nominal value of redeemed coupons must be deducted from the original price under Article 11(C)(1).

do not constitute a discount on the retail price, capable of being attributed to the original supply, but, rather, form part of the consideration for the retail supply. Since the operation of such an incentive scheme would present obvious practical difficulties for Gibbs, the use of its money-off coupons provides an ideal means of effectively achieving the same result; namely, to benefit the retail customer while simultaneously promoting the sale of Gibbs' products. The United Kingdom does not distinguish between direct and indirect supplies via a wholesaler; the latter, it says, merely further highlight the fallacy of the Gibbs argument which seeks fictitiously to treat several transactions as one. The United Kingdom contends that *Boots* can be distinguished from the present case; unlike *Boots*, the retailer in the Gibbs scheme does not undertake through the issue of the coupon to grant a discount and, thus, it would be 'perverse to treat the retailer as reducing the price of his goods simply because he accepts a coupon issued by a third party with whom he has no economic link and from whom he may not have purchased the goods'.

32. France also supports the second approach, but only in respect of goods supplied directly by the manufacturer to the retailer. Where there is a direct relationship, the redemption of the coupons may effectively be regarded as a reduction in the price of the original supply. By analogy with Article 11(A)(3)(b), which requires a discount or rebate to be accounted for at the time of supply, it contends that a post-supply price reduction under Article 11(C)(1) can only arise where the reduction is allowed by the supplier to the purchaser. Thus, where a wholesaler is inserted into the chain of supply, the later redemption by the manufacturer of the coupons constitutes a payment made by a third party to the retailer.

33. The United Kingdom, supported on essentially similar grounds by Germany,²¹ Greece and Italy, contends that the coupons

34. It is fundamental to Gibbs' arguments that the position of the retailer should not be adversely affected by any favourable adjustment of Gibbs' own taxable amount. If the VAT liability of retailers were to be increased as a consequence of operating the promotional schemes, it is obvious that they would be unlikely to participate. Gibbs, in the model transaction presented to the Court, treats the retail price as being reduced by the

21 — Germany, however, contends that the manufacturer's taxable amount could be reduced but only if certain strict conditions are satisfied: i. e. if the reduction is made in each transaction in the chain of supply so that the retailer ultimately receives back part of the consideration for the supply which it may pass on to the customer by selling the product more cheaply, and if the manufacturer issues a corrected invoice leading to a corresponding correction by the retailer of the input tax which it deducts. In so far as the Gibbs' scheme is concerned, it contends, by reference to paragraph 22 of the Court's judgment in *Boots*, that the redemption of the coupons by Gibbs constitutes third-party consideration which cannot affect the consideration for the original supply by the manufacturer.

amount of the coupon and omits from the retailer's taxable amount the refund obtained from Gibbs. It is only by making this important, and, in my view, incorrect, assumption that Gibbs succeeds in leaving the retailer's position unaffected by the reduction in taxable amount which it claims for itself. Without that reduction, the redemption of coupons would automatically increase the margin between the retailer's outputs and inputs and, accordingly, the retailer's VAT. In view of the analogy drawn with *Boots*, it is worth pointing out that this was clearly not the approach adopted by that company in accounting for the proceeds of a similar scheme. *Boots* included in its gross takings for VAT purposes and thus conceded liability for VAT on any payments received from manufacturers in the reimbursement of coupons. This approach was accepted by all parties to that case and did not have to be addressed by the Court, which in the event was asked to rule only on cases where there was no reimbursement by the manufacturer.²² Gibbs' argument implies that *Boots* was wrong to concede that liability. I think that *Boots* acted on a correct interpretation of Article 11(A)(1)(a).

of the public. They are designed to induce consumers to buy named Gibbs' products by promising a price reduction. Their sole function is, therefore, sales promotion. Gibbs offers to pay part of the price, on behalf of the consumer. The retailer is informed by the coupon that, if he accepts it, Gibbs will refund to him the amount by which he has reduced the price to the consumer. The payment made by Gibbs to the retailer is, therefore, part of the retail price of the product. In terms of Article 11(A)(1)(a), it constitutes part of the consideration received by the retailer for the supply of goods. It is not received 'from the purchaser [or] the customer' but from 'a third party for such supplies'. It could equally appropriately be regarded as a subsidy to the consumer 'directly linked to the price of such supplies'.²³ A direct link exists between the supply of goods and this element of consideration as required in the Court's constant case-law.²⁴

35. The promotional coupons issued by Gibbs appear in newspaper and magazine advertisements or are distributed to members

36. If the refund of the coupon forms part of the consideration for the retail sale, or more simply the retail price, I agree with Germany that it cannot simultaneously represent a partial repayment of the original consideration given by the retailer to the manufacturer. The retailer has already bought and either

22 — See *Boots*, Report for the Hearing, [1990] ECR I-1235, pp. 1236 to 1238, paragraphs 5, 7 and 12; Opinion of Advocate General Van Gerven, paragraph 2.

23 — In contrast to payments made under the cash-back scheme, the payments in the money-off schemes take the form of a refund to the retailer of the price reduction which *he has been asked to allow to the consumer*.

24 — See, for example, the passages from 'Dutch Potatoes' and *Naturally Yours* cited in footnote 13 above.

paid or incurred liability for the goods as they are displayed with their prices marked on his shelves. Just as his quoted sale price is unaffected by the fact that Gibbs steps into the shoes of the consumer to pay part of it, his purchase price is unaffected by the fact that the coupon refund is made by the manufacturer from whom he has bought the product. The United Kingdom, at the hearing, put forward a vivid and convincing comparison depicting the manufacturer's representatives standing at the shop counter and offering to discharge in cash ten pence of the price of named products. Clearly, such payments would leave untouched the price originally charged by the manufacturer to the retailer. Indeed, we know that some 30% of Gibbs' sales are made through wholesalers, in which case there has, in any event, been no earlier relevant sale whose price is to be reduced at the time when the retailer presents his coupons for refund to the manufacturer.

noted that the Conseil d'État in *Berthier-Savéco* was interpreting French VAT law and, secondly, that it was concerned with the situation of a retailer who, at a time when VAT was not payable in France on retail sales but stopped at the stage of wholesale supply, sought a reduction in the amount upon which it was liable to pay tax in respect of certain purchases of soap from a manufacturer who had distributed money-off coupons similar to those of Gibbs. In any event, I consider the analysis of the *Commissaire du Gouvernement*, M. Schmeltz, more relevant for the interpretation of Article 11(A) of the Sixth Directive.²⁵

37. It follows inexorably from the character of the refund as consideration for the retail sale that its payment does not have the effect that the price charged by Gibbs to the retailer 'is reduced after the supply takes place' for the purpose of Article 11(C)(1).

39. I am satisfied, therefore, that the money-off coupon scheme should be regarded as a sales promotion financed by Gibbs designed initially to benefit the retail customer so as to promote the commercial reputation and turnover of Gibbs. Unlike in *Boots*, the scheme does not involve the grant of any discount or a *posteriori* price reduction by Gibbs to its customer.

38. *Berthier-Savéco* does not, in my view, assist the Gibbs argument. It should first be

25 — 'In any event, the redemption of coupons by the supplier cannot be regarded as resulting in a genuine discount granted by the latter since the granting of it depends not on the will of the supplier but on that of the consumer and it is granted not on the basis of the purchases made by his retail customer but according to the number of articles sold by the latter in specified circumstances'; conclusions reported in *Droit Fiscal* 1974, p. 37. The judgment of the Conseil d'État is also criticized by the *Droit Fiscal* annotator who stated that in order to have a 'discount' in the proper sense of the term, the reduction in the selling price for the benefit of the purchaser must be supported by the vendor, which was not the case in *Berthier-Savéco* where it was credited by the manufacturer with the relevant amount; p. 34.

IV — Conclusion

40. In the light of the foregoing, I recommend that the Court answer the questions referred by the Value Added Tax Tribunal, London as follows:

Article 11(A)(1)(a) and (C)(1) of Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment should be interpreted as follows:

- (1) The taxable amount in respect of the supply of goods to a wholesaler or retailer by a supplier who procures the issue to potential consumers of money-off coupons printed with offers of stated reductions in the price of its specified products is not reduced by payments made by that supplier to retailers corresponding to the price reductions allowed by them to consumers presenting those coupons to purchase those products.

- (2) The taxable amount in respect of the supply of goods to a wholesaler or retailer by a supplier who arranges for the printing of cash-back coupons on the said goods containing offers of cash refunds in specific amounts is not reduced by payments made by that supplier to consumers corresponding to the amounts so printed on products purchased by them.