the retailer to apply the inducement in procuring another person to arrange, or in rewarding another for arranging, a gathering at which further goods of the wholesaler can be sold by the retailer to the public for their mutual benefit, on the understanding that if no such gathering is held the inducment must be returned to the supplier or paid for at its wholesale price, the taxable amount is the sum of the monetary consideration and of the value of the service provided by the retailer which consists in applying the inducement to procure the services of another person or in rewarding that person for those services; the value of that service must be regarded as being equal to the difference between the price actually paid for that product and its normal wholesale price.

REPORT FOR THE HEARING
delivered in Case 230/87 *

I — Facts and procedure

1. *The marketing system of the appellants in the main proceedings*

Naturally Yours Cosmetics Ltd is a company which carries on business as a wholesaler of cosmetic products for sale by the 'party-plan' method. This method of retailing goods is well established in the United Kingdom; it operates in the present case under a framework of district and area managers controlling a number of 'beauty consultants'. The function of a beauty consultant, who appears to be an independent contractor, is to sell the goods of the appellant company. This she does by finding from among her friends and acquaintances a number of persons, known as 'hostesses', who are willing to allow their homes to be used for the giving of parties, organized by the hostess, to which she invites her friends and acquaintances and at which the products of the appellant company are displayed and sold. Having found a suitable venue, the beauty consultant attends to sell the products and get in the cash and also to give practical advice to the guests.

It appears that all the goods for sale at a party are purchased by the beauty consultant who is consequently in the position of a tied retailer. The appellant company supplies the beauty consultants with an order form listing the complete range of their products together with their wholesale prices. The recommended retail prices for sale to the party guests are separately shown in a brochure available to the

* Language of the Case: English.

guests. The difference between the recommended retail price and the so-called selling price (namely, the price at which the beauty consultant acquires each particular cosmetic product from the appellant company) constitutes the benefit which the beauty consultant gets out of her sale to customers.

As an inducement to hold parties the hostess receives a 'dating gift' free of charge. The appellant company used for the period in question (the year of 1984) a particular beauty product — a pot of cream known as 'Natural oasis rejuvenating cream' — for which the recommended retail price was UKL 12.95. The normal selling price of that cream to a beauty consultant was UKL 10.14. However, when used as a dating gift by the beauty consultant, the pot of cream was purchased from the appellant company at a specially low price, fixed at UKL 1.50.

2. *Legal background to the dispute*

Section 10 of the United Kingdom Value-Added Tax Act 1983 (hereinafter referred to as 'the Act') states as follows:

'10. (1) For the purposes of this act the value of any supply of goods or services shall be determined as follows.

(2) If the supply is for a consideration in money its value shall be taken to be such amount as, with the addition of the tax chargeable, is equal to the consideration.

(3) If the supply is not for a consideration or is for a consideration not consisting or not wholly consisting of money, the value of the supply shall be taken to be its open market value.'

Article 11 A, paragraph 1, subparagraph (a) of the Sixth 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 (Official Journal 1977, L 145, p. 1, hereinafter referred to as 'the Sixth Directive') provides that:

'(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;'

By Article 8 of the Second Council Directive, 67/228/EEC, of 11 April 1967, on the harmonization of legislation of Member States concerning turnover taxes — Structure and procedures for application of the common system of value-added tax (Official Journal, English Special Edition 1967, p. 16, hereinafter referred to as 'the Second Directive'), the basis of assessment was expressed to be:

'In the case of supply of goods and of the provision of services, everything which makes up the consideration for the supply of goods or the provision of services, including all expenses and taxes except the value-added tax itself . . . '

Annex A, paragraph 13, regarding Article 8, of the Second Directive, provided that:

'The expression "consideration" means everything received in return for the supply of goods or the provision of services including incidental expenses (packing, transport, insurance, etc.) that is to say not only the cash amounts charged, but also, for example, the value of the goods received in exchange or, in the case of goods or services supplied by order of a public authority, the amount of the compensation received.'

The Commissioners of Customs and Excise, relying on Section 10 (3) of the Act, contended that each supply of dating gifts by the appellant company had been made for a consideration not wholly consisting of money with the result that its value for tax purposes was the open market value of the cream, which they considered to be UKL 10.14, the wholesale selling price of the cream to a beauty consultant where the cream was not supplied for use as a dating gift.

In an appeal by the appellant company against a decision of the Commissioners with respect to a tax assessment for the year 1984, the appellant company argued before the London value-added tax tribunal that the value-added tax was chargeable on UKL 1.50 only, namely the price charged by it to a beauty consultant for such supply of the cream to be used as a dating gift. It relied in this respect on the direct effect of Article 11 A, paragraph 1, subparagraph (a) of the Sixth Council Directive and claimed, as a result, that for tax purposes the value of every dating gift would be the monetary consideration received, namely UKL 1.50.

The London value-added tax tribunal considered that it was essential to determine whether the undertaking or promise given by the beauty consultant to the appellant company to give the dating gift to a hostess who throws a party at which the appellant company's products are displayed and can be purchased, other than the cash payment of UKL 1.50, can be considered as forming part of the 'consideration' obtained by the appellant company for the supply of a dating gift and, if so, how such undertakings or promises are to be valued for tax purposes. It noted that although the word 'consideration' is defined in Annex A, paragraph 13 of the Second Directive, that definition is not repeated in the Sixth Directive.

By order of 13 March 1987, the London value-added tax tribunal decided to stay the proceedings until such time as the Court of Justice should have given a preliminary ruling pursuant to Article 177 of the EEC Treaty on the following questions:

'For the purposes of Article 11 A of the Sixth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes (Directive 77/388/EEC, of 17 May 1977), where a supplier ("the wholesaler") supplies goods ("the inducement") to another ("the retailer") for a monetary consideration (namely a sum of money) which is less than

that at which he supplies identical goods to the retailer for resale to the public on an undertaking by the retailer to apply the inducement in procuring another person to arrange, or in rewarding another for arranging, a gathering at which further goods of the wholesaler can be sold by the retailer to the public for their mutual benefit, is the taxable amount

(a) only the monetary consideration received by the wholesaler for the inducement, or

(b) the monetary consideration at which the wholesaler supplies the identical goods to the retailer for resale to the public, or

(c) such amount as is to be determined in accordance with such criteria which may be determined by the Member State concerned, or

(d) the monetary consideration together with the value of the undertaking by the retailer to apply the inducement in so procuring or rewarding the other person and, if so, how the value of the undertaking is to be determined, or

(e) some other, and if so, what other, amount?'

The Chairman of the London value-added tax tribunal commented in the order for reference that, in his opinion, the Court's judgment of 5 February 1981 in Case 154/80 *(Coöperatieve Vereniging Aardappelenbewaarplaats GA* [1981] ECR 445) showed clearly that the taxable amount on a supply of goods is not to be determined by reference to the goods supplied, or their open market value, or otherwise by reference thereto, but by reference to the consideration received for the goods. In particular he considered that there is no basis in the Sixth Directive in circumstances such as in the present case for a reference to the open market value of the goods (as provided for by Section 10 (3) of the Value-Added Tax Act 1983) but only for reference to the consideration received. In finding this he relied on the wording of the Sixth Directive and the fact that reference to 'open market value' for goods was originally proposed for Article 11 A of the Sixth Directive, but was subsequently deliberately omitted.

The order requesting a preliminary ruling was received at the Court Registry on 29 July 1987.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted to the Court by Naturally Yours Cosmetics Ltd, represented by David Vaughan QC, instructed by Stephen Kon, solicitor, London, assisted by John Arnold FCA; by the United Kingdom, represented by H. R. L. Purse, Treasury Solicitor, acting as Agent; by the Government of the Portugese Republic, represented by Luís Inês Fernandes and Maria Helena Brito, Directorate-General for the European Communities, and Arlindo Correia, Department for the administration of value-added tax, acting as Agents, and by the Commission, represented by Johannes Føns Buhl, Legal Adviser, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

(a) *The appellant company*

The appellant company submits that the consideration for the supply of the dating gift in the present case is the price paid to the supplier (namely UKL 1.50) since this is the consideration received by the supplier for the supply of that product. On the contrary, ancillary undertakings or ancillary benefits (such as the undertaking by the beauty consultant to give the dating gift to a hostess as a gift) do not form part of the consideration because, first of all, they are not sufficiently proximate to the supply of the goods upon which the tax has to be paid but relate rather to the possibility of the sale of other products at their full price at the party provided by the hostess; secondly, they are not sufficiently capable of precise and exact subjective monetary valuation since the value of the opportunity of selling other products depends entirely upon the success of each individual party. Thus the opportunity for products to be sold at one party may be more valuable than the opportunity to sell at another party. Moreover, the appellant company stresses the fact that consideration is a subjective value in the sense that it is subjective to the parties to the transaction and is not a value to be assessed by the tax authorities according to objective criteria.

Irrespective of whether the benefit received by the appellant company from the hostess may be regarded as consideration, the appellant company argues that such benefit is not obtained for the supply of the product to be used as a dating gift and is therefore not to be included in the taxable amount. The benefit arises from the supply of the other products to the beauty consultant who carries on business on her own account.

In the light of these submissions, the appellant company contends that the answer to the question referred should be:

'In the circumstances envisaged by the question, the taxable amount is the actual monetary consideration received by the wholesaler for the inducement.'

(b) *The Commission of the European Communities*

The Commission shares the opinion of the appellant company pointing out that the provisions of Article 11 of the Sixth Directive require the taxable amount to be 'everything which constitutes the consideration'. In relation to the facts of the present case the consideration received by the appellant company for the item sold to the beauty consultant for use as a dating gift amounts to UKL 1.50 only. While the Commission points out that Article 11 B 1 (b) and paragraph 2 of the Sixth Directive do provide, under certain circumstances, for the open market value to be applied both for the supply of services within the territory of the country and to the importation of goods, it stresses that this

system does not apply, by analogy, in respect of the supply of goods effected for consideration within the territory of a Member State, by a taxable person acting as such for which no special provision is made.

Finally, the Commission notes that the reference concerns a number of parties involved in a direct selling operation and observes that there are provisions in the Sixth Directive (for example, Articles 4, 24 and 27) which a Member State may invoke if it considers that for some specific reason tax should be levied in a different way.

The Commission concludes that the question submitted by the London value-added tax tribunal should be answered as follows:

'For the purpose of Article 11 A of the Sixth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes (Directive 77/388/EEC, of 17 May 1977) value-added tax is levied upon everything which constitutes the consideration received by a taxable person for the supply of taxable goods within the territory of the same Member State, and where such consideration in fact only consists or only can be valued in terms of its monetary consideration, then the taxable amount is only such monetary consideration.'

(c) *The Government of the United Kingdom*

The United Kingdom maintains on the contrary that where consideration consists of or includes a consideration other than money, Article 11 A 1 (a) requires that part to be valued; the mode of valuation is, to a certain degree, left to the discretion of the Member States. It argues that Section 10, paragraph 3 of the Value-Added Tax Act of 1983 which values the consideration by reference to the open market value of the supply is in conformity with the spirit and intention of the Community provision. Since the supply of goods or services by a taxable person attracts a charge of VAT only if they are affected for a consideration and, since the taxable amount is determined by reference to that consideration, Article 11 of the Sixth Directive appears in their submission to have rejected a mode of valuation inextricably linked to open market values but have enabled individual Member States to select such a mode should they wish.

Moreover the United Kingdom submits that Article 8 and Annex A, paragraph 13, of the Second Directive, and Article 11 A 1 (a) of the Sixth VAT Directive make it clear that non-monetary consideration constitutes good consideration for the purposes of a VAT charge. The United Kingdom further submits that the provisions of Article 11 A 1 (a) make it equally clear that non-monetary consideration has to be valued but does not specify how it is to be valued; the United Kingdom has opted to value non-monetary consideration by reference to the open market value of the supplies. The United Kingdom also places its reliance upon the French language text of the Sixth Directive which, in its use of

the words 'la contrepartie' in Article 11, makes it clear, in its opinion, that 'consideration' is not confined to monetary payment.

The United Kingdom submits that the determination of the taxable amount by reference to the open market value of the goods supplied in cases where there is non-monetary consideration is the only defensible method of ensuring that the taxable amount accurately reflects the value which the supplier himself places on that consideration which he has received in exchange for his goods. It submits that this is what is meant by 'subjective value' and '... the consideration actually received and not a value assessed according to objective criteria' as expressed by the Court in its judgment of 5 February 1981, *supra*. It contends that the United Kingdom's legislation does measure the value of the goods with which the supplier has parted in exchange and is thus wholly compatible with Article 11 of the Sixth Directive.

The United Kingdom concludes that since the undertaking by the beauty consultant to procure the services of a hostess and to reward her for those services constitutes part of the consideration for a supply of the dating gift, it must be included in 'the taxable amount' in accordance with the clear wording of Article 11 A 1 (a) of the Sixth Directive. The value of that consideration in the hands of the appellant company is UKL 8.64, being the difference between what the appellant company would have charged for a jar of cream and what it in fact charged the beauty consultant in reliance upon the undertaking that she would procure the services of a hostess and reward her accordingly. It notes in this respect that in determining the taxable amount by reference to an open market value the market has to be confined to the one in which the transactions take place, namely, the wholesale market.

(d) *The Government of the Portugese Republic*

The Government of the Portugese Republic submits that in cases where the consideration for the supply of goods is represented partly by money and partly by goods and services, the taxable amount for value-added purposes is to be ascertained by adding to the sum of money obtained the value of the goods or services received in exchange. It refers, in support of this conclusion, to the definition of 'consideration' in Annex A, paragraph 13, of the Second Directive and contends that the expression 'consideration' in the Sixth Directive has the same meaning. It follows therefore that the taxable amount must include not only cash amounts which have been or are to be obtained but also the value of the goods or services obtained.

In the present case, the twofold obligation, namely to pay the company the sum of UKL 1.50 and to promote and organize a party in a hostess's home intended to attract customers, constitute the consideration for the supply by the appellant company to the beauty consultant of the product used as a dating gift. Hence there is a direct link between the service provided and the consideration received.

It is necessary to determine the open market value of the goods supplied since it is equal to the sum of money obtained plus the value of the service provided by the beauty consultant. That conclusion follows from the fact that the parties have concluded a synallagmatic contract. The provision of goods by one of the parties has its counterpart in the provision of a service by the other party. Such a solution is adopted by Portugese law (Article 16 (3) of the Value-Added Tax Code) which provides that:

'In cases where the consideration is not determined, either wholly or in part, in money terms, the taxable value shall be the amount that has been or is to be obtained, increased by the open market value of the goods or services supplied in exchange.'

In the light of the foregoing submissions the Portugese Republic suggests an answer to the question referred in the following terms:

'Where a supplier ("the wholesaler") supplies goods ("the inducement") to another ("the retailer") for a monetary consideration (namely a sum of money) which is less than that at which he supplies identical goods to the retailer for resale to the public on an undertaking by the retailer to apply the inducement in procuring another person to arrange, or in rewarding another for arranging, a gathering at which further goods of the wholesaler can be sold by the retailer to the public for their mutual benefit, the taxable amount, within the meaning of Article 11 A 1 (a) of the Sixth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes, is the monetary consideration received by the wholesaler together with the value of the service provided by the retailer which consists in applying the inducement in so procuring or rewarding the other person; the value of that service may be regarded as being equal to the difference between the monetary consideration for which the wholesaler supplies identical goods to the retailer for resale to the public and the monetary consideration actually received from the retailer.'

T. F. O'Higgins
Judge-Rapporteur